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ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT and Public Employee Claims Division *v.* Danny McWILLIAMS and Second Injury Fund

CA 92-381 846 S.W.2d 670

Court of Appeals of Arkansas
Division I
Opinion delivered February 10, 1993

[redacted]

[redacted]

Maria L. Schenetzke, Frank GoBell, and *Robert L. Wilson*, for appellant.

Lavender, Rochelle, Barnette & Dickerson, by: *Charles D. Barnette*, for appellee Danny McWilliams.

Phillip T. Whiteaker, for appellee Second Injury Fund.

JOHN MAUZY PITTMAN, Judge. The Arkansas Highway and Transportation Department and Public Employee Claims Division, appellants, appeal from an order of the Arkansas Workers' Compensation Commission. The Commission found that the appellee/claimant's pre-existing impairment did not combine with his work-related injury to produce his current disability status, but rather that the claimant's current disability status was solely the result of his compensable injury, and that the appellee Second Injury Fund had no liability in this case. In addition, the Commission found claimant's healing period ended September 8, 1988. The primary issue is whether payment to the claimant should be solely from the appellants or from the appellants and the Second Injury Fund. We find no error and affirm.

Appellants first contend that there is no substantial evidence to support the Commission's finding that the claimant's current disability status is solely the result of his compensable injury. We do not agree.

When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. We must uphold those findings unless there is no substantial evidence to support them. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). The issue is not whether we might have reached a different result

or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.*; *Welch's Laundry and Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992).

In order for the Second Injury Fund to have liability, three prerequisites must be met: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury, the employee must have had a permanent partial disability or impairment; and (3) the disability or impairment must combine with the recent compensable injury to produce the current disability status. *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988); Ark. Code Ann. § 11-9-525(b)(3) (1987). If the more recent injury alone would have caused the claimant's current disability status, the Second Injury Fund has no liability. In other words, the prior condition must combine with the compensable injury "to produce a disability greater than that which 'would have resulted from the last injury, considered alone and of itself.' " *Id.* at 9, 746 S.W.2d at 543 (quoting Ark. Code Ann. § 11-9-525(b)(3)).

All parties agree that the claimant is now permanently and totally disabled and that he experienced a pre-existing non-work-related impairment to his back. As a child, he contracted spinal meningitis. Although he sustained a back strain in junior high school, he continued to play football through his senior year of high school. In 1980, he injured his lower back while playing softball. As his back condition worsened, he went to Dr. Thomas Fletcher for a diagnostic test which revealed a congenital fusion at the L4-5 level, a herniated disc at L5-S1 on the right, and degenerative disc disease at L3-4. On October 4, 1985, Dr. Fletcher performed a lumbar interlaminar laminotomy with bilateral L5-S1 discectomy decompression of conjoined L5-S1 right nerve root for the ruptured disc. On December 5, 1985, Dr. Fletcher released the claimant to return to work with instructions to avoid heavy lifting or bending. Dr. Fletcher noted that the surgery was successful and that the claimant made a good recovery. The claimant returned to an active life and was able to participate in hunting, fishing, camping, and water skiing. From the summer of 1986 through the date of his compensable injury on November 12, 1987, claimant routinely performed heavy manual labor and on occasion worked sixty-hour weeks.

As stated, claimant sustained a compensable injury in November 1987 while working for appellant Arkansas Highway and Transportation Department. He continued working until he went to Dr. Fletcher on December 29, 1987. On March 9, 1988, Dr. Fletcher performed a lumbar interlaminar laminotomy with bilateral L4-5 discectomy and exploration at L5-S1. Dr. Fletcher noted some adhesion at L5-S1 that required no intervention. He placed substantial restrictions on the claimant's activities and approved only sedentary work or work requiring very light activity. Claimant obtained no relief after the 1988 surgery. On June 21, 1988, Dr. Fletcher assigned a ten-percent permanent impairment for the compensable injury and for the first time gave a ten-percent rating for the prior back problem. The compensable injury rating was subsequently increased by Dr. Jim Moore to eighteen percent.

Since his 1987 injury, claimant has undergone considerable medical treatment by a number of specialists. In October 1989, Dr. Moore performed a myelogram, which reflected arachnoiditis. Dr. Moore indicated that this condition was found at L4-5 and L5-S1 levels and was related to the compensable injury. It is important to note that the March 1988 surgery performed by Dr. Fletcher involved a discectomy at L4-5 and an exploration at L5-S1. Thereafter, claimant saw Dr. Richard Guyer about the possibility of installing a dorsal column stimulator. Dr. Guyer referred to Dr. Ralph Rashbaum, who determined that the claimant was not a candidate for the procedure but that he might require fusion surgery at L3-4. Dr. Rashbaum stated the L5-S1 level did not seem to be painful at this time. Subsequently, claimant saw a urologist for chronic bladder problems that developed after the 1988 surgery. The record establishes that this treatment continued until April 8, 1991.

From our review of the record, we conclude that there is substantial evidence to support the Commission's finding that the claimant's current disability is a result of his compensable injury on November 12, 1987. The claimant did not experience severe pain until after his compensable injury. Dr. Rashbaum stated that the L5-S1 level was not causing pain prior to the compensable injury. Dr. Moore stated that the claimant's problems stemmed from his compensable injury. The 1985 surgical treatment of the L5-S1 disc protrusion was successful according to all

consulting doctors. There was evidence that the L-5 nerve root discomfort was related to the 1987 injury. Dr. Moore's X-ray notes from May 1989 revealed the existence of fusion related to the prior impairment, but indicated that the fusion was not significantly impairing the claimant's range of motion. The medical records indicate that the L5-S1 scarring and adhesions were mild before 1987. After the 1988 surgery, only minimal adhesion was found at L5-S1, but scarring from L4-5, L5-S1 was significant enough to cause claimant's problems regarding his range of motion. The arachnoiditis at L4-5, L5-S1 was attributed to the compensable injury. In sum, we conclude that there was evidence from which the Commission could reasonably conclude that the Second Injury Fund had no liability in this case.

■ Appellants next contend that the Commission erred, as a matter of law, in considering the claimant's physical abilities and/or lack of disabilities prior to the work-related injury in determining whether his prior impairment combined with the work-related injury to produce the claimant's current disability status. Appellants note that the supreme court held in *Mid-State Construction Co.* v. *Second Injury Fund, supra*, that to constitute an "impairment" (the existence of which forms the second prerequisite to Second Injury Fund liability), it is not necessary that the prior condition have resulted in actual disability, or wage-earning loss. Appellants then argue that the Commission nevertheless required proof that the earlier injury or impairment resulted in some disability before it would find that the prior impairment and the work-related injury had combined to produce the claimant's current disability status. In other words, appellants argue, the Commission has made prior wage-earning loss a prerequisite to Fund liability by " 'read[ing] into' the third prong of the test the very condition which the court in *Mid-State Construction* stated was not required." Appellants contend that the Commission's decision has the effect of rendering the holding of *Mid-State Construction Co.* void.

Unlike appellants, we do not read the Commission's opinion to require as a prerequisite to Fund liability proof that a claimant's prior impairment was disabling or causing wage-earning loss. The Commission refers to and recites the supreme court's holding in *Mid-State Construction Co.* The Commission clearly acknowledges its understanding that a prior condition

need not cause a loss of wage-earning capacity in order to constitute an "impairment" and thereby meet the second prong of the test for Fund liability.

Nor do we read the Commission's opinion to make prior wage-earning loss a prerequisite to finding that an impairment and work-related injury have "combined" to produce one's level of disability, the third prong of the test. The Commission did refer in its opinion to the claimant's physical abilities and his lack of physical problems subsequent to his prior back impairment but before his compensable injury. However, we cannot conclude that the Commission made the lack of prior "disability" a determining factor, and we do not think that the extent of one's physical abilities prior to a compensable injury is necessarily irrelevant in every case, or in this case, to the decision whether the third prong of the test has been met.

Appellee/claimant Danny McWilliams has cross-appealed from that portion of the Commission's decision determining the end of his healing period to be September 8, 1988. He argues that there was no evidence to support the Commission's finding. McWilliams argues that the healing period ended on April 8, 1991, the date Dr. George Hunter, a urologist, indicated that claimant's chronic bladder problems that developed after the 1988 surgery had stabilized. In the alternative, claimant argues that the healing period ended on January 18, 1991, the date Dr. Guyer rated claimant's permanent physical impairment.

The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *J. A. Riggs Tractor Co.* v. *Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990); *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of when the healing period has ended is a factual determination that is to be made by the Commission, and if that determination is supported by substantial evidence, it must be affirmed. *Mad Butcher, Inc.* v. *Parker, supra.*

Here, the Commission determined that the claimant's healing period ended on September 8, 1988. Dr. Norris Knight, in a December 19, 1988, letter to claimant's attorney, stated that the claimant was permanently and totally disabled and "it is not expected that the patient will improve any significant amount in the future." Drs. Fletcher and Moore both opined that the healing period would extend for six months from the date of the surgery, ending in early September 1988. There was also evidence in the record from which the Commission could conclude that claimant's bladder problems did not contribute to the claimant's disability. Despite subsequent evaluation and treatment, claimant's underlying back condition had stabilized. We find no error.

Affirmed.

JENNINGS, C.J., and MAYFIELD, J., agree.

Dewayne HANNER *v.* STATE of Arkansas

CA CR 92-396 847 S.W.2d 43

Court of Appeals of Arkansas
Division II
Opinion delivered February 10, 1993
[Rehearing denied March 10, 1993.]

Henry & Mooney, by: *Wayne Henry*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with two separate counts of rape committed by engaging in deviate sexual activity with two girls under twelve years of age. A jury trial was held, and the appellant moved for directed verdicts as to both counts of rape at the close of the State's case. The trial court directed a verdict in favor of appellant as to the charge involving the victim A.E., but denied the motion as to the charge involving the victim J.B. After a continuance, the trial court allowed the State to amend the information as to both counts in order to dismiss the rape charges and substitute charges of sexual abuse in the first degree as to both victims.[1] After deliberation, the jury found the appellant guilty of sexual abuse in the first degree as to the charge involving J.B., and guilty of sexual solicitation of a child as to the charge involving A.E. The appellant was sentenced to one year in the county jail for sexual solicitation, and to four years in the

[1] The continuance followed discussion between the court and counsel regarding whether sexual abuse in the first degree was a lesser-included offense of rape. The trial court initially ruled that it was; however, following an objection by the appellant, the trial court reversed its earlier ruling and determined that sexual abuse in the first degree was not a lesser-included offense of rape, whereupon the trial court permitted the State to amend the information. No question is presented on appeal concerning the lesser-included offense determination made by the trial court, and we express no opinion on this issue.

Arkansas Department of Correction for sexual abuse.

On appeal, the appellant argues that his conviction of sexual solicitation of a child is barred by the double jeopardy clause, and that the trial court erred in denying his motion for a directed verdict as to the charge of rape of J.B. We affirm in part and reverse and dismiss in part.

The record shows that the appellant was charged with two counts of rape committed by deviate sexual activity with two girls under twelve years of age. At trial, following the conclusion of the State's case, the appellant moved for a directed verdict of an acquittal with respect to the charge of rape involving A.E. The trial court granted the motion. The prosecution conceded that the evidence was insufficient to support that charge, but asked that the jury be instructed on first-degree sexual abuse as a lesser-included offense of rape. The defense objected on the ground that first-degree sexual abuse was not a lesser-included offense of rape. After a continuance, the trial court ruled that first-degree sexual abuse was not a lesser-included offense of rape, but allowed the State to amend the information to charge the appellant with two counts of first-degree sexual abuse. The trial court overruled the appellant's objection that, given the court's prior grant of a directed verdict on the rape charge involving A.E., double jeopardy was violated by permitting the State to amend the information. The appellant advances the same argument on appeal. We find it to be well taken, and we reverse and dismiss as to that charge.

In *Grady* v. *Corbin*, 495 U. S. 508 (1990), the United States Supreme Court held that subsequent prosecution is barred where the government will establish an essential element of the offense by proving conduct constituting an offense for which the defendant has already been prosecuted. *Grady* v. *Corbin, supra*, at 510. The *Grady* holding was discussed by the Arkansas Supreme Court in the recent case of *State* v. *Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991), as follows:

> The Court formulated a two (2) part inquiry to determine whether double jeopardy bars a prosecution. First, the *Blockburger* test should be applied. If it reveals that the offenses have identical statutory elements or that one offense is a lesser included offense of the other, then the

> inquiry must cease, and the subsequent prosecution is barred. If the subsequent prosecution is not barred under the first inquiry, it should be subjected to the second inquiry, the 'proof of the same conduct' analysis. The holding of the case concisely sets out this second inquiry as follows: 'We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.'

State v. *Thornton, supra, quoting Grady* v. *Corbin, supra.*

The *Thornton* Court further held that the State bears the burden to demonstrate that it will rely on conduct other than that for which the defendant has already been prosecuted. The State has failed to do so in the case at bar. Instead, it is obvious that the State intended to prove the entirety of the conduct employed in its attempt to prove the charge of rape against A.E., for no new trial was had or requested: instead, the information was merely amended to "conform to the proof." Under these circumstances, the State has failed to meet its burden and we hold that the successive prosecution is barred by the Double Jeopardy Clause. *State* v. *Thornton, supra*, 306 Ark. at 406.

Next, the appellant contends that the trial court erred in denying his motion for a directed verdict as to the rape charge involving J.B. We do not reach this issue because it is moot. The jury was never instructed to determine whether the appellant was guilty of rape on this count, because the charge was amended to first-degree sexual abuse, as was the charge involving A.E., and the appellant does not argue on appeal that the trial court erred in permitting the amendment as to the charge involving J.B. The question raised by the appellant therefore cannot affect the matter in issue, and we will not address it. *See Dust* v. *State*, 26 Ark. App. 34, 759 S.W.2d 569 (1988).

Affirmed in part; reversed and dismissed in part.

ROBBINS and ROGERS, JJ., agree.

Damon BOYD *v.* METRO TEMPORARIES

CA 92-507 846 S.W.2d 668

Court of Appeals of Arkansas
Division II
Opinion delivered February 10, 1993

Barry D. Kincannon, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *E. Diane Graham*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Damon Boyd appeals from a decision of the Workers' Compensation Commission

finding he was entitled to a compensation rate equal to the statutory minimum of $20.00 per week. Appellant contends the Commission erred in determining his compensation rate. We agree and reverse.

Appellant was employed by Metro Temporaries, a temporary employment agency. On May 10, 1990, while on a work assignment at Didier's Garden Center in Fort Smith, Arkansas, Boyd suffered an admittedly compensable injury to his right leg, resulting in a 29% impairment. He was paid temporary total disability benefits of $101.22 per week from May 11, 1990, through August 20, 1990, when he was released to return to work.

At the hearing before the administrative law judge, the appellee contended that the proper compensation rate was $20.00 per week, the statutory minimum, since the contract for hire was for only four hours at $3.80 per hour. The appellant contended that he was entitled to a greater compensation rate. The administrative law judge held that appellant's proper compensation rate was $76.17 per week. This was based on an average of thirty hours and four minutes per week for the time appellee was employed by appellant on a job assignment prior to the one on which he suffered the subject injury. The full Commission reversed, finding that pursuant to the contract for hire in effect at the time of the accident the appellant was entitled to a compensation rate based on an average weekly wage of four hours at $3.80 per hour. Consequently his compensation should be the statutory minimum of $20.00 per week.

The appellant testified that he was employed by Metro Temporaries in March 1990, and initially assigned to work at Fort Smith Plastics. Appellant continued to work at Fort Smith Plastics until April 24, 1990, when he suffered a compensable injury to his finger. Appellant was taken off work until May 2, 1990, when he received a medical release to return to work. Thereafter, Metro offered to return the appellant back to work at Fort Smith Plastics, but he refused. Appellant was eventually offered a temporary job at Didier's Nursery on May 10, 1990. The job at Didier's was to last only four hours and appellant was to be paid $3.80 per hour. Appellant suffered a compensable injury while working at Didier's, resulting in a permanent injury to his right knee with a permanent physical impairment rating

equal to 29% of the leg below the hip.

Appellant argues that the Commission ignored part of the language of the Arkansas Workers' Compensation Act in computing his average weekly wage and erroneously determined that his compensation rate should be the statutory minimum of $20.00 per week. Appellant contends the Commission should have considered his entire record of employment with Metro from the time he was employed on March 21, 1990, through the date of injury for his claim on May 10, 1990. In support of this argument he relies on the following portion of Ark. Code Ann. § 11-9-518 (1987):

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and *in no case shall be computed on less than a full-time workweek in the employment.*

(Emphasis added.) Appellant contends that this statute requires wages to be computed on no less than an average *full* workweek, and that his average weekly wage should be computed by including the time he worked with Fort Smith Plastics because he is a temporary employee.

The compensation rate of temporary employees represents exceptional circumstances for calculating wages. *Travelers Insurance Company* v. *Perry*, 262 Ark. 398, 557 S.W.2d 200 (1977). We believe that both parties correctly point to *Perry* as the controlling precedent. The parties disagree, however, as to the computation method for which the case stands. In that case it was undisputed that the employee was injured in the course of his employment with a temporary employment company. Over a six-week period of employment the employee only worked a total of four days at $2.20 per hour. There was no contract of employment between the employee and his employer. The employee would simply make himself available for work as and when he wanted, and the employer would assign him to work for a customer as needed. The employee was not required to be available for work assignments. The Commission awarded the employee compensation based on an average weekly wage computed on a forty-hour workweek at $2.20 per hour. The Arkansas Supreme Court reversed, finding no substantial evidence to support the Commis-

sion's finding that the employee's average weekly wage was $88.00. The case was remanded to the Commission and lower court with directions that judgment be entered for the employee at the minimum amount authorized by law.

Appellant contends that *Perry* stands for the principle that the average weekly wage for temporary employees should be averaged over the period of employment with the employment company. Appellee sees *Perry* as limiting the computation of the average weekly wage of an employee who simply makes himself available for unspecified work to the wage being received by the employee on the particular job assignment he is working at the time of the injury. Appellee suggests that *TEC* v. *Underwood*, 33 Ark. App. 116, 802 S.W.2d 481 (1991) supports its interpretation of *Perry*.

TEC v. *Underwood* also involved an injured employee of a temporary employment company. The employee was first employed and placed on assignment by the employer at a job which paid $3.50 per hour and involved a forty-hour workweek. Some two months later, at the employee's request, she was assigned to another job which paid $5.50 per hour and where she usually worked forty hours each week. She was injured on this job and the Commission awarded her compensation based solely on a forty-hour workweek at the job where she was working at the time of her injury. Her employer appealed, contending the Commission erred in not averaging her actual hours worked and in not averaging the wages of both her earlier and last job assignments. We affirmed, finding substantial evidence to support the Commission's computation of an average weekly wage based on $5.50 per hour for forty hours each week.

We hold that *Perry* requires an averaging of the earnings of an employee of a temporary employment company who at the time of injury is working on a job assignment of less than a full week. However, if such employee is working on a job assignment involving a full workweek at the time of injury, then only the wage rate for that particular full workweek should be used as the basis for computing compensation. Thus, *Perry* and *TEC* are not in conflict.

The Commission erred in finding that the appellant is entitled only to the statutory minimum of weekly compensation.

Therefore, we reverse the decision of the full Commission and remand for a determination of appropriate benefits.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

ERWIN L.D. *v.* MYLA JEAN L.

CA 92-346 847 S.W.2d 45

Court of Appeals of Arkansas
Division II
Opinion delivered February 10, 1993

Erwin L. Davis, for appellant.

JUDITH ROGERS, Judge. Appellee, Myla Jean L., brought this action against appellant, Erwin L. D., claiming that appellant was the father of her child born on July 26, 1990. The chancellor decided this disputed issue in favor of appellee and entered an order to that effect, requiring appellant to pay $250 a month in support for the child. For reversal of the chancellor's decision, appellant questions the finding of paternity, and he also contends that the trial court erred by not considering his defenses of "birth control fraud" allegedly perpetrated by appellee, and estoppel based on her assurances that she would not pursue a paternity action. We find no merit in the issues raised, and affirm.

At the hearing, it was revealed that the parties had married in February of 1989, but that they had divorced in October of that same year. However, both appellant and appellee acknowledged that, despite the divorce, they maintained a sexual relationship until March of 1991. Before their final separation, appellee gave birth to a child prematurely on July 26, 1990. According to appellee, the probable time of conception was early December of 1989, and it was her testimony that she had only been intimate with appellant during that period of time. She denied having sexual contact with any other man. Appellee further testified that it was understood between them that appellant was the father of the child. She related that, when she went into labor prematurely and was transported from Fayetteville to Tulsa, appellant followed the ambulance to Tulsa and that he stayed the night with her and part of the next day. She also stated that appellant had visited with the child and that he had demanded visitation with her after the petition for paternity was filed.

In his testimony, appellant conceded that he and appellee had intercourse during the months of October, November and December of 1989, and at times thereafter. He said, however, that their relationship was not smooth, describing it as one that was "off and on." Appellant suggested that appellee was seeing other men during those periods when they were estranged, and he stated that appellee told him that she had been sexually involved with various men. He said that he had no way of knowing who the father of the child was, but that at times he considered himself to be the child's father. He stated, however, that this belief was based only on appellee's representations. He also said that appellee had on occasion professed that he was not the father of the child.

Appellant first argues that appellee failed to meet her burden of proof. It is his contention that, in the absence of blood testing, proof of paternity must be established by clear and cogent evidence. He contends that appellee did not meet this burden based on conflicts and inconsistencies in her testimony.

Contrary to appellant's argument, in a paternity proceeding brought against a living putative father, the mother's burden of proof is a mere preponderance of the evidence, as the proceeding is civil in nature. *Stewart* v. *Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992). On appeal, we consider the evidence in the light most favorable to the appellee, and, although we try chancery cases *de novo* on the record, we will not reverse a finding of fact made by the chancellor unless it is clearly erroneous. *Roe* v. *State*, 304 Ark. 673, 804 S.W.2d 708 (1991). The alleged conflicts and inconsistencies in the testimony presented a question of credibility, which is a matter we leave to the trial court. *See Green* v. *Bell*, 308 Ark. 473, 826 S.W.2d 226 (1992). The chancellor obviously found appellee's testimony persuasive. From our review of the record as a whole, we cannot say that the chancellor's decision is clearly against the preponderance of the evidence.

Appellant next argues, without citation to authority, that the trial court erred in not holding that appellee was precluded from seeking a paternity determination based on "birth control fraud" and her pledge that she would not bring a paternity action. Appellant maintained that appellee indicated that she was using

birth control pills, and further, that she assured him after she had become pregnant that she would not file suit for paternity to obtain support. Appellee denied these allegations. Other than to note that the testimony was conflicting, we need not discuss the evidence any further for we hold that neither claim provides a valid defense in paternity litigation.

In *Paul M.* v. *Teresa M.*, 36 Ark. App. 116, 818 S.W.2d 594 (1991), we rejected the notion that a father could assert a counterclaim against a mother in a paternity proceeding based on her agreement to assume sole financial responsibility for the child. We held that such an agreement failed for lack of consideration and, more importantly, was void as against public policy as an attempt to permanently deprive the child of support. The justification for the latter part of our decision rested on the settled law that the duty of child support cannot be bartered away permanently to the detriment of the child. Likewise, we hold that a mother's agreement or assurances that she would not pursue a paternity action to request support cannot validly be interposed by a putative father as a defense.

We also cannot endorse appellant's proposition that birth control fraud can act as a bar to a claim of paternity. Courts that have confronted the issue have refused to recognize misrepresentations concerning the use of contraceptives as a defense. *See e.g. Faske* v. *Bonanno*, 357 N.W.2d 860 (Mich. Ct. App. 1984); *Hughes* v. *Hutt*, 455 A.2d 623 (Pa. 1983); *Pamela P.* v. *Frank S.*, 449 N.E.2d 713 (N.Y. 1983). In *Paul M.* v. *Teresa M.*, *supra*, we observed that the purpose of our filiation laws was to provide a process whereby the putative father can be identified so that he may assume his equitable share of the responsibility to his child. To permit this defense, as one that assigns fault for conception, would result in the denial of support to innocent children whom the law was designed to protect.

Affirmed.

COOPER and ROBBINS, JJ., agree.

Larry Adam ROBINSON *v.* STATE of Arkansas

CA 92-516 847 S.W.2d 49

Court of Appeals of Arkansas
Division II
Opinion delivered February 17, 1993

Harrod Law Office, by: *David W. Harrod*, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Larry Robinson, a juvenile, was adjudicated delinquent on January 31, 1991, and placed on probation until January 31, 1993. On September 23, 1991, the State filed a petition for detention in Desha County Chancery Court, alleging the commission of three burglaries. On that same day Robinson appeared with counsel and the court ordered that he be detained until the adjudication hearing set for October 8, 1991. At the adjudication hearing the court found that Robinson was indeed delinquent and committed him to the Division of Children and Family Services. Robinson now appeals, contending that since the court did not hold a hearing within fourteen days of the detention hearing as required by Ark. Code Ann. § 9-27-327, the case should be dismissed. We affirm.

Arkansas Code Annotated section 9-27-327(b) (1991) provides:

> If a juvenile is in detention, an adjudication hearing shall be held not later than fourteen (14) days from the date of the detention hearing unless waived by the juvenile

or good cause is shown for a continuance.

Appellant's argument is that this limitation is analogous to the speedy trial rule and is governed by cases such as *Glover* v. *State*, 307 Ark. 1, 817 S.W.2d 409 (1991). There, the supreme court said:

> Once it has been shown that trial was scheduled to be held after the speedy trial period had expired, the Sate has the burden of showing that any delay was the result of the petitioner's conduct or was otherwise legally justified.
>
> . . . .
>
> The primary burden is on the court and the prosecutor to assure that a case is brought to trial in a timely fashion. A defendant has no duty to bring himself to trial. [Citations omitted.]

Appellant concedes that he made no objection at the detention hearing to the October 8 setting for the adjudication hearing. We agree with the trial judge that the instant case is controlled by *Cobbins* v. *State*, 306 Ark. 447, 816 S.W.2d 161 (1991). In *Cobbins* the supreme court said:

> The hearing on the motion to transfer was not held until almost fourteen months after the charges were filed. For nine months Cobbins was held in the Mississippi County Detention Center, unable to post bonds.
>
> Section 9-27-318(b)(2) states that "the circuit court shall hold a hearing within ninety days of the filing of charges to determine whether to retain jurisdiction of the juvenile in Circuit Court." Cobbins would have us hold that the Circuit Court loses jurisdiction of the charges upon failing to hold the transfer hearing within the ninety-day period.
>
> Although the language of the statute is mandatory, it is silent on the effect of noncompliance. In making the decision on this issue, the Trial Court analogized to parole revocation hearings. A statute requires that a hearing be conducted on parole revocation within a reasonable time, not to exceed sixty days after the defendant's arrest. Ark. Code Ann. § 5-4-301(b)(2) (1987). In *Haskins* v. *State*, 264 Ark. 454, 572 S.W.2d 411 (1978), we held that this

requirement was not intended by the General Assembly to be jurisdictional. The sixty-day limitation represented the period beyond which the hearing could not be delayed if the defendant objected. Failure to demand a hearing within the sixty-day period waived the right to insist on a timely hearing.

Here, the trial Court relied on the *Haskins* case and determined that the ninety-day hearing requirement was not intended to be jurisdictional. We consider the analogy to be apt. Although the statute makes the ninety-day requirement mandatory, nothing in the statute indicates it is jurisdictional. Another factor to be considered is that Cobbins was represented by counsel during the ninety-day period.

The language of *Cobbins* applies with even greater force to the case at bar because the statute applicable here, Ark. Code Ann. § 9-27-327(b), expressly provides that the time limitation may be waived by the juvenile.

We find no error and affirm.

PITTMAN and COOPER, JJ., agree.

STEWART TITLE GUARANTY COMPANY *v.* Don R. CASSILL and Gloria H. Cassill

CA 92-334 847 S.W.2d 465

Court of Appeals of Arkansas
Division II
Opinion delivered February 17, 1993

Marian M. McMullan, for appellants.

Zachery David Wilson, for appellees.

JAMES R. COOPER, Judge. This case originated in a foreclosure action brought by the mortgage holder against the appellees' residence. The appellees filed a third-party complaint against the appellant title companies alleging breach of contract and negligent misrepresentation. The appellants responded with a third-party counterclaim alleging that the appellees' claim was frivolous. The third-party action was severed from the original

foreclosure action. After trial of the third-party action, the chancellor entered an order on April 11, 1991, finding in favor of the appellants on the appellees' third-party complaint, finding that the appellees' third-party complaint constituted a frivolous action, and awarding the appellants attorney's fees and costs with the amount to be determined at a subsequent hearing. On August 23, 1991, the appellants filed a motion for the trial court to set the amount of attorney's fees. On September 9, 1991, the appellees filed a motion to set aside that portion of the April 11, 1991, judgment that concerned the counterclaim. After a hearing, the chancellor entered an order on November 19, 1991, modifying the April order by reversing its award of attorney's fees to the appellants. From that decision, comes this appeal.

For reversal, the appellants contend the chancellor erred in finding that the April 11, 1991, order did not constitute a final judgment; by modifying the April 11, 1991, order; and that the chancellor abused his discretion in setting aside the award of attorney's fees to the appellants and denying the appellants' motion for summary judgment. We affirm.

The chancellor's order of April 11, 1991, bore the heading "Final Order and Opinion of Court." In it the chancellor found that the appellees' contract and tort claims against the appellant were without merit, and awarded the appellants "their attorney's fees and costs with the amount to be determined at a subsequent hearing." Subsequently, in an order dated November 19, 1991, the chancellor found that the April 11 order was not a final judgment and determined that the portion of the April 11 order awarding attorney's fees was in error. The April 11 order was set aside with regard to the award of attorney's fees but confirmed in all other respects.

The appellants' argument that the chancellor erred in modifying the April 11 order is premised on the contention that the April 11 order was a final order. We reject their argument because, with regard to the attorney's fee issue which is the subject of the present appeal, the April order was clearly not final.

A similar situation was presented in *Thomas v. McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967), where it was argued that the modification of a decree after the lapse of one full term of court was an unauthorized modification because no grounds for

modification under those circumstances were asserted. The *Thomas* Court rejected this argument because it concluded that the first court action was not a final judgment. In reaching this conclusion, the Court noted that the decisions, opinions, and findings of a court do not constitute a judgment, but instead "merely form the basis upon which the judgment or decree is subsequently to be rendered," and that "[a] judgment or decree for money should state the amount which the defendant is required to pay and the date from which interest is to be computed." Applying these principles to the facts of the case before it, the *Thomas* Court concluded that the first order was not a final judgment because the amount of the money award was not stated therein. *Thomas, supra.*

In the case at bar, the April order failed to state the amount of attorney's fees to be awarded, a matter which was in dispute and continues to be disputed by the parties on appeal. Under the *Thomas* rationale, the order is not final. Moreover, the April order specifically anticipates a subsequent hearing to establish the amount of attorney's fees, and an order is generally not considered to be final where further judicial action is necessary to fully and finally determine the rights of the parties. *Hardy v. Hardy*, 217 Ark. 296, 230 S.W.2d 6 (1950).

Moreover, the April order is not final because, despite the reservation of the attorney's fees issue for a subsequent hearing, the April order contained no express determination that there was no just reason for delay and express direction for the entry of judgment with respect to the remaining claims. In the absence of such determination and direction:

> [A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Ark. R. Civ. P. 54(b).

We are not unaware of the Supreme Court's decision in *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), where it

was held that the unliquidated award of attorney's fees was a final order. However, unlike the case at bar, *Bosnick* involved the narrow question of whether an order was final for purposes of appeal pursuant to Ark. R. App. P. 2. In contrast, the case at bar addresses a different aspect of finality, i.e., whether the award of attorney's fees was final so as to preclude subsequent modification by the trial court. Furthermore, it should be noted that the attorney's fee award in the present case was based on Ark. Code Ann. § 16-22-309 (1987), which specifically requires that the judgment for attorney's fees be included in the final judgment entered in the action. No such requirement appears in § 26-35-902 (1987), which was the statutory basis for the fee award in *Bosnick, supra.*

Given the facts of this case and the authorities cited above, we hold that the chancellor correctly ruled that the April order was not final, and that modification of the April order was therefore "subject to revision *at any time*" pursuant to Ark. R. Civ. P. 54(b), without regard to the time limitations applicable to modification or relief from final judgments enumerated in Ark. R. Civ. P. 52, 59, and 60.

Finally, the appellants contend that the chancellor abused his discretion denying the appellants' motion for attorney's fees and setting aside the previous award of attorney's fees. We are unable to address this issue because the appellants have failed to provide us with a record of the proceedings prior to the order of April 11, 1991. It is the appellants' burden to bring up a record sufficient to show error, *Johnson* v. *Lilly*, 308 Ark. 201, 823 S.W.2d 883 (1992), and in the absence of a record of the pleadings and evidence before the chancellor in determining the issue of attorney's fees, we cannot say that any error or abuse of discretion occurred when the chancellor reversed his earlier decision.

Given our resolution of the issues presented on this appeal, the appellees' motion to dismiss the appeal is moot, and we need not address it.

Affirmed.

ROBBINS and ROGERS, JJ., agree.

Brent STORY *v.* Linda SPENCER

CA 92-512 847 S.W.2d 48

Court of Appeals of Arkansas
En Banc
Opinion delivered February 17, 1993

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., for appellant.

R. I. Womack, for appellee.

JAMES R. COOPER, Judge. The appellee in this civil case was injured in a motor vehicle accident on April 5, 1986. More than three years later, on April 10, 1989, the appellee filed this action alleging that her injury was caused by the appellant. On April 27, 1989, the appellant moved to dismiss on the ground that the appellee's complaint was not filed within the time allowed by the statute of limitations. After a hearing on October 13, 1989, the trial court found that the parties had agreed to extend the statute of limitations, and denied the motion to dismiss. More than one year later, on August 20, 1991, the trial court dismissed the case without prejudice for want of prosecution pursuant to Ark. R. Civ. P. 41(b). More than 90 days after the order of dismissal, the appellee filed a motion to reopen the case on January 16, 1992. The motion was granted, the case was submitted to the court, and judgment was entered for the appellee in the amount of $25,000. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in ruling that the appellee's cause of action was not barred by the statute of limitations, and that the trial court lacked the authority to reopen the case. We address only the second issue because we find it to be dispositive.

In *Ware* v. *Gardner*, 309 Ark. 148, 827 S.W.2d 657 (1992), the question presented was identical to that raised by the appellant in the case at bar, i.e., whether a trial court can vacate an order dismissing an action for failure to prosecute more than ninety days after the order of dismissal. The Supreme Court held that, under Ark. R. Civ. P. 60(b), the trial court lost jurisdiction to reinstate the action after ninety days. Applying the rule in *Ware, supra*, to the case at bar, we hold that the trial court was without authority to reopen the present action more than ninety days after the dismissal for want of prosecution, and we reverse.

We note that the appellee has argued for affirmance that the ninety-day limitation in Rule 60(b) does not apply because her attorney never received notice of the court's order as required by Ark. R. Civ. P. 41(b), and that the judgment in her favor was entered by consent of the parties and is therefore non-appealable. Both of these arguments are premised on assertions by the appellee which are not supported by evidence contained in the record; therefore, we will not consider them. *See Shaw* v. *Commerical Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991); *AM Credit Corp.* v. *Riley*, 35 Ark. App. 168, 815 S.W.2d 392 (1991).

Reversed and dismissed.

E. Margrette SMITH (Birchfield) *v.* Bill J. SMITH

CA 92-824 848 S.W.2d 428

Court of Appeals of Arkansas
Division I
Opinion delivered February 17, 1993

Roberts, Harrell & Lindsey, P.A., by: *Allen P. Roberts*, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellee.

JOHN B. ROBBINS, Judge. Margrette Smith (Birchfield) appeals from a decree of the Union County Chancery Court denying her petition for enforcement of an alimony provision in the parties' divorce decree. We affirm.

Appellant and appellee, Bill J. Smith, were divorced in August 1989; a property settlement agreement entered into between the parties was incorporated in the decree. In this agreement, appellee agreed to pay the following alimony to appellant:

> Husband agrees to pay Wife the sum of five thousand dollars ($5,000.00) per year for three (3) years and said sum is to be considered alimony. Husband shall make the first payment on March 15, 1990. Subsequent payments, in the amount of five thousand dollars ($5,000.00) each, shall be due and payable on March 15, 1991, and March 15, 1992. Upon the third and final payment on March 15, 1992, Husband shall have fulfilled his alimony obligation.

In April 1990, appellant petitioned to have appellee held in contempt for failure to pay the first installment of alimony and, in the alternative, for an award in that amount. In a counterclaim, appellee petitioned the court to terminate his alimony obligation on the grounds that appellant had obtained the agreement by fraud and had remarried.

Appellant did not dispute that she had remarried and given birth to a baby before the first alimony payment was due. At trial, appellant characterized the alimony payments as her share of the property acquired by the parties during their marriage; she stated that she had agreed to receive the three alimony payments in return for giving a quitclaim deed for her share of the parties' businesses to appellee. She admitted, however, that she had received $28,000.00 in cash and that she was pregnant by another man when the divorce was final.

Appellee testified that he had given appellant $28,000.00 under the terms of the property settlement agreement and that he was not aware at the time of the divorce that his wife was expecting a baby.

In the letter opinion, the chancellor stated:

> Plaintiff seeks a judgment against defendant for unpaid alimony. The agreement provides that defendant will pay plaintiff three $5,000.00 alimony payments. The payments were to be made March 15, 1990, March 15, 1991 and March 15, 1992. No payments have been made.

> The evidence at the trial reflects that soon after the divorce plaintiff remarried. A.C.A. 9-12-312(a)(1) provides that unless otherwise ordered by the court or agreed to by the parties alimony ceases upon remarriage of the person to receive the alimony. Plaintiff contends here that the three $5,000.00 payments are not actually alimony but are rather payments she is to receive for division of the property acquired by the parties. To reach that conclusion requires that the agreement itself be disregarded. The agreement clearly states that the payments are alimony. The complaint of plaintiff seeking judgment for $10,000.00 plus interest should be denied.

From the order incorporating these findings and denying appellant's petition, comes this appeal.

Appellant argues that Ark. Code Ann. § 9-12-312(a)(1) (Repl. 1991), relied upon by the chancellor, does not apply in this case. That statute provides:

> When a decree is entered, the court shall make such orders concerning the alimony of the wife or the husband and care of the children, if there are any, as are reasonable from the circumstances of the parties and the nature of the case. Unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon the date of the remarriage of the person who was awarded the alimony.

On appeal, appellant concedes that this statute was effective prior to the entry of the divorce decree; that the chancellor's characterization of the payments as alimony is correct; and that the property settlement agreement is not ambiguous. Appellant argues that, because the alimony agreement incorporated in the divorce decree has a limited duration, it is one that is "otherwise agreed" to by the parties as provided in the statute and thus did not terminate upon her remarriage. In her brief, appellant states that, "where people agree to three annual installment payments of alimony they have 'agreed' that the alimony will terminate after the third payment." Although appellant concedes that the alimony provision in the decree did not specifically deal with the event of appellant's remarriage, she argues that it "otherwise" provided for termination of her

alimony. Appellant urges this court, without citation to authority, to apply the statute so that, when the duration of alimony payments is left indefinite by the divorce decree or property settlement agreement, remarriage operates to terminate alimony; but, when the duration of such payments is limited, it does not, even though the decree or agreement does not expressly refer to the remarriage of the party awarded alimony. An assignment of error unsupported by convincing argument or authority will not be considered on appeal unless it is apparent, without further research, that the assignment of error is well taken. *General Elec. Supply Co.* v. *Downtown Church of Christ*, 24 Ark. App. 1, 3, 746 S.W.2d 386, 387 (1988).

Even if we consider appellant's argument on the merits, the only reasonable application of the statute does not support her position. Where the language of a statute is plain and unambiguous, we give the language its plain meaning. *McGee* v. *Amorel Pub. Schs.*, 309 Ark. 59, 63, 827 S.W.2d 137, 139 (1992). We must determine the meaning of a statute from the natural and obvious import of the language used by the legislature, without resorting to subtle and forced construction for the purpose of limiting or extending the meaning. *City of N. Little Rock* v. *Montgomery*, 261 Ark. 16, 18, 546 S.W.2d 154, 155 (1977).

Here, the agreement does not expressly refer to remarriage on the part of appellant and cannot be interpreted as alluding to that event. The statute clearly requires that remarriage of the person who is awarded the alimony must be specifically mentioned in the decree or agreement if the automatic cessation of liability for alimony is not to occur upon such event. We find no error in the chancellor's decision.

Affirmed.

MAYFIELD, J., agrees.

ROGERS, J., concurs.

HENDERSON STATE UNIVERSITY *v.* Joe SPADONI

CA 92-423 848 S.W.2d 951

Court of Appeals of Arkansas
Division II
Opinion delivered February 24, 1993

McMillan, Turner & McCorkle, by: *Ed McCorkle*, for appellant.

Travis Mathis, for appellee.

JOHN E. JENNINGS, Chief Judge. This is a school discipline case. The Clark County Chancery Court enjoined Henderson State University from suspending Joe Spadoni for the 1991-92 school year, holding that the university had denied Spadoni procedural due process. We reverse the chancellor's decision.

On September 22, 1991, Joe Spadoni struck a fellow student, Bobby Cullen, in the face with a beer bottle. The bottle broke and Cullen was cut rather severely on the nose and the arm. The injury to the arm required twenty-four staples; the injury to the nose required twelve stitches and a subsequent skin graft.

The incident took place in the street between the Henderson State University campus and the Phi Sigma Kappa fraternity house, of which Spadoni was a member. Bobby Cullen was a member of Sigma Phi Epsilon fraternity; the quarrel appears to have had its origin in inter-fraternity rivalry. There was conflicting evidence on whether Cullen struck Spadoni before the former was hit in the face with a bottle.

On October 1, 1991, Spadoni was notified by Associate Dean Robert Neal that he had been suspended from school. In accordance with school procedure, Spadoni immediately exercised his right to appeal to the university disciplinary committee.

A hearing was set for October 15, and before the hearing Spadoni was provided with the full text of all witnesses' statements. The committee was composed of four students and four faculty members. During the October 15 hearing, at which Spadoni was represented by an attorney, the committee heard the testimony of fourteen witnesses. After the four-hour hearing the committee voted six to zero with two abstentions to uphold the one

year suspension.

Mr. Spadoni promptly filed suit in Clark County Chancery Court seeking an injunction to prohibit the suspension. After a hearing held on December 10, 1991, the chancellor held that Spadoni had been denied his rights to procedural due process and permanently enjoined Henderson State from suspending him.

There is no question but that the Due Process Clause of the Fourteenth Amendment to the United States Constitution gives rights to a student who faces expulsion for misconduct at a tax-supported college or university. *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *see also Goss* v. *Lopez*, 419 U.S. 565 (1975). Once it is determined that due process applies, the question remains what process is due. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). There is a general policy against intervention by the courts in matters best left to school authorities. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Goss* v. *Lopez*, 419 U.S. at 577, citing *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The courts have been reluctant to interfere with the authority of local school boards to handle local problems. *Fortman* v. *Texarkana Sch. Dist. No. 7*, 257 Ark. 130, 514 S.W.2d 720 (1974). A chancery court has no power to interfere with school district boards in the exercise of their discretion when directing the operation of the schools unless the boards clearly abuse their discretion. *Springdale Bd. of Educ.* v. *Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987). The burden is upon those charging such an abuse to prove it by clear and convincing evidence. *Bowman*, 294 Ark. at 71. Undoubtedly these general principles apply to disciplinary hearings for students at state supported universities and colleges.

What procedural safeguards then are required in this context by the Due Process Clause? In *Goss* the Court said, "[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." 419 U.S. at 577; *Boykins* v. *Fairfield Bd. of Educ.*, 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Flexibility and elbow room are to be preferred over specificity.

Esteban v. *Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). Again in *Goss*, the Court said that a student facing suspension is entitled to, at the very minimum, "some kind of notice and . . . some kind of hearing." 419 U.S. at 579. *See also University of Houston* v. *Sabeti*, 676 S.W.2d 685 (Tex. Ct. App. 1984) (holding basic elements of due process are notice and a right to be heard). A full-dress judicial hearing is not required. *See Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d at 159.

The court's order states in part:

> (3) That the Defendant, Henderson State University, failed to provide the Plaintiff due process in this case, and therefore, the preliminary injunction should be permanent and the University should allow the Plaintiff to continue his education at the University for the Fall term of 1991 and Spring term of 1992;
>
> (4) The Court, in finding that the Plaintiff was not afforded due process, makes the following specific findings:
>
> > (a) That the hearing before the Disciplinary Committee did not afford the Plaintiff nor his witness the opportunity to give their entire testimony but was restricted to questions asked by the chairman;
> >
> > (b) That the committee met behind closed doors with Dean Neal for approximately forty-five minutes prior to the hearing. In effect, the prosecutor met with the judges behind closed doors which smacks with impropriety;
> >
> > (c) That George Staples, a member of Sigma Phi Epsilon Fraternity, served as an official member of the Disciplinary Committee. The committee as well as Mr. Staples, knew that the prosecuting witness, Bobby Cullen, was a member of Sigma Phi Epsilon and that Mr. Staples had a conflict of interest and should have disqualified from hearing the case;
> >
> > (d) That Exhibit 14, a letter from faculty member Dr.

> John Crawford addressed to Dr. Charles Dunn dated October 16, 1991, is further evidence that he observed the injustice that took place at the committee hearing and reported this to Dr. Dunn prior to his decision;
>
> (e) That the suspension was not based upon the facts as set forth in this finding by the Court;
>
> (f) That the University investigation was incomplete and one sided which clearly indicates that due process was not afforded;
>
> (g) The University's action in this case and their actions involving athletic students indicates that the University has two standards that they apply in the same type of off campus activities.
>
> IT IS, THEREFORE, CONSIDERED AND ORDERED that the preliminary injunction is made permanent in that due process was denied to the Plaintiff and the University shall allow the Plaintiff to continue his education for the Fall term of 1991 and Spring term of 1992.

The chancellor's first finding, that the hearing unduly restricted Mr. Spadoni from presenting his side of the case, is clearly against a preponderance of the evidence. At the hearing in chancery court Spadoni admitted that the faculty did not prohibit him from presenting any evidence he wanted them to hear. The finding is apparently based on testimony that Spadoni's witnesses were required to testify in response to questions instead of being permitted to tell whatever they wanted to say, but this is normal procedure even in a judicial proceeding.

Similarly, the chancellor's finding that the suspension was "not based upon the facts" was clearly erroneous. The appellee admitted striking Bobby Cullen in the face with the beer bottle. His argument before the chancellor was that he was justified in doing so because Cullen hit him first. As stated previously, the evidence on this point was in conflict, but in any event this was a question of fact to be decided by the disciplinary committee. Likewise the court's findings that the investigation was "one sided and incomplete" and that "the University has two standards that

they apply in the same type of off campus activities" are simply not supported by the record.

The finding by the court that the disciplinary committee met with Dean Neal prior to the beginning of the hearing itself finds support in the evidence, but it is undisputed that the purpose of the meeting was to decide whether the hearing would be open or closed and whether the "Buckley Amendment" applied. In any event we cannot agree that the meeting resulted in a deprivation of the student's right to procedural due process. The chancellor's finding that committee member George Staples was a member of the same fraternity as Bobby Cullen is supported by the evidence, but again, we do not agree that this fact in and of itself constituted a denial of due process.

The chancellor also found that a letter from Dr. John Crawford, the faculty advisor for Mr. Spadoni's fraternity, "Is further evidence that he [Crawford] observed the injustice that took place at the committee hearing." In the letter, Dr. Crawford objected to the closing of the hearing, expressed dissatisfaction with the "attitude" of the committee, and expressed the opinion that both Cullen and Spadoni should be punished equally. The letter will not support a finding of a denial of procedural due process.

In the case at bar, Mr. Spadoni was provided reasonable notice of the specific charges against him. Before the disciplinary hearing he was provided with copies of the statements of witnesses. He was represented by counsel at the hearing. He was permitted to ask questions of the witnesses against him. He was permitted to speak in his own defense and to call witnesses, including character witnesses, in his own behalf.

■ We conclude that Mr. Spadoni was provided more than the "rudimentary elements of fair play" required by the Due Process Clause. *See Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d at 159. We therefore reverse the chancellor's decision to the contrary.

Reversed.

PITTMAN and COOPER, JJ., agree.

Randall S. BRUNSON *v.* STATE of Arkansas

CA CR 92-391 848 S.W.2d 936

Court of Appeals of Arkansas
Division I
Opinion delivered February 24, 1993

C. Scott Clark, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Randall S. Brunson appeals from his conviction of second-degree murder, for which he was sentenced to fifteen years in the Arkansas Department of Correction. He argues only that the trial court erred in denying his motion to suppress pretrial custodial statements given to the police. We find no error and affirm.

The evidence at the hearing on appellant's motion indicates that early on the morning of March 16, 1991, police officers discovered the body of Lonnie Barlow. He had been shot in the head with a large caliber weapon. Based on information gathered from the victim's brother about the victim's last known whereabouts, appellant and four acquaintances were contacted that evening and voluntarily agreed to go to the sheriff's department for interviews. At approximately 9:30 p.m., appellant, who was nineteen years old and did not appear intoxicated or otherwise impaired, was given *Miranda* warnings from a written form. According to Sheriff Jess Odom, appellant acknowledged that he understood those rights as read to him. He also indicated that he understood the waiver of rights provision read to him, and he signed the waiver at the end of the form. Appellant was then interviewed by Sheriff Odom and Chief Deputy Alton Boyd. The interview lasted less than an hour, ending around 10:30 p.m., during which appellant gave no statement that in any way implicated him in the murder. After the interview, appellant was considered only a witness.

Within moments after that initial interview, the sheriff was provided with additional information making appellant a suspect. Appellant was then interviewed a second time. At approximately 11:00 p.m., less than one-half hour after that interview began, appellant stated to the officers that they earlier had told him that he could have an attorney. At this point, according to the officers, the interview concluded, appellant was provided a telephone, telephone book, and instructions on how to reach an outside line, and the officers left the room.

At 1:15 a.m. on the morning of March 17, Sheriff Odom and

Lt. Steve Dozier re-entered the room, and appellant was informed by Sheriff Odom that he was going to be held overnight. The sheriff then left the room. According to Lt. Dozier, who was going to escort appellant to the jail, appellant began asking why he was being held. Lt. Dozier told him that the investigation had ended for the night and that the officers felt that they had probable cause to believe that he had killed the victim. Appellant stated that the officers were wrong and that he wanted to give his version of what had happened. Lt. Dozier told appellant that he was not allowed to question him further and that if appellant wanted to discuss the matter he would have to initiate any further conversation. According to Dozier, appellant was "insistent upon giving his version" of the events. Dozier then gave appellant *Miranda* warnings for a second time. Appellant initialed each of those rights and signed the waiver of rights at the bottom of the form, which included the express statement that he did not want a lawyer at that time. He then gave a statement in which he admitted having been present at the murder scene but denied having done the shooting. This statement ended at approximately 2:15 a.m., at which time Lt. Dozier left the room.

At approximately 2:45 a.m., several officers entered the room and informed appellant that the murder weapon had been located. One officer had the pistol in a brown bag and showed the bag to appellant. According to the officers, appellant said, "Okay, I did it, but it was an accident." Appellant then gave a final statement, which Lt. Dozier wrote down and appellant signed, in which he stated that he pointed the pistol at the victim's head and it went off accidentally.

Appellant's testimony at the suppression hearing differed markedly from that of the officers. He maintained that he told the officers on more than one occasion that he did not wish to speak with them and that he wanted an attorney. Appellant contended that the officers "kept coming back" asking more questions. He admitted signing the second rights statement and waiver at approximately 1:20 a.m. and admitted giving the statement acknowledging his presence but denying complicity in the crime. However, he stated that he did so only in response to repeated questioning by the officers, and then only because he thought that he would be released. He denied giving the final, inculpatory statement altogether. He stated that Lt. Dozier merely wrote

something which he (appellant) signed without reading.

Statements arising from custodial interrogation are presumed to be involuntary. The burden is thus on the State to prove that a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to an attorney, and that he voluntarily made the statement. *Scherrer* v. *State*, 294 Ark. 227, 742 S.W.2d 877 (1988); *Scales* v. *State*, 37 Ark. App. 68, 824 S.W.2d 400 (1992). On appeal from the denial of a motion to suppress, we make an independent review based on the totality of the circumstances, but we will not reverse unless the trial court's ruling is found to be clearly erroneous. *Scales* v. *State, supra.* We defer to the trial court's superior position to determine the issue of the credibility of the witnesses who testify to the circumstances of a defendant's custodial statement. *See Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991); *Scales* v. *State, supra.*

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless it demonstrates that it used the familiar procedural safeguards to secure the privilege against self-incrimination and the right to counsel as set forth in that opinion. Once the warnings have been given, if the individual indicates in any manner that he wishes to remain silent, interrogation must cease. *Id.* The admissibility of statements obtained after the defendant has decided to remain silent depends on whether his "right to cut off questioning" was "scrupulously honored." *Michigan* v. *Moseley*, 423 U.S. 96, 104 (1975).

Additional safeguards are necessary when the accused asks for counsel:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further *police-initiated* custodial interrogation even if he has been advised of his rights. . . .[A]n accused, . . .having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless* the accused himself initiates

> further communication, exchanges, or conversations with the police.

Edwards v. *Arizona*, 451 U.S. 477, 484 (1981) (emphasis added) (footnote omitted). In other words, where an accused has invoked his right to counsel, "courts may admit his responses to further questioning only upon finding that he (a) initiated further discussions with police, and (b) knowingly and intelligently waived the right he had invoked." *Smith* v. *Illinois*, 469 U.S. 91, 95 (1984); *see Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988). The Supreme Court recently made it clear that the protection afforded by the *Edwards* rule does not terminate simply upon the accused's consultation with counsel. *Minnick* v. *Mississippi*, 498 U.S. 146 (1990). Rather, "when counsel is requested, interrogation must cease, and *officials* may not *reinitiate* interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 153 (emphasis added).

Appellant argues that the trial court erred in denying his motion to suppress and maintains that reversal is mandated under the Supreme Court's decisions in *Edwards* and *Minnick*. He notes that he asserted his right to counsel and that he subsequently was interrogated further without counsel present. He contends that the record will not support the trial court's findings that he reinitiated communication with the officers and validly waived his right to counsel after he asserted it.

From our review of the totality of the circumstances, we cannot conclude that the trial court's findings are clearly erroneous. Here, there was evidence that, upon being told that he was going to be held in jail, appellant began asking Lt. Dozier why. When Dozier answered his question by stating that there was probable cause to believe that appellant had killed the victim, appellant stated that he wanted to give his version of what had happened. Dozier quickly informed appellant that appellant could not be questioned and that, in order to speak with the authorities, appellant would have to initiate the communication. Appellant "insist[ed]" upon giving a statement. Dozier readministered the *Miranda* warnings to appellant, including his right to remain silent and his right to an attorney. Appellant indicated his understanding of these rights, initialed each one on

the form, and executed a written waiver of those rights. He then gave a statement accusing someone else of shooting the victim. One-half hour later, officers re-entered the room where appellant was, told him that they had recovered the murder weapon, and showed him a paper bag in which they had placed the gun. He then gave his final pretrial statement, in which he admitted having shot the victim.

We cannot agree with appellant that the officers "reinitiated" further communication with appellant simply by telling him that he was going to be held overnight. The officers had a duty to inform appellant that he was under arrest. *See* Ark. R. Crim. P. 4.4(b). Moreover, words or conduct on the part of the police "normally attendant to arrest and custody" do not constitute "interrogation." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980) (footnotes omitted). Rather, we think that appellant reinitiated communication with the authorities with his questioning of Lt. Dozier as to why he was being held and his insistence upon giving a further statement. *See Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983).

Nor can we agree that appellant's 2:45 a.m. inculpatory statement was inadmissible because he did not initiate the particular conversation or exchange during which it was given. The record supports the trial court's finding that appellant validly waived his previously invoked right to counsel after he initiated the communication leading to the statement given between 1:20 and 2:15 a.m. Appellant never again invoked his right to counsel or indicated a desire to remain silent. Therefore, the officers were not prohibited from initiating contact with or questioning appellant at the time that they confronted him with the weapon, and no *Edwards* violation occurred. *See Henderson* v. *Singletary*, 968 F.2d 1070 (11th Cir. 1992)(*supp. op. on reh'g denied*).

Even were we to find that appellant's statement was inadmissible, its admission was harmless, and we would not reverse. As a general rule, most trial errors, including constitutional ones, do not automatically require reversal of a criminal conviction. *Chapman* v. *California*, 386 U.S. 18 (1967). Rather, if the error is harmless, the conviction will be affirmed despite the error. *Id.* In order to be harmless, a constitutional error must be harmless beyond a reasonable doubt. The test is whether there is a

reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.*; *Fahy* v. *Connecticut*, 375 U.S. 85 (1963); *Vann* v. *State*, 309 Ark. 303, 829 S.W.2d 415 (1992). The Supreme Court has recently held that the erroneous admission of an involuntary confession is subject to a harmless-error analysis. *See Arizona* v. *Fulminante*, 499 U.S. ____, 111 S. Ct. 1246 (1991).

At trial in this case, Wade Lawrence, a friend of appellant, testified that several people were gathered at his house on the night of the murder. At approximately 9:00 p.m., appellant and the victim argued. Appellant left and returned about midnight. Kevin Ryan testified that he, Steve Coleman, Kevin Bloesch, and appellant left Lawrence's in Ryan's car at approximately 1:00 a.m. When they saw the victim walking, appellant had Ryan stop the car and the victim got in. Ryan testified that appellant again argued with the victim and told Ryan to turn down a dirt road, which he did. Appellant "started counting down from ten" and then directed Ryan to stop the car. Appellant and the victim got out and walked to the rear of the car. Appellant came back to the passenger door, said "zero," and then walked back toward the rear of the car. Ryan then heard a gun shot and what he thought was a body hitting the ground. Appellant, who had a pistol, immediately got back into the car and told Ryan to "drive." The group returned to Lawrence's home. This testimony was essentially identical to that of Steve Coleman. It was also corroborated by Kevin Bloesch, except with regard to the events that occurred between picking up the victim and stopping the car on the dirt road, during which time Bloesch, Coleman, and Ryan claimed that Bloesch was asleep.

Lawrence testified that, when the group returned to his home, appellant said, "I fucked up. You'll read about it in the paper tomorrow. I shot Lonnie.... I popped him right between the eyes." The State Medical Examiner testified that the cause of the victim's death was a single gunshot wound between the eyes. Houston DuPriest, appellant's cousin, testified that appellant brought a pistol to his home and asked him to keep it. That weapon matched ballistically with the bullet removed from the victim. Michael Perry identified the weapon as one that he sold to appellant two weeks before the killing.

From our review of this record, we are convinced that the evidence of appellant's guilt is so overwhelming as to render any possible error regarding admission of his confession harmless beyond a reasonable doubt.

Affirmed.

JENNINGS, C.J., and MAYFIELD, J., agree.

RINGIER AMERICA *v.* Sean COMBS

CA 92-661 849 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered February 24, 1993

Frye & Mickel, P.A., by: *Thomas W. Mickel*, for appellant.

Branch, Thompson & Philhours, by: *Robert F. Thompson*, for appellee.

JOHN MAUZY PITTMAN, Judge. Ringier America appeals from a decision of the Arkansas Workers' Compensation Commission finding that appellee Sean Combs sustained a compensa-

ble injury on March 6, 1991. Appellant contends that appellee's injury resulted from his involvement in "horseplay" that constituted a substantial deviation from the course of his employment, and that the Commission's findings to the contrary are not supported by substantial evidence. We disagree and affirm.

In a worker's compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable; *i.e.*, that his injury was the result of an accident that arose in the course of his employment, and that it grew out of or resulted from the employment. *Wolfe* v. *City of El Dorado*, 33 Ark. App. 25, 799 S.W.2d 812 (1990). When the sufficiency of the evidence is challenged on appeal, however, we will affirm if the Commission's findings are supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.* In reaching our determination, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and gives the testimony its strongest probative force in favor of the action of the Commission, whether it favored the claimant or the employer. *Roberts* v. *Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Appellee was employed at appellant's magazine plant. His duties involved moving stacks of magazines from a printing press to a loading area where they were placed on pallets. To prevent the magazines from sliding off of the pallets, they were covered with plastic stretch wrapping. On occasion, the wrapping would fray. When this occurred, the workers would smooth out the frayed areas with a knife or razor blade. On March 6, 1991, appellee's hand was severely lacerated when it came into contact with a knife held by co-worker Mike Lindley.

According to appellee's testimony, he was about one hour into his shift at appellant's plant and was covering the magazine-loaded pallets with stretch wrapping. When one of the wrappings frayed, he asked to borrow a pocket knife from co-worker Lindley. When appellee felt a nudge from behind, he reached

back with his right hand to receive the knife and was severely cut.

Lindley testified that he and appellee had in the past engaged in cutting, or attempting to cut, one another's belt loops with pocket knives. He testified that, after work began on the day in question, appellee was wrapping a stack of magazines when he asked for Lindley's knife. Lindley testified that he grabbed appellee's belt loop, intending to cut it, when appellee reached back and cut his hand on Lindley's knife.

In its opinion, the Commission noted that Lindley was apparently trying to cut appellee's belt loop when the accident occurred. However, the Commission found that appellee was wrapping a stack of magazines and, consequently, had not deviated from his duties at the time the injury was sustained. The Commission further noted that, while appellee may have participated in "belt-loop cutting" in the past, there was no evidence that he was participating in that activity, or any other form of horseplay, at or near the time of the injury. The Commission concluded that appellee was a non-participating victim and that his injury was compensable.

The current tendency is to treat an injury resulting from horseplay as a "course-of-employment" rather than an "arising-out-of-employment" problem. Thus, minor acts of horseplay do not automatically constitute departures from employment but may be found to be insubstantial. Whether initiation of horseplay is a deviation from one's course of employment depends on: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (*i.e.*, whether it was commingled with the performance of duty or involved an abandonment of duty); (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some such horseplay. 1A Larson, *The Law of Workmen's Compensation*, §§ 23.00—23.66 (1992); *see Southern Cotton Oil Division* v. *Childress*, 237 Ark. 909, 377 S.W.2d 167 (1964).

The trend has also been to eliminate the distinction between instigator of and mere participant in horseplay, and the fact that the injured employee may have been the instigator will not necessarily render the injury noncompensable. *See Southern Cotton Oil Division* v. *Childress, supra.* Clearly, however, an

injury to a non-participating victim of horseplay is compensable. *Id.*; 1A Larson, *The Law of Workmen's Compensation*, § 23.10.

Appellant's argument that the Commission erred in finding appellee to be a non-participating victim of horseplay is based primarily on its assertion that neither appellee nor Lindley were credible witnesses. Appellant points out that Lindley had given more than one version of the events prior to the hearing. It also contends that appellee's testimony is controverted as a matter of law since he is a party to the action.

Appellant's argument overlooks the rule that the credibility of witnesses and the weight to be given to their testimony are matters solely within the province of the Commission. *See Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). Here, the Commission recognized that Lindley had given conflicting versions of the events. Moreover, while it is true that the uncorroborated testimony of an interested party is never considered uncontradicted, this does not mean that the fact finder may not find such testimony to be credible and believable or that it must reject such testimony if it finds the testimony worthy of belief. *See Norman* v. *Norman*, 268 Ark. 842, 596 S.W.2d 361 (Ark. App. 1980). From our review of the record, we cannot conclude that the Commission's findings are not supported by substantial evidence.

Affirmed.

JENNINGS, C.J., and COOPER, J., agree.

Joe R. SUMMERS *v.* Delmas H. DIETSCH and Mary A. Dietsch

CA 92-894 849 S.W.2d 3

Court of Appeals of Arkansas
Division II
Opinion delivered February 24, 1993

Coxsey & Coxsey, by: *Kent Coxsey*, for appellant.

Gerald K. Crow, for appellee.

JOHN MAUZY PITTMAN, Judge. Joe R. Summers, appellant, appeals from an order of the Carroll County Chancery Court concerning a boundary line dispute between appellant and appellees, Delmas and Mary Dietsch. The chancellor found that

the disputed boundary line was accurately reflected on a 1991 survey and was not located along a particular fence line, as contended by appellant. Appellant contends that the chancellor erred in not finding either that the fence line constituted a boundary by acquiescence or that appellant had gained title to the disputed area on his side of the fence by adverse possession. We agree with appellant's first point and hold that the boundary line was established by acquiescence. We therefore do not reach appellant's second argument.

In 1943, Roy Summers, appellant's father, purchased forty acres of land. In 1954, he deeded the east thirty acres to his father and appellant's grandfather, J.R. Summers. In 1970, Roy Summers deeded the remaining ten acres to his son, the appellant herein. Also in 1970, J.R. Summers deeded his thirty acres to Dale Kesner. In 1980, Kesner deeded fifteen of his thirty acres to the appellees, Delmas and Mary Dietsch. Appellees' fifteen-acre tract shares a common north-south boundary with appellant's ten-acre tract and lies immediately to its east. Appellant has been in possession of his ten acres since 1970. Appellees have been in possession of their fifteen acres since 1980.

During all relevant times, a fence has divided appellees' lands from those of appellant. The fence in question runs north-south and has existed for at least forty years. The fence is not mentioned in the parties' deeds.

In February 1991, appellees had their land surveyed. The survey reflected that the fence was approximately forty feet east of their deed line on the north and thirty feet west of their deed line on the south. Thus, the fence encroached on the respective lands of each of the parties as described in their deeds.

Appellees filed suit seeking injunctive relief, removal of the old fence, and damages. Appellant responded stating that the old fence was the long-established boundary line and that it had become a boundary line by acquiescence. Appellant also contended that he had acquired title to the area in dispute by adverse possession. The chancellor found that the evidence would not support a boundary line by acquiescence nor appellant's claim of adverse possession of the area in dispute.

On appeal, chancery cases are tried *de novo* on the

record. However, we will not reverse the findings of the chancellor unless they are clearly erroneous, or clearly against the preponderance of the evidence. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *RAD-Razorback Limited Partnership* v. *B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1989); *Johnson* v. *Southern Electric, Inc.*, 29 Ark. App. 160, 779 S.W.2d 190 (1989).

Appellee Delmas Dietsch testified that when he began constructing a new fence on the survey line in 1991, appellant immediately complained. Dietsch stated that he thought that the fence was on his property in the early 1980s. However, he also testified that the 1991 survey provided the first knowledge he had that the fence was not on the deed line. He further stated that he never spoke to appellant about the encroachment until approximately one year before this action was filed. Dietsch acknowledged that he and appellant recognized the fence as their dividing line and that each used the property up to their respective sides of the fence for farming purposes.

James McMillan, appellees' former tenant, testified that Mr. Dietsch had helped him maintain the fence and had furnished him fence posts and other materials. McMillan stated that appellant had helped maintain the fence on occasion. McMillan said that he considered the dividing line to be the fence and stated that it was acknowledged that whatever was on the west side of the fence belonged to appellant and whatever was on the east side of the fence belonged to appellees.

Appellant testified that he was forty-five years of age and that the fence had been in its present location for as long as he could remember. He stated that the fence not only served to keep cattle in, but also served as a boundary line. He testified that there was never any question among his family, the community, "or anybody" as to the fact that the fence was the dividing line between the two properties. He stated he had always used up to the fence line, as had the predecessors in title to both tracts, and that during the twenty years of his ownership no one had ever objected to his use of the land. He stated that he claimed as his land everything west of the fence. Appellant's ex-wife corrobo-

rated his testimony regarding use of the property and stated that it was "common knowledge" to everyone in that area that the fence line was the boundary.

Boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question and may be affected by the concepts of acquiescence and adverse possession. A fence, by acquiescence, may become the accepted boundary even though contrary to the surveyed line. *Adcock* v. *Deaton*, 253 Ark. 189, 485 S.W.2d 203 (1972). The general rule in Arkansas as to establishment of a boundary line by acquiescence is stated in the case of *Tull* v. *Ashcraft*, 231 Ark. 928, 929-30, 333 S.W.2d 490, 491 (1960):

> We have frequently held that when adjoining land owners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Deidrich* v. *Simmons*, 75 Ark. 400, 87 S.W. 649; *Robinson* v. *Gaylord*, 182 Ark. 849, 33 S.W.2d 710; *Seidenstricker* v. *Holtzendorff*, 214 Ark. 644, 217 S.W.2d 836. As we said in a very similar case, *Gregory* v. *Jones*, 212 Ark. 443, 206 S.W.2d 18:
>
> > "It is true that in this case the original rail fence line was established without a prior dispute as to boundary; but the recognition of that line for many intervening years (34 in this case) shows a quietude and acquiescence for so many years that the law will presume an agreement concerning the boundary."

In the case of *Kittler* v. *Phillips*, 246 Ark. 233, 236, 437 S.W.2d 455, 456 (1969), the supreme court stated:

> The appellant ably argues that to establish a boundary line by acquiescence there must be a mutual or expressed agreement of the dividing line. However, in *Stuart* v. *Bittle*, 236 Ark. 716, 370 S.W.2d 132 (1963), we said: "It may be conceded, as claimed by appellant, that there never was any express agreement to treat the fence as the dividing line between the two parcels of land. Such an agreement, however, may be inferred by the actions of the parties."

Moreover, as the court noted in *Rabjohn* v. *Ashcraft*, 252 Ark. 565, 570, 480 S.W.2d 138, 141 (1972):

> Quite apart from the inference of some parol agreement, a boundary may also be established by adjoining owners by acquiescence in a clearly established line as the boundary over a period in excess of seven years, whether preceded by a dispute or uncertainty as to the line or not and without the necessity of adverse user to the line. [Citations omitted.]

It is well established that whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line for a long period of time and thus apparently consent to that line, the line becomes the boundary by acquiescence. *Rabjohn* v. *Ashcraft, supra*. The property owners and their grantees are then precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although it may not be on the survey line. *Id*; *Seidenstricker* v. *Holtzendorff*, 214 Ark. 644, 217 S.W.2d 836 (1949).

In this case, it is undisputed that the fence had been in existence at the same location for over forty years. During at least the twenty-one years of appellant's ownership, neither appellees nor their predecessors ever objected to appellant's use of all of the property west of the fence. Rather, the owners of each tract of land used the property on their respective sides of the fence, up to the fence line. The evidence indicates that both appellant and appellees helped maintain the fence. Although appellee Dietsch testified that he thought as early as 1980 that the fence was on his property, he also testified that he did nothing about it until commencing this action in 1991. By their actions, the parties and their predecessors have accepted the fence as the existing and physical boundary line for at least twenty years without question or objection. Appellees' actions belie their contentions to the contrary.

From our *de novo* review of the record, we conclude that the chancellor's finding that the fence line had not become the boundary by acquiescence is clearly erroneous. The decree is therefore reversed and the case remanded for entry of an order consistent with this opinion. The order should locate the boundary by description.

Reversed and remanded.

JENNINGS, C.J., and COOPER, J., agree.

CDI CONTRACTORS and U.S. Fidelity & Guaranty Co. *v.* Jimmy McHALE

CA 92-11 848 S.W.2d 941

Court of Appeals of Arkansas
En Banc
Opinion delivered February 24, 1993

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellant.

James F. Swindoll, for appellee.

JAMES R. COOPER, Judge. CDI Contractors appeals from a decision of the Workers' Compensation Commission awarding temporary total disability benefits to Jimmy McHale. On appeal, appellant argues that there is no substantial evidence that the appellee's psychological problems bear a causal relationship to his work-related injury, and that there is no substantial evidence that the appellee's healing period extended beyond October 9, 1990. We affirm.

In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Deffenbaugh Indus.* 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. *San Antonio Shoes* v. *Beaty*, 28 Ark. App. 201, 771 S.W.2d 802 (1989). In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given to their testimony. *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362

(1989). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Tyson Foods, Inc.* v. *Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

The record reveals that the appellee was working as a carpenter's helper on February 28, 1990, when he injured his back. The appellant accepted the claim as compensable and paid medical and disability benefits up through January 28, 1991. The appellee was seen by a number of doctors of varying specialties who offered diagnoses of lumbar strain and ankylosing spondylitis.

On October 9, 1990, the appellee sought treatment from Dr. Austin Grimes, an orthopedic surgeon. When Dr. Grimes first examined him, he noted that the appellee complained of pain, but had good range of motion and no neurological deficits. Dr. Grimes questioned the previous diagnosis of ankylosing spondylitis and recommended further examination by a rheumatologist, Dr. Thomas Kovaleski. During this period, the appellee also underwent a rehabilitation evaluation by Karen Martin, a rehabilitation specialist. In her report, she noted that the appellee related a history of personality and psychological problems and recommended psychological assessment and further medical evaluation. Dr. Kovaleski examined the appellee and determined that he did not suffer from ankylosing spondylitis, but felt that his low back injury could not be effectively treated without psychological care. Dr. Kovaleski referred the appellee to Dr. Frank Slavik, a psychologist, for chronic pain syndrome.

Dr. Slavik evaluated the appellee in November 1990, and administered the Minnesota Multiphasic Personality Inventory (MMPI-II) test. Dr. Slavik determined that the results were indicative of psychological and emotional problems and recommended that the appellee see a psychiatrist for evaluation regarding the appropriateness of psychiatric medication. Another report from Karen Martin dated January 5, 1991, indicated that any vocational rehabilitation plans would be suspended pending resolution of the appellee's emotional and psychological

status.

The appellee also underwent a functional capacity evaluation at Ergoplex, a work hardening center on January 23, and 23, 1991. This evaluation was to determine physical limitation and physical capabilities as related to job tasks. The MMPI-II and The Millon Behavioral Health Inventory (MBHI) were administered as part of the evaluation. Paul Allen Bolt, the occupational therapist who supervised the evaluation, indicated inconsistencies in the findings of functional capacity due to sub-maximal effort suggesting poor participation. Based on these findings and the psychological test results, Mr. Bolt concluded that a work hardening program would not be beneficial to the appellee.

Dr. Winston Wilson, a clinical psychologist, interpreted the test results of the MMPI-II and MBHI administered by Mr. Bolt. Dr. Wilson concluded that test was not valid because the appellee exaggerated the answers. Based on his evaluation of the test results, he concluded that the appellee had an anti-social personality; that he was impulsive, manipulative, and malingering; that he was motivated by secondary gain, and that he would utilize threats to achieve his ends. Dr. Wilson's opinion indicated that the appellee's psychological problems were long-standing and were in no way related to his workers' compensation injury.

The appellee returned to Dr. Grimes in January, February and March 1991, and he was found to have a herniated disc and degenerative disc disease at multiple levels, and continued to experience pain.

By an opinion dated June 7, 1991, the administrative law judge found that the appellee was entitled to medical expenses for continued treatment by Dr. Grimes; that he was entitled to continuing temporary total disability until he reached a maximum medical benefit as determined by Dr. Grimes; that the appellant would have no liability for care and treatment by Dr. Kovaleski beyond the initial evaluation and that the appellant would bear responsibility for active care and treatment rendered by Dr. Slavik up to the date of the ALJ's opinion. This last finding was based upon the ALJ's determination that the appellee's current psychological problems bore a causal relationship to his work-related injury. The full Commission adopted and affirmed the ALJ's findings.

For reversal, the appellant first argues that there is no substantial evidence that the appellee's psychological problems bore a causal relationship to his work-related injury. The appellant asserts, and the record reflects, that the appellee has a lengthy history of drug and alcohol abuse and treatment, instability in employment, physical violence, and emotional difficulties. The appellant therefore contends that the appellee's work-related injury in no way caused his psychological problems or aggravated his pre-existing psychological problems. The appellant relies on Dr. Winston Wilson's opinion in support of this argument.

However, the record also contains the evaluation of Dr. Slavik, which was noted by the administrative law judge and adopted by the Commission. Dr. Slavik opined that the test results were valid and that the appellee's profile was suggestive of paranoid schizophrenia. Dr. Slavik stated that this coupled with the patient's history led him to believe that the appellee had a violent history and was likely to have pressed social limits. He noted that the appellee reported that he had participated in a rehabilitation program that, with one exception, had helped him refrain from drug abuse for a period of over twelve months. Dr. Slavik further stated:

> *It seems that this man had made what I would call a partial adjustment, had been able to hold down a job, and had worked productively, without abusing drugs, until his injury. This supported my opinion that his injury disturbed the fragility of his adjustment* and this resulted in inconsistent, sad, angry, depressed, anxious, suspicious behavior with a fragile hold on reality.
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> * * *
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> . . . In my opinion his emotional condition is now part of his *chronic pain syndrome which is related and secondary to the on-the-job injury to his lower back.*
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> * * *
>
> . . . As I noted above I am of the opinion that his *current psychological condition emerged as his marginal adjustment was disturbed by his injury.*

* * *

> It is important to realize in the case of Mr. McHale that it is, in my opinion, both reasonable and necessary for him to be treated both behaviorally by a psychologist and psychiatrically by a psychiatrist for the chronic pain syndrome and the secondary emotional and psychiatric conditions, which have been triggered.

The Commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of the conflict is a question of fact for the Commission. *Public Employee Claims Div.* v. *Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992); *Mack* v. *Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989). We hold that there was substantial evidence to support the Commission's finding that the appellee's current psychological problems bore a causal relationship to his work-related injury.

The appellant also argues that there is no substantial evidence that the appellee's healing period extended beyond October 9, 1990, the date he first saw Dr. Grimes. The appellant emphasizes that at the time of that examination Dr. Grimes reported little objective findings to support the appellee's subjective complaints of pain. However, a report from Dr. Grimes dated March 14, 1991, stated that an MRI had disclosed a herniated disc and degenerative disc disease at multiple levels and indicated that the appellee would not be employable until he had psychiatric counseling and retraining. The determination of when the healing period has ended is a factual determination that is to be made by the Commission; if that determination is supported by substantial evidence it must be affirmed. *Crosby* v. *Micro Plastics, Inc.*, 30 Ark. App. 225, 785 S.W.2d 56 (1990). We find there is substantial evidence to support the Commission's finding.

Affirmed.

JENNINGS, C.J., not participating.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. I agree with that portion of the majority opinion that appellee should continue to receive temporary total disability for his physical injury until Dr. Grimes feels that appellee has reached the end of his healing period.

However, I strongly disagree that there is substantial evidence to support the finding that appellee's psychological problems bear a causal relationship to his work-related injury.

While it is true that it is the function of the Commission, and not the appellate courts, to act as the fact finder in workers' compensation cases, *see* Ark. Code Ann. § 11-9-711(b)(3) (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. *Chappel*, 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).

The medical and psychiatric history of the appellee is important to an understanding of his present condition.

Appellee testified that he came to Arkansas for the Veteran Administration's drug and alcohol treatment program. His employment history reveals an inability to get along with co-workers and supervisors; long-standing drug and alcohol addiction; psychiatric hospitalizations; and incidents of violence. He has been diagnosed as having a borderline personality disorder. Individuals who have this disorder are noted for feelings of entitlement. In addition, these persons "tend to experience complicated or incomplete recovery from illness [and] . . . may consciously or unconsciously create challenging, vague, undiagnosable illnesses, such as chronic viral infections or chronic pain." In summary, treatment of individuals with BPD tends to be rather difficult and challenging, as it is often complicated by noncompliance and/or active interference with professional care, poor impulse control and mood instability, and an uncertain response to both psychotherapy and the use of psychotropic

agents.[1]

I agree with the dissent of Commissioner Tatum that the claimant has failed to meet his burden of proof that his pre-existing psychiatric condition was aggravated by his compensable injury.

In affirming, the majority emphasizes the Commission's reliance on the testimony of Dr. Frank Slavik that appellee had partially adjusted simply because he had been able to hold down a job for a two month period. I note this period was of short duration and I do not think that, given appellee's intermittent work history, his long years of substance abuse, and his previous psychiatric history, that reasonable minds could conclude that he had made an adjustment in this short period. Appellee had never held a job for more than three months since February of 1986. Given appellee's long-standing problem, it does not seem reasonable to consider a two-month length of employment as representing an "adjustment period;" therefore, the entire premise on which this argument is predicated appears to be unjustified. Furthermore, the maladaptive behaviors described as resulting from this injury are consistent with his previous mode of functioning and there is no indication that the present behaviors represent a significant deterioration of his psychological condition.

The workers' compensation system was designed in some small measure to compensate injured victims, pay their medical costs and rehabilitate them for future gainful employment. This court has previously reversed commission findings when it is obvious that the law is not being applied to achieve these ends. We should not hesitate to reverse a decision that is not supported by substantial evidence.

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[1] Borderline Personality Disorder: Office Diagnosis and Management by Randy A. Sansone and Lori A. Sansone, il v44 *American Family Physician*, July 1991, p. 194(4).

Robert NEVILLE *v.* STATE of Arkansas

CA CR 92-647 848 S.W.2d 947

Court of Appeals of Arkansas
Division II
Opinion delivered February 24, 1993

William R. Simpson, Jr., Public Defender, by: *Michelle Young Leding*, Deputy Public Defender, for appellant.

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

JAMES R. COOPER, Judge. The appellant, Robert Neville, was convicted in a non-jury trial of driving while intoxicated, fourth offense. On appeal, the appellant contends that the trial court erred in admitting two of his prior DWI convictions which, together with a third prior DWI conviction, were used to enhance his sentence as provided in Ark. Code Ann. § 5-65-111(b)(3) (1987).

The State introduced into evidence certified copies of court dockets to prove the appellant's prior convictions of DWI. Although three docket sheets were introduced, only two are challenged on appeal. The two documents in issue are court

dockets from Pulaski County Municipal Court. There is a column designated "Atty:" on both sheets. Immediately after this designation on the first docket sheet appears the name Richard Lewallen. The name Susan Wilson appears after this designation on the other docket sheet in issue.

The appellant argues that the admitted documents were too ambiguous on the issue of whether appellant had been counseled or validly waived his right to counsel in his prior cases. He contends that our decision in *Tims* v. *State*, 26 Ark. App. 102, 760 S.W.2d 78 (1988), *supp. op. on reh'g granted*, 26 Ark. App. 106-A, 770 S.W.2d 211 (1989), requires that this case be reversed. We agree.

It is clear that a prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or he validly waived counsel. *Baldasar* v. *Illinois*, 446 U.S. 222 (1980); *State* v. *Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984). Representation by counsel or a waiver of the right to counsel cannot be presumed from a silent record. *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Rodgers* v. *State*, 31 Ark. App. 159, 790 S.W.2d 911 (1990).

In *Tims* v. *State, supra*, the document evidencing a prior conviction contained a column for the name of the arresting officer in which appeared the words "Atty. O'Brien." The appellant in *Tims* argued that the entry could mean that the attorney was either the defense counsel or the prosecuting attorney. We held that although this was not a silent record, in the absence of further evidence, the record was too ambiguous to determine whether the defendant was represented or had validly waived counsel. We see no meaningful distinction between the facts of *Tims* and the facts presented in the case at bar. Here, as in *Tims*, although the records were not silent, there was no other proffered evidence to explain or clarify the entries. In the case at bar, the two docket entries, absent further evidence, were too ambiguous to be relied upon to establish that the appellant was represented or validly waived counsel. Therefore, we reverse and remand for a new trial, consistent with our supplemental opinion in *Tims* v. *State*, 26 Ark. App. 106-A, 770 S.W.2d 211 (1989).

Reversed and remanded.

ROBBINS and ROGERS, JJ., agree.

Beatrice HOUSTON *v.* STATE of Arkansas

CA CR 92-653 848 S.W.2d 430

Court of Appeals of Arkansas
Division I
Opinion delivered February 24, 1993

Cuffman & Phillips, by: *James H. Phillips*; and *John Wesley Hall, P.A.*, by: *Craig Lambert*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Beatrice Houston was convicted of delivery of a controlled substance. She was sentenced to fifteen years in the Arkansas Department of Correction, fined $5,000, and recommended for drug rehabilitation while incarcerated. Appellant contends on appeal that the trial court erred in denying her motion to suppress evidence from the nighttime search, in denying her motion for mistrial due to an ex parte communication, and in permitting a State's witness to testify about prior criminal acts. We affirm.

Since sufficiency of the evidence is not argued, we will give only a summation of the facts. At 4:15 p.m. on March 5, 1991,

Detective Lane of the Pulaski County Sheriff's Department fitted informant Pettit with a body microphone and provided $60.00 to make a drug purchase from appellant. Informant was observed entering appellant's residence, where she gave appellant the $60.00 for one Dilaudid pill. Informant inquired about obtaining more Dilaudid, and appellant replied that she would have more later. The detective used this information to file his affidavit for a warrant along with the fact there was only one entrance to the apartment building; that appellant sells primarily in the late hours; that appellant was very secretive about where the drugs were kept; and that the informant had dealt with appellant on previous occasions. The affidavit stated that the request for a nighttime search was due to a need for safety, speedy access, and to prevent any objects from being removed before entry. The judicial officer issuing the warrant found there was probable cause to search appellant's home for the reasons set forth in the detective's affidavit. The search of appellant's home was executed at 10:45 p.m. on the same day as the informant's purchase, at which time the $60.00 from the earlier purchase was seized from appellant's purse.

Appellant first contends that it was error for the trial court to deny her motion to suppress the evidence obtained from her home. Specifically, appellant argues that it was unnecessary to execute the search at nighttime. Arkansas Rules of Criminal Procedure 13.2(c) provides that:

> Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or

> night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

In reviewing a trial court's decision to deny an appellant's motion to suppress evidence, the appellate court makes an independent determination based on the totality of the circumstances and reverses the decision only if it is clearly against the preponderance of the evidence. *State* v. *Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991). Even if the issuance of the search warrant was in violation of Ark. R. Crim. P. 13.2(c), a motion to suppress will not be granted unless the violation is substantial. *Martinez, id.* Our cases have consistently held that a factual basis must be stated in the affidavit before a nighttime search warrant may be validly issued. *Coleman* v. *State*, 308 Ark. 631, 826 S.W.2d 273 (1992). The affidavit here clearly showed drugs had been purchased at appellant's residence that day; there was a danger and difficulty because of the one-door entrance; the drugs were in danger of removal or disposal due to the small size of the pills; and the appellant primarily sells late at night. The issuing judge stated in the search warrant that he was satisfied that, based on all the information in the affidavit, there was probable cause to issue a search warrant that could be executed at any time, day or night. We cannot say the trial judge erred in its denial of appellant's motion to suppress.

Appellant next contends the trial court erred in denying appellant's motion for a mistrial based on an ex parte communication between the trial judge and the jury that occurred during jury deliberations. Ark. Code Ann. § 16-89-125(e) (1987) provides:

> After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties.

This section of the statute, requiring the judge to call the jury into open court to answer any question the jury may have, is mandatory. *Rhodes* v. *State*, 290 Ark. 60, 716 S.W.2d 758 (1986). Noncompliance with the statute gives rise to a presump-

tion of prejudice, and the State has the burden of overcoming the presumption. *Huckabee* v. *State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990).

In the case of *Tarry* v. *State*, 289 Ark. 193, 710 S.W.2d 202 (1986), the State failed to meet its burden of proving that the defendant was not prejudiced because the record was insufficient to show what occurred when the judge entered the jury room to answer the jury's questions. Here, the record clearly reflects what occurred when the jury sent the note to the judge and the judge's response. The note said: "Are we allowed to require drug rehabilitation as part of the sentence?" The court answered, "You may make any recommendations you wish. Please keep this note. Jack Lessenberry." It was obvious the jury had finished deliberations on guilt by that point and simply wanted to add this condition to appellant's sentence. The record also shows that the court gave notice of the jury's note to defense counsel before the jury returned. Counsel made no motions or objections to the court's response at that time. "A mistrial is an extreme remedy to be resorted to only when the trial court makes the discretionary determination that there has been an error so prejudicial that justice cannot be served by continuing the trial." *Walker* v. *State*, 303 Ark. 401, 404, 797 S.W.2d 447, 448 (1990). We find that the court's communication with the jury was not prejudicial to defendant and a mistrial was not required.

Appellant's final contention is that the trial court erred in permitting a State's witness to testify to past drug purchases at the apartments where appellant lived. Appellant moved for a mistrial on grounds that this was testimony of prior, uncharged conduct. The State asserted that the testimony was admissible under Ark. R. Evid. 404(b). Appellant's argument is misleading on this point. The statement made by the informant was: "They took me out to Pine Garden Apartments where I had bought drugs in the past." Appellant incorrectly argues that the statement was: "[T]hat she had purchased drugs in the past from Houston's residence." The record is clear that the informant never testified to prior uncharged conduct. However, to address the argument, we note that evidence of other crimes will be admitted under Rule 404(b) if (1) it has independent relevance, and (2) its relevance is not substantially outweighed by the danger of unfair prejudice. *Price* v. *State*, 268 Ark. 535, 597

S.W.2d 598 (1980). This information was relevant to explain the relation between the informant, detective, and the operation at hand, as well as why they were in this particular area to make a purchase at that time. As the State points out, this was evidence of an ongoing drug operation and is independently relevant. Whether the probative value outweighs the prejudice is a matter left to the sound discretion of the trial judge. *Beebe* v. *State*, 301 Ark. 430, 784 S.W.2d 765 (1990). The prejudice, if any, was not of the sort which would require a mistrial. We cannot say the ruling of the trial court was clearly erroneous.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

R. D. WILMANS & SONS COMPANY *v.* Gerald TURNER

CA 92-545 848 S.W.2d 946

Court of Appeals of Arkansas
Division I
Opinion delivered February 24, 1993

James A. McLarty, for appellant.

Gerald W. Carlyle, for appellee.

JOHN B. ROBBINS, Judge. Appellant R. D. Wilmans & Sons Company, a farming corporation, sold a piece of farm equipment to appellee Gerald Turner on credit during the summer of 1990. It is undisputed that Turner has never made any payment to appellant for the equipment. In August of 1991 appellant filed a complaint against Turner seeking $3500 as the unpaid price of the equipment, and offered evidence supporting the claim that $3500 was the price agreed upon. Turner, on the other hand, contended the purchase price was $1000. The trial court found in favor of appellant, rendering judgment against Turner for $2000. Appellant contends on appeal that the trial court erred in awarding judgment in an amount neither party claimed to be the purchase price. We agree with appellant and reverse and remand.

Rex Wilmans testified that during the summer of 1990 he was farming under the corporate name R. D. Wilmans & Sons Company and entered into a sales agreement with appellee Gerald Turner to sell him a Mud Hog unit for a Massey combine. Wilmans said that he did not know the actual value of the unit, so he and Turner agreed that they would let Bob Forrester, who was in the farm equipment business, inspect the unit and set the price. Forrester testified that after inspecting the unit, he valued it at $3500. Wilmans said he then called Turner, told him of Forrester's $3500 figure and subsequently sent him a bill. He said Turner stated that the $3500 was probably a little high, but that he would pay appellant within a month.

Several months passed without the bill being paid. Appellant sent several additional bills to Turner, none of which were paid. Wilmans said that at some point Turner told him the price was too high because he had made a lot of repairs. Wilmans says he offered at that time to take $2500 if Turner would pay him within ten days, but payment was never made.

Appellee Gerald Turner testified that the parties agreed on a purchase price of $1000. He denies having ever received any of the bills for $3500. He acknowledged that Wilmans said he would take $2500. Turner says he then offered Wilmans $1500, which Wilmans refused.

[redacted]

When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous. *City of Pocahontas* v. *Huddleston*, 309 Ark. 353, 831 S.W.2d 138 (1992). The trial court found both Wilmans and Turner to be "very credible" and found that the only "fair" solution was to "split the difference" and set the contract price at $2000. We agree with appellant's contention that the trial court should have resolved the credibility issue and rendered judgment based on the contract prices testified to, rather than arriving at some in-between figure to reach a "fair" solution. This was not a situation as was present in *Central Arkansas Milk Producers Association* v. *Smith*, 232 Ark. 206, 335 S.W.2d 289 (1960), where the parties had never reached an agreement as to the contract price; here, each party testified that they had agreed upon a price, but offered conflicting testimony as to what that price was. Neither party claimed that $2000 was the agreed-upon price and there is no evidence in the record to support such an award. In rendering judgment for $2000, the court was, in effect, making a new contract for the parties. As noted by the supreme court in *Smith* v. *MRCC Partnership*, 302 Ark. 547, 792 S.W.2d 301 (1990), our courts have historically refused to rewrite contracts for the parties. *See also W. William Graham, Inc.* v. *City of Cave City*, 289 Ark. 105, 709 S.W.2d 94 (1986); *St. Paul Fire & Marine Insurance Co.* v. *Kell*, 231 Ark. 193, 338 S.W.2d 510 (1959). We find that the trial court's decision was clearly erroneous and we therefore reverse and remand for a new trial.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

Wylene ROSS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

CA 92-194 848 S.W.2d 948

Court of Appeals of Arkansas
Division I
Opinion delivered February 24, 1993

Easley, Hickey & Cline, by: *Preston G. Hickey*, for appellant.

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

MELVIN MAYFIELD, Judge. This is an underinsured motorist case arising out of an automobile accident between Mary Rowland and the appellant, Wylene Ross. At the time of the accident, Ms. Rowland was insured under a policy of liability insurance issued by Dixie Insurance Company with liability limits of $25,000.00 per person; appellant was insured under an automobile insurance policy issued by the appellee, State Farm Mutual. Appellant's policy of insurance provided, among other things, underinsured motorist coverage (UIM) in the amount of

$25,000.00. Under the heading, "Consent to Be Bound" the policy provided, "We are not bound by any judgment against any person or organization obtained without our written consent."

As a result of the collision, appellant filed a personal injury suit against Ms. Rowland. Appellant notified appellee of the filing of the lawsuit and otherwise kept appellee current on the proceeding; however, appellee was not a party to the proceeding nor is it argued that the appellee consented to be bound by the judgment. The suit was tried before a jury which returned a verdict for the appellant and awarded her damages in the sum of $50,000.00. Appellant notified appellee of the judgment and demanded that appellee pay her $25,000.00 pursuant to the UIM coverage provided by appellant's insurance policy with appellee. The appellee refused to pay, and on October 30, 1990, appellant filed suit against appellee.

On March 21, 1991, appellant filed a motion for summary judgment in her suit against appellee. The motion alleged that appellant was entitled to judgment as a matter of law pursuant to the UIM coverage provided by the policy issued by appellee. In a letter opinion dated June 8, 1991, the trial court, relying on *MFA Mutual Insurance Co.* v. *Bradshaw*, 245 Ark. 95, 431 S.W.2d 252 (1968), denied appellant's motion. An order to that effect was filed July 15, 1991. Subsequently, in a letter dated November 26, 1991, the trial judge held that the issues of liability and damages would have to be relitigated as to the appellee insurance company because it was not a party to the tort suit between the appellant and Ms. Rowland. The suit against the appellee was then tried (in which the tort issues were relitigated) and that trial resulted in a judgment in favor of the appellee.

Appellant argues the trial court erred in denying her motion for summary judgment and says she should not be required to prove her case twice. Appellant relies on *Lowe* v. *Nationwide Insurance Co.*, 521 So.2d 1309 (Ala. 1988), and *Haas* v. *Freeman*, 236 Kan. 677, 693 P.2d 1199 (1985), and argues the better rule is that notice of the filing of a tort action and of the potential UIM claim, and an opportunity to participate in the action are sufficient to bind an UIM carrier by any judgment obtained in the tort action.

We first note that the appellee filed a motion to dismiss this

appeal on the grounds that it is an appeal from the denial of a motion for summary judgment and, therefore, is not an appealable order. In a Per Curiam opinion issued June 3, 1992, we said briefs had been filed by both parties on the merits of the case and we would consider the issue of appealability when the case was submitted in regular course. The appellee also raised an issue about the sufficiency of appellant's abstract, and we allowed appellant to file another brief with a supplemental abstract.

On the appealability issue, we do not view this matter as an appeal from the denial of a motion for summary judgment. Indeed, appellant, in the statement of the case in her supplemental abstract and brief to this court, states that the order denying her motion for summary judgment was an unappealable order and, therefore, no appeal was taken at the time it was entered. After appellant's summary judgment motion was denied, appellant proceeded to retry her case against the appellee and a judgment was filed December 20, 1991, holding that appellant should have no recovery against appellee and dismissing appellant's complaint with prejudice. On January 13, 1992, appellant filed a notice of appeal which stated that appellant was appealing from the court's order denying appellant's motion for summary judgment. It is clear, however, that the appellant is really appealing from the judgment rendered against her in the second trial and is arguing that the trial court erred in refusing to grant appellant judgment on the underinsured insurance coverage without requiring her to relitigate the tort issues of damages and liability against the appellee.

In *Bradshaw, supra* the appellees brought suit against an insurance company seeking judgments each had recovered against an uninsured motorist. The appellees' liability insurance policy provided uninsured motorist coverage and contained the following provision:

> No judgment against any person or organization alleged to be legally responsible for the bodily injury (sustained by the insured) shall be conclusive, as between the insured and the Company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured

with the written consent of the Company.

245 Ark. 97-98.

The appellees in *Bradshaw* filed a motion for summary judgment which was granted by the trial court. The sole issue on appeal in that case was the validity of the consent clause which provided that no judgment in an action prosecuted by the insured against an uninsured motorist without the written consent of the insurer shall be conclusive as between the insured and the insurer. Our supreme court held the consent clause valid and stated that it allowed the insured "to pursue remedies against either or both the uninsured motorist and the insurer, but he cannot hold the insurer, without its consent, upon a judgment obtained in an action in which the insurer was not a party." 245 Ark. at 100. The court noted further that in many of the decisions cited in its opinion there was a holding that an insurer, having notice of or an opportunity to participate in an action against the uninsured motorist is, or may be, bound by a judgment in favor of its uninsured but that none of those decisions involved a contract containing a clause stipulating against such a binding effect. Thus, *Bradshaw* stands for the proposition that in cases involving a consent clause, the insured cannot hold the insurer liable, without its consent, upon a judgment obtained in an action in which the insurer was not a party and consequently had no control over the defense made or evidence offered.

We think the consent clause in the insurance policy in the instant case is substantially equivalent to that contained in *Bradshaw*. Therefore, we cannot agree that the trial court erred in requiring appellant to relitigate her case against the appellee.

We are not mindful of appellant's argument that *Bradshaw* is distinguishable because that case involved uninsured motorist coverage (UM) and the defendants in that case failed to appear thus preventing litigation of the issues of liability and damages. However, the fact that *Bradshaw* involved a defaulting defendant and involved UM coverage rather than UIM coverage does not, in our judgment, make a difference in the legal principle involved.

We also note that neither the *Lowe* nor *Haas* case, *supra*, relied upon by the appellants, involved a consent clause contained within the policy of insurance.

For the reasons stated above, the judgment of the trial court is affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

John Uzzelle ROWLAND, et al. *v.* FARM CREDIT BANK of ST. Louis

CA 92-699 848 S.W.2d 433

Court of Appeals of Arkansas
Division II
Opinion delivered March 3, 1993
[Rehearing denied March 31, 1993.]

Nance & Nance, P.A., by: *C.B. Nance*, for appellants.

Barrett, Wheatley, Smith & Deacon; and *Kemp, Duckett, Hopkins & Spradley*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellants in this case, beneficiaries under a testamentary trust created by their grandmother's will, appeal from an order foreclosing the liens of two mortgages on trust property in favor of appellee and mortgagee, Farm Credit Bank of St. Louis. Appellants contend their father, the executor of their grandmother's estate and trustee of the trust, was without authority to mortgage the property for his personal benefit and that a 1977 probate court order purporting to grant the executor that authority was void for lack of probate court jurisdiction over the mortgaged property. We affirm.

The land described in the mortgages consists of two tracts, referred to by the parties as Tracts I and II. Title to both tracts was vested in Charline Uzzelle Rowland on the date of her death in 1972. Her will was admitted to probate and her son, W.W. Rowland III, was nominated as executor of her estate. Tract I, then encumbered by two mortgages, was placed in a testamentary trust created by the deceased's will. W.W. Rowland III was named trustee and life beneficiary of the trust. Appellants, John Uzzelle Rowland, David Robinson, Walter Williams Rowland IV, and Tipton Rowland (children of W.W. Rowland III), are "remainder beneficiaries" under the trust. Upon Charline Uzzelle Rowland's death, title to Tract II vested in W.W. Rowland III, individually, subject to the right of dower of his wife, Betty Robinson Rowland. Appellants are not interested in the lands included within Tract II.

Albert and Wayne Streeter, d/b/a Streeter Brothers Partnership, are tenants in possession of the lands which are the focus of this foreclosure suit. By agreement, their rental payments have been paid into the court's registry.

By probate court order dated October 20, 1977, W.W. Rowland III was authorized as trustee and as executor of the estate of Charline Uzzelle Rowland to borrow $225,000.00 from appellee and to mortgage Tracts I and II as security. The probate court's stated reason for granting that authority was to allow acquisition of funds to pay taxes and debts of the decedent, to refinance the existing mortgages, and to benefit the beneficiaries of the trust and W.W. Rowland III, individually.

On May 23, 1979, W.W. Rowland III, as trustee and as executor of the estate of Charline Rowland, and W.W. Rowland III and his wife, individually, made application for a loan from appellee for $165,000.00. On May 30, 1979, they borrowed $165,000.00 from appellee. This loan was secured by a first mortgage on Tracts I and II. The note and mortgages securing the debts were executed by W.W. Rowland III, as executor and trustee, and by W.W. Rowland III and his wife, individually. The existing mortgages to Equitable Life Assurance Society and Prudential Insurance Company of America securing the debts of the decedent were satisfied from the proceeds of this loan.

On October 31, 1980, the executor borrowed an additional $35,000.00 from appellee for the stated purpose of installing an irrigation system. This loan was secured by a second mortgage on Tracts I and II. The note and mortgages securing the debt were again executed by W.W. Rowland III, as executor and trustee, and W.W. Rowland III and his wife, individually. No irrigation system was ever installed.

When the payments due under the promissory notes were not timely made, appellee commenced this foreclosure action in chancery court against W.W. Rowland III as executor and trustee, W.W. Rowland III and his wife individually, the remainder or trust beneficiaries, and the tenants in possession. The chancery court granted judgment upon the promissory notes *in rem* and *in personam* against the estate of W.W. Rowland III and against his widow, and *in rem* as against any and all of the appellants' interests in the property. The court ordered that

Tracts I and II be sold at public auction in the event the judgment was not paid. It is from this order that appellants appeal.

On appeal, appellants contend that the 1977 order of the probate court authorizing the executor to mortgage Tract I is void on its face and that the executor was not authorized to mortgage the property. Therefore, appellants contend, the two mortgages are not enforceable against Tract I. They further contend that the trust is entitled to a *pro rata* share of the rental income that is held in the court's registry.

Admittedly, appellants' defense to the foreclosure action and their contentions on appeal constitute a collateral attack on the 1977 probate court order purporting to authorize the loans and mortgages in question. Clearly, however, a judgment cannot be collaterally attacked unless it is void on the face of the record or the rendering court is shown to have lacked subject-matter jurisdiction. *Brown* v. *Kennedy Well Works, Inc.*, 302 Ark. 213, 788 S.W.2d 948 (1990); *Reed* v. *Futrall*, 195 Ark. 1044, 115 S.W.2d 542 (1938). Where a court has jurisdiction of the subject matter, its judgment, even if erroneous, is conclusive so long as not reversed, and cannot be attacked collaterally. *Brown* v. *Kennedy Well Works, supra*; *Sewell* v. *Reed*, 189 Ark. 50, 71 S.W.2d 191 (1934).

Article 7 § 34 of the Arkansas Constitution, as amended by Amendment 24, provides that probate courts "have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, and administrators, guardians, and persons of unsound mind and their estates, as is now vested in courts of probate, or may be hereafter prescribed by law." Arkansas Code Annotated § 28-1-104(a)(1) (1987) provides that probate courts have jurisdiction over the administration, settlement, and distribution of estates of decedents. As far as real property is concerned, Ark. Code Ann. § 28-49-101(b)(1) (1987) provides:

> Real property shall be an asset in the hands of the personal representative when so directed by the will, if any, or *when the court finds that the real property should be sold, mortgaged, leased, or exchanged for any purpose enumerated in § 28-51-103*, irrespective of whether any personal property of the estate, other than money, is available for

such purpose. [Emphasis added.]

Arkansas Code Annotated § 28-51-103 (1987), in turn, provides in part as follows:

> (a) Real or personal property belonging to an estate may be sold, mortgaged, leased, or exchanged under court order when necessary for any of the following purposes:
>
> (1) For the payment of claims;
>
> (2) For the payment of a legacy given by the will of the decedent;
>
> (3) For the preservation or protection of assets of the estate;
>
> (4) For making distribution of the estate or any part thereof; or
>
> (5) For any other purpose in the best interest of the estate.

Here, an order was entered by the probate court on October 20, 1977, authorizing the executor to borrow as much as $225,000.00 from appellee and to secure the loan by executing mortgages on Tracts I and II. According to that order, the probate court so authorized the executor in order that he would have funds for certain expressed purposes, including paying the taxes, debts, and mortgage indebtedness of the decedent. We conclude, and appellants do not dispute, that these purposes fall within those permissible ones listed in § 28-51-103. Thus, Tract I became an asset in the hands of the executor and subject to the probate court's jurisdiction. *See* Ark. Code Ann. § 28-49-101(b)(1). We further conclude that the fact that the court may have authorized the mortgaging of the real estate for additional purposes, which were not themselves authorized by statute, did not serve to oust the court of jurisdiction or to render its order void and subject to collateral attack. Since the court had subject-matter jurisdiction, its order is not void and Tract I is subject to the liens in question.

Nor can we agree with appellants' alternative argu-

ment that the property is not subject to the lien of the second mortgage in particular, which was given as security for the $35,000.00 loan. Joe Martin, employed by appellee as a loan officer until 1985, testified that the two loans were part of one continuous transaction. The probate court order authorized the borrowing of $225,000.00. The two loans in question totalled $220,000.00. The order did not preclude the borrowing of a lesser amount initially, and Ark. Code Ann. § 28-51-303(f) (1987) provides that an order permitting property to be mortgaged shall remain in force until terminated by the court.

Since the probate court's order is not void, appellants' argument pertaining to rental proceeds must also fail. The mortgages provided that appellee had a lien on all rents, issues, and profits as part of the security for the debts. Appellee is entitled to all the rental proceeds deposited with the court. These proceeds will be applied to the judgment awarded appellee.

As pointed out by the chancellor, appellants may have a cause of action against the estate of the executor, who died subsequent to the filing of this action. That, however, is independent of the present action.

Affirmed.

JENNINGS, C.J., and COOPER, J., agree.

Helen MURCHIE *v.* Lester HINTON, et al.

CA 92-671 848 S.W.2d 436

Court of Appeals of Arkansas
Division I
Opinion delivered March 3, 1993
[Rehearing denied March 31, 1993.]

Jeff R. Conner, for appellant.

Coffelt, Burrow & Sawyer, by: *Stephen P. Sawyer*, for appellee.

JOHN B. ROBBINS, Judge. This action arose out of a property line dispute between appellant Helen Murchie and her neighbors, Edward and Juanita Foster. Appellant filed a third-party complaint against appellees Lester Hinton and Thelma Hinton seeking damages for their failure to defend appellant's title in the dispute. The chancellor found against the appellant on her third-party action and she appeals. We hold that appellant is entitled to recover the reasonable costs of defending her title, and reverse.

Appellant purchased her property from appellees in September 1989. The following July the Fosters filed their petition against appellant seeking ejectment and a temporary restraining order. They alleged that appellant was encroaching onto a portion of their adjacent lot. The trial court entered a temporary restraining order prohibiting appellant from interfering with the Fosters' use and enjoyment of their property, including the disputed strip, and prohibiting appellant from interfering with any construction, grading, or landscaping, or other use of the land. This restraining order was later modified to prohibit either party from continuing any work on the disputed property.

In August 1990, appellant notified appellees by certified mail of the Fosters' ejectment suit and asked that they defend the action. The appellees had specifically covenanted in their warranty deed to appellant that they would "forever warrant and defend the title to the said lands against all claims whatever." Appellees refused to take any action to defend the title, and appellant subsequently filed a third-party complaint against them for damages sustained in defending the ejectment action.

At the trial on the merits of the ejectment action, appellant prevailed. The court, however, denied appellant's request for fees and costs against the appellees. The court reasoned that the Hintons had fulfilled their obligation by appearing and putting on testimony at the trial. It is from the denial of fees and costs that appellant appeals.

The deed of conveyance from appellees to appellant contained the words "grant, bargain, sell, and convey" in its granting clause. These words constitute:

> an express covenant to the grantee, his heirs, and assigns that the grantor is seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by the deed, as also for the quiet enjoyment thereof against the grantor, his heirs, and assigns and from the claim and demand of all other persons whatever, unless limited by express words in the deed.

Ark. Code Ann. § 18-12-102(b) (1987).

In *Bosnick* v. *Metzler*, 292 Ark. 505, 731 S.W.2d 204 (1987), the supreme court held that a grantee-covenantee was entitled to recover his costs and expenses from his grantor-covenantor when the covenantee successfully defended or asserted his title against a third-party's claim of adverse possession. The court also recognized the general rule that in order to recover for breach of such a covenant there must be an actual or constructive eviction. Here, the appellant was actually evicted from a portion of her lot by the temporary restraining order entered by the trial court on July 27, 1990. This eviction continued until the conclusion of the final hearing on November 21, 1991. Consequently, under the statutory warranty and pursuant to the court's holding in *Bosnick*, appellant was entitled to recoup her litigation costs and expenses in successfully defending the Fosters' suit and recovering possession of the disputed portion of her lot.

The warranty deed involved in *Bosnick* also contained a special covenant that the grantors would "defend the title to the said lands against all claims whatever." *Id.* at 507, 731 S.W.2d at 205. The court did not discuss this covenant in its opinion, nor apparently rely on it in holding that the grantors were responsible for the grantees' costs and expenses. The supreme court has previously held, however, that "the law is settled that, under a covenant to warrant and defend title, the covenantee is entitled to recover the cost and necessary expenses incurred in the bona fide defense or assertion of the title, including a reasonable attorney's fee." *Arkansas Trust Co.* v. *Bates*, 187 Ark. 331, 336, 59 S.W.2d

1025, 1027 (1933). Appellees' specific covenant to warrant and defend provides an additional basis for their duty to reimburse appellant for her costs and attorney's fees incurred in defending the Fosters' action.

The trial court concluded that appellees fulfilled their obligation to defend appellant's title by appearing and participating at the trial. However, when appellant requested that they defend for her soon after she was sued by the Fosters, they failed to do so. They answered appellant's third-party action by denying that they were subject to a covenant to defend appellant's title. We hold that their eventual participation at the trial falls short of their duty to defend and the trial court erred in so ruling.

Appellees suggest that appellant is seeking to recover attorney's fees and costs for collateral litigation which would not be recoverable, and that no fees may be awarded a covenantee in an action against the covenantor for breach of warranty. While appellant's third-party action against appellees would be considered collateral, the underlying ejectment action brought by the Fosters is clearly a direct attack on appellant's title and right to possession, and damages related to defending the title are recoverable. *Bosnick* v. *Metzler, supra.* As to appellant's entitlement to her attorney's fees and costs incurred in her third-party action against appellees, we acknowledge that the supreme court held in *O'Bar* v. *Hight*, 169 Ark. 1008, 277 S.W. 533 (1925), that a covenantee could not recover attorney's fees from the covenantor in an action for breach of warranty. Were it not for Act 800 of 1989, this would continue to be the rule. However, Act 800 amended Act 519 of 1987 to permit a trial court to allow a reasonable attorney's fee to the prevailing party in an action for breach of contract (codified, as amended, at Ark. Code Ann. § 16-22-308 (Supp. 1991)). A warranty deed should be considered a contract between a grantor and his grantee who has accepted it. For a review of cases where the supreme court has referred to deeds as being contracts see *Schnitt* v. *McKellar*, 244 Ark. 377, 382, 427 S.W.2d 202, 206 (1968); *Black* v. *Been*, 230 Ark. 526, 528, 323 S.W.2d 545, 547 (1959); *Davis* v. *Collins*, 219 Ark. 948, 951, 245 S.W.2d 571, 572 (1952); *Jackson* v. *Lady*, 140 Ark. 512, 523, 216 S.W. 505, 508 (1919). *See also Parker* v. *Carter*, 91 Ark. 162, 167, 120 S.W. 836, 838 (1909). Consequently, the trial court may allow appellant a reasonable attorney fee for that

portion of appellant's attorney's fees attributable to prosecution of her third-party action against appellees. While we require an award of attorney's fees and costs to appellant for defending Fosters' claim after she notified appellees of their suit, an award for appellant's attorney fees for prosecuting the third-party action against appellees is discretionary with the trial court. Ark. Code Ann. § 16-22-308. The case must be remanded to the trial court for these determinations.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

John L. LEWIS *v.* STATE of Arkansas

CA CR 92-666 848 S.W.2d 955

Court of Appeals of Arkansas
Division I
Opinion delivered March 3, 1993

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Teri L. Chambers, for appellant.

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

MELVIN MAYFIELD, Judge. John L. Lewis was charged with the aggravated robbery of a convenience store on June 21, 1986. He was convicted by a jury of robbery and sentenced as a habitual offender to thirty years in the Arkansas Department of Correction. On appeal he argues that the trial court erred in denying him the opportunity to ask a witness whether she had made a prior inconsistent statement; in informing the jury, during the sentencing stage of the trial, of the punishment imposed for his previous convictions; and in denying his request for a jury admonishment when the prosecutor improperly argued to the jury, during the sentencing stage, that the evidence proved aggravated robbery even though the jury had already returned a verdict of guilty of robbery.

Appellant does not challenge the sufficiency of the evidence; therefore, only a brief recital of the facts is necessary. Rita Holiman testified that on June 21, 1986, she was the clerk at a Junior Food Mart when, at about 12:30 a.m., a man came in and asked for change to use in the telephone. When she opened the cash register the man reached over the counter and began grabbing the money. Ms. Holiman said that when he got all the money from the register he demanded that she open the safe. She testified that she told the man that she could not open it, but the man said to give him the money from the safe or he would kill her, and that he put his hand in his pocket as if he had a weapon. So, Ms. Holiman got the money from the safe and gave it to the man. She said there was approximately $370 in small bills and coins in the cash register and some "big money" and blank money orders in the safe. She positively identified the defendant as the man who robbed her. On cross-examination Ms. Holiman testified that the shirt appellant was wearing at the time of the robbery was "a dark

color."

Several police officers testified to investigating the robbery, apprehending appellant, finding money on him, and that he told them the money came from the Junior Food Mart. One officer testified that when the appellant was arrested he was wearing blue jeans and a dark colored shirt with light sleeves.

After the State rested, defense counsel called Ms. Holiman to the witness stand and established that she had given the police a description of the man who had robbed her. Counsel then started to hand her a copy of the police report, and the prosecutor objected that the report was hearsay. The trial judge sustained the objection. As his first argument on appeal, appellant contends that "the trial court erred in denying appellant the opportunity to ask witness Rita Holiman whether she had made a prior inconsistent statement."

Arkansas Rule of Evidence 613 permits extrinsic evidence of prior inconsistent statements of a witness for purposes of impeachment if the witness is afforded the opportunity to explain or deny the statement and does not admit having made it, and the other party is afforded the opportunity to interrogate the witness on that statement. However, unsworn prior statements made by a witness cannot be introduced as substantive evidence in a criminal case to prove the truth of the matter asserted therein. *Harris* v. *State*, 36 Ark. App. 120, 819 S.W.2d 30 (1991). Under Ark. R. Evid. Rule 105, whenever evidence is admissible for one purpose but not admissible for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. *Crawford* v. *State*, 309 Ark. 54, 827 S.W.2d 134 (1992); *Harris, supra.*

So, the description of the robber Ms. Holiman gave the police on the telephone could have been admissible to impeach her testimony by showing a prior inconsistent statement, but it would not be admissible as substantive evidence. Appellant points out that the police report (which was proffered for the record) stated that Ms. Holiman said the robber was wearing "a light colored pullover shirt," and at trial she testified that the shirt he was wearing was "a dark color." Appellant's brief states: "Thus, it is clear that the testimony defense counsel attempted to elicit was being offered for impeachment purposes." However, defense

counsel (who is not the same attorney on appeal) failed to ask Ms. Holiman whether she made the statement as contained in the police report. If that question had been asked and answered in the affirmative the matter would have been concluded as the witness would have been impeached. *Ford* v. *State*, 296 Ark. 8, 18, 753 S.W.2d 258, 263 (1988) (an admitted liar need not be proved to be one). But the problem here is that Ms. Holiman was not asked whether she made the statement in the report. Ark. R. Evid. 613(b) provides that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same." The trial court did not rule that defense counsel could not ask Ms. Holiman whether she had made the statement that was attributed to her by the police report. The trial court simply would not allow counsel to reveal what the report stated Ms. Holiman said until she had been asked whether she had made that statement. We think the trial court was correct.

Next, appellant argues that the judge erred in informing the jury, during the sentencing phase of the proceedings, of the punishments imposed on appellant for his previous convictions. Arkansas Code Annotated Section 5-4-502 (1987) provides:

> The following procedure shall govern trials at which a sentence to an extended term of imprisonment is sought pursuant to § 5-4-501:
>
> (1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge.
>
> (2) If the defendant is found guilty of the felony, the trial court, out of the hearing of the jury, shall hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies and shall determine the number of prior felony convictions, if any. Defendant shall have the right to hear and controvert this evidence and to offer evidence in his support.
>
> (3) The trial court shall then instruct the jury as to the number of previous convictions and the statutory sentencing range. The jury may be advised as to the nature of the previous convictions and the date and place thereof.

> (4) The jury shall retire again and then determine a sentence within the statutory range.

Appellant argues that the trial court violated this statute by informing the jury of the specific punishments imposed upon appellant for his previous convictions. He contends that the statute, by specifically stating the jury shall be informed of the "statutory sentencing range," has by negative implication made it unlawful to inform the jury of the specific sentences imposed. He contends this information prejudiced him because the prosecutor was able to argue that the previous sentences were too light and to encourage the jury to give the maximum sentence of thirty years.

The record shows that appellant failed to specifically object to the fact that the judge told the jury what sentences appellant had received for his previous convictions. After the court told the jury that the appellant had two previous felony convictions, the court said, "Now, I will tell you about the two previous convictions." At that point, the appellant's attorney made the following objection:

> Your Honor, I believe I am going to object to the Court telling what they were, and allege to the Court that all you have to do is show what they were — I mean, what he was convicted of — the charge and in effect there was a conviction or that he plead guilty or was found guilty. I object to the Court telling what they involved.

The court then said:

> Well, I am going to let the jury know what the information charges and I am going to tell the jury what the disposition was. I think that is proper.

Counsel for appellant responded to the above statements by saying "thank you," and there was no further response or objection when the court told the jury what sentences the appellant had received for his previous convictions.

■■ It has consistently been held that in order to preserve an issue for appellate review, the objection below must be specific enough to apprise the trial court of the particular error about which appellant complains. *Terry* v. *State*, 309 Ark. 64, 826

S.W.2d 817 (1992); *Clark* v. *State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989). The trial judge told the jury, "Now I will tell you about the two previous convictions." Subsection 3 of the statute provides that certain information about the previous convictions be given the jury. Appellant's objection was not clear. The precise objection was: "I object to the court telling what they involved." However, subsection 3 provides that the jury "may be advised as to the nature of the previous convictions." We do not think appellant's objection was specific enough to apprise the trial judge of the argument now being made on appeal. Moreover, after the court ruled upon appellant's objection his counsel said, "thank you."

Finally, appellant argues that the court erred in denying his request for a jury admonishment on the basis that the prosecutor improperly argued to the jury that the evidence proved aggravated robbery. In his jury argument, during the sentencing phase of the trial, the prosecutor referred to the robbery for which appellant had been convicted as "aggravated robbery" although the jury had already returned a verdict of simple "robbery." When the prosecutor made this argument defense counsel stated:

> I object to the use of the term aggravated robbery. It is not. It is robbery. That is what a jury of 12 folks — and I ask that the jury be admonished of the fact that it is not aggravated robbery. They found him guilty of robbery.
>
> THE COURT: Well —
>
> DEFENSE COUNSEL: I again ask for a mistrial.
>
> THE COURT: No sir. Your motion is denied. I assume the prosecutor has his own opinion and he can state his opinion. You may state yours.

Defense counsel then proceeded with his argument to the jury without further mention of a request for admonishment.

Some leeway must be given in opening and closing remarks and counsel are free to argue every plausible inference which can be drawn from the testimony. *Abraham* v. *State*, 274 Ark. 506, 625 S.W.2d 518 (1981). The State may argue for the maximum punishment in sensible language just as a defendant may argue for the minimum punishment. *Holloway* v. *State*, 268

Ark. 24, 594 S.W.2d 2 (1980). The trial court has a wide latitude of discretion in controlling the arguments of counsel, and its rulings in that regard are not overturned in the absence of clear abuse. *Cobbs* v. *State*, 292 Ark. 188, 728 S.W.2d 957 (1987).

Also, mistrial is an extreme and drastic remedy and is proper only if the action on which it is predicated has infected the trial with so much prejudice to the defendant that justice cannot be served by a continuance of the trial. Since the trial judge is in a superior position to assess the possibility of prejudice, he is vested with great discretion in acting on motions for mistrial, and this court will reverse only where that discretion is manifestly abused. *Jimenez* v. *State*, 24 Ark. App. 76, 749 S.W.2d 331 (1988). Obviously, the jury knew that it had just found the appellant guilty of "robbery" and not of "aggravated robbery." Thus, it could not have been mislead by the prosecutor's argument and we do not think the court abused its discretion in its ruling on appellant's request for an admonishment to the jury.

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

Larry BEAVERS *v.* Dorothy Brown VAUGHN

CA 92-686 849 S.W.2d 6

Court of Appeals of Arkansas
Division II
Opinion delivered March 10, 1993

William M. Howard, Jr., for appellant.

Eugene Hunt and *Amanda Nixon White*, Jefferson County Child Support Enforcement Unit, for appellee.

JOHN MAUZY PITTMAN, Judge. Larry Beavers appeals from an order of the Jefferson County Chancery Court awarding Dorothy Brown Vaughn, appellee, retroactive child support, increased future support, and attorney's fees. Appellant contends that the chancellor erred in making each of these awards. We reverse the award of retroactive child support and remand for reconsideration and clarification of the award of attorney's fees.

In December 1987, appellee brought a paternity action against appellant alleging that appellant was the father of her three children and seeking an award of child support. Appellant admitted paternity and in January 1988 an order was entered requiring appellant to pay appellee $200.00 per month in child support, beginning in February 1988. Neither appellee's complaint nor the order in any way addressed the question of support for the period before the order. A general reservation of jurisdiction "for such further orders and proceedings as may be necessary" concluded the order.

In November 1990, appellee brought this action seeking an

order increasing appellant's child support obligation. Subsequently, appellee filed an amended petition wherein she alleged that appellant had practiced fraud upon the court in obtaining the 1988 order. Appellee contended that, as a result of that fraud, she was entitled to have the original decree modified so as to provide an award of retroactive child support covering the period between the children's respective birthdates and the time appellant first began paying support in February 1988.

After a trial, the chancellor specifically found that appellant had not committed fraud upon the court. Nevertheless, in his December 1991 order, the chancellor awarded appellee retroactive support in the amount of $20,160.00. The chancellor concluded that such an award was mandated by Ark. Code Ann. § 9-10-111(a) (Repl. 1991), which provides that upon a finding of paternity, the court "shall give judgment for a monthly sum of not less than ten dollars ($10.00) per month for each month from the birth of the child until the child attains the age of eighteen (18) years." The chancellor also prospectively increased appellant's support obligation from $200.00 to $320.00 per month and awarded appellee attorney's fees.

Appellant first contends that, since the chancellor found that appellant had not committed fraud in obtaining the 1988 decree, the chancellor erred in modifying the decree so as to award retroactive child support. We agree.

After the expiration of the ninety-day period provided for in Ark. R. Civ. P. 60(b), a chancellor ordinarily lacks jurisdiction to modify a decree if grounds for modifying an order after ninety days are absent. *Jones* v. *Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988); *Harrison* v. *Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983). Furthermore, a general reservation of jurisdiction, such as the one in the 1988 order in this case, will permit modification of a decree after ninety days only with respect to issues that were before the court in the original action. *Jones* v. *Jones*, *supra*; *Cox* v. *Cox*, 17 Ark. App. 95-A, 705 S.W.2d 902 (1986) (*supp. op. on reh'g denied*). Here, the issue of retroactive support admittedly was not before the court until the petition for modification was filed, approximately three years after the original decree was entered. In the absence of fraud or another ground listed under Rule 60(c), the chancellor had no

authority in 1991 to modify the 1988 order by awarding retroactive child support.

Appellant next contends that the trial court erroneously determined his current income and therefore erred in increasing his support obligation from $200.00 to $320.00. However, appellant has wholly failed to abstract any of the evidence presented on this issue. The burden is on the appellant to bring up a record sufficient to demonstrate that prejudicial error was committed below. *Irvin* v. *State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989). On appeal, the abstract is the record. *Id.* We conclude that appellant has failed in this burden, and we no not address the merits of his argument.

Appellant finally contends that the trial court erred in awarding attorney's fees. He argues that there is no statutory basis for ever awarding attorney's fees in paternity actions. Appellant's argument overlooks Ark. Code Ann. § 9-27-342(d) (Repl. 1991), which specifically provides:

> Upon an adjudication by the court that the putative father is the father of the juvenile, the court shall follow the same guidelines, procedures, and requirements as established by the laws of this state applicable to child support orders and judgments entered upon divorce. *The court may award court costs and attorney's fees.* [Emphasis added.]

See Ark. Code Ann. § 9-10-109(a) (Repl. 1991); *see also Rudolph* v. *Floyd*, 309 Ark. 514, 832 S.W.2d 219 (1992).

However, since the chancellor may have considered the results obtained in making the award of fees and since we have reversed that part of the order awarding retroactive child support, we think that the issue of fees should be remanded to the chancellor for reconsideration. This will also allow the chancellor an opportunity to clarify the various and conflicting indications regarding whether the fees were awarded to the Jefferson County Child Support Enforcement Unit, to private attorneys working under contract with the State, or to private attorneys employed by appellee. It will further allow the chancellor to specifically consider, if necessary, appellant's argument regarding the authority to award fees to the Child Support Enforcement Unit or to

attorneys providing services pursuant to a contract with the State.

Affirmed in part; reversed in part; and remanded.

JENNINGS, C.J., and COOPER, J., agree.

Thomas GILKEY *v.* STATE of Arkansas

CA CR 92-442 848 S.W.2d 439

Court of Appeals of Arkansas
Division II
Opinion delivered March 10, 1993

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Appellant Thomas Gilkey was tried for first-degree murder and second-degree battery. The jury found appellant guilty of second-degree murder and sentenced him to twenty years in the Arkansas Department of Correction. He also was found guilty of second-degree battery and was sentenced to a term of five years. Appellant raises three points for reversal in this appeal. We affirm.

On May 5, 1990, appellant spent the day drinking and barbecuing with a group of his friends. At approximately 10:00 p.m. that evening, he was asked to take three female guests to the "Thunder Zone", an area of night clubs and drug related activity. One of the guests was searching for her sister. As appellant and his passengers were driving through the area in question, he apparently sideswiped a vehicle. Shortly thereafter, a car angled in front of appellant's truck and two or three men got out of the

car. Appellant states that one of the men had a knife and that they were threatening to kill him. Appellant stated that he jerked away from one of the individuals and was able to get in his truck and drive away. As he was leaving, he struck the vehicle that was blocking his path. Appellant stated that at this point he was totally rattled and just wanted to leave the scene. He stated he became lost and finally returned to the same street that he had just left. Appellant testified that there was a large crowd in the street and people were sitting on sidewalks and cars. He testified that he was afraid that these individuals might try to harm him. He stated that he was so afraid that he took a pistol from the floor board of his truck and fired approximately fourteen times in the direction of the crowd of people he believed were trying to surround his truck. Virgil Sapp was struck in the head and died instantly. Garland Phiefer was hit in the upper thigh by a ricocheting bullet but he required no medical attention.

Appellant argues that the court erred in failing to direct a verdict on the charge of battery in the second degree. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Hill* v. *State*, 299 Ark. 327, 773 S.W.2d 424 (1989). On appeal, this court will affirm the verdict it if is supported by substantial evidence. *Id.*; *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985).

The statute at issue here is Ark. Code Ann. § 5-13-202(a) (1987), which provides, in pertinent part:

> A person commits battery in the second degree if:
>
> (1) with purpose of causing physical injury to another person, he causes serious physical injury to any person;
>
> (2) with the purpose of causing physical injury to another person, he causes physical injury to any person by means of a deadly weapon;
>
> (3) he recklessly causes serious physical injury to another person by means of a deadly weapon.

The second-degree battery charge arose when Garland Phiefer was hit in the thigh with a ricochet bullet fired by appellant. Phiefer testified that he removed the bullet with his finger shortly after being hit and treated his wound with peroxide

and did not seek medical attention. When asked if he had been hurt he responded, "Yeah." When asked if he had suffered "substantial" pain, Phiefer replied, "It hurt no worse than anything else." Where the jury could have reasonably found appellant acted purposely, and where the injury was occasioned by the use of a deadly weapon, only physical injury, not serious physical injury, need have been shown. *Cole* v. *State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991). Certainly, from this testimony it appears that Phiefer experienced some degree of pain. Pain is a subjective matter. The fact that a victim does not verbalize his pain is not conclusive; the factfinder must consider all of the testimony and is not required to set aside its common knowledge and may consider the evidence in light of its observations of experiences in the affairs of life. *Id.* We find that the trial court properly submitted the matter to the jury and that there is sufficient evidence to support the verdict.

Appellant next argues that the trial court erred when it, over the objections of the defendant, gave Instruction No. 25 concerning voluntary intoxication. He argues that the giving of the instruction amounted to a comment on the evidence in violation of Ark. Const. Art. 7, § 23. He further contends the court's comment on sobriety tended to emphasize that evidence. Appellant also argues that since the jury also sets punishment, the jury may have enhanced his sentence because of this instruction. The essence of the appellant's argument is that the refusal of a state to allow evidence of voluntary intoxication for the purpose of disproving intent effectively relieves the prosecution of its duty to provide the element beyond a reasonable doubt.

The trial judge instructed the jury that voluntary intoxication is not a defense to the charge of murder in the first degree or to the charge of battery in the second degree, in reliance upon the decision of *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986). The court in *White* effectively held that voluntary intoxication is no longer available as a defense for purposes of negating specific intent. *See* Ark. Code Ann. § 5-2-207 (1987). Here, a number of witnesses, including appellant, testified at trial about appellant's drinking the day of the shooting. Appellant also testified that he was "rattled" and "afraid." Under these circumstances, the trial judge determined that the State was entitled to an instruction informing the jury of the law regarding evidence of

intoxication so as to avoid any confusion. The voluntary intoxication instruction properly stated the law and served to guide the jury in its consideration of the evidence presented. We believe the trial court properly applied the rationale of the *White* case to the facts of the case at bar and did not err in giving Instruction No. 25.

Appellant's final argument is that the court erred in not permitting the jury to hear detailed testimony about his military service in Vietnam. Mitigation of punishment is the only reason appellant gave for offering this testimony. Appellant has cited no authority for his contention that a defendant can present evidence to the jury for the purpose of mitigating punishment. We do not consider assignments of error that are unsupported by convincing argument or citation of authority. *Womack* v. *State*, 36 Ark. App. 133, 819 S.W.2d 306 (1991). Nevertheless, questions of mitigation are properly presented to the trial court, which has the responsibility of sentencing after maximum punishment has been fixed by the jury. *Lair* v. *State*, 283 Ark. 237, 675 S.W.2d 361 (1984); *Killman* v. *State*, 274 Ark. 422, 625 S.W.2d 489 (1981). We find that appellant's military heroism offered solely for the purpose of mitigating punishment was not relevant to any issue to be determined by the jury.

Affirmed.

JENNINGS, C. J., and COOPER, J., agree.

Vernon WINTERS *v.* STATE of Arkansas

CA CR 92-14 848 S.W.2d 441

Court of Appeals of Arkansas
Division II
Opinion delivered March 10, 1993

Chet Dunlap, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was convicted of burglary and theft of property and was sentenced to fifteen years on each count to run consecutively for a

total of thirty years in the Arkansas Department of Correction. On appeal, the appellant contends that there was insufficient evidence to support the conviction and that the trial court erred by not finding as a matter of law that the appellant could not be found guilty of burglary because the State did not prove that the buildings which were entered were occupiable structures.

Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), when there is a challenge to the sufficiency of the evidence, we review that point before considering other arguments. On appeal, we review the evidence in the light most favorable to the appellee and affirm if the verdict is supported by substantial evidence. *Larue* v. *State*, 34 Ark. App. 131, 806 S.W.2d 35 (1991). 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 resort to speculation or conjecture. *Kendrick* v. *State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992). In determining whether there is substantial evidence to support the jury's verdict, it is permissible to consider only the testimony that tends to support the verdict of guilt. *Franklin* v. *State*, 311 Ark. 601, 845 S.W.2d 525 (1993).

Burglary is committed when a person enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201 (1987). A person commits theft of property if he knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a) (Supp. 1991).

Here, the evidence, when viewed in the light most favorable to the State, discloses that on the morning of February 18, 1991, Jim Wyse arrived at work and discovered that a supply room had been broken into at the Craighead Farmers Co-op in Bay, Arkansas, where he worked as branch manager. Upon further inspection, he discovered that several large tractor tires and wheels were missing from the small supply room and from another storage building on the premises. The lock on the supply room's gate had been forcibly removed. Mr. Wyse identified some of the tires taken as Armstrong rice and cane tires and estimated the total value to the tires taken at $4,000.00. Several of the tires

were later found behind a cemetery in Lunsford, Arkansas, which is five or six miles from Bay.

Kenneth Walker, Chief of Police in Bay, testified that around 8:30 p.m. on Sunday, February 17, he circled the Co-op premises while on patrol. He stated that he noticed a set of tire tracks leading to the large storage building, but that he did not see a vehicle.

Mr. Purvis DeWayne Carr, an employee of Procter Tire Company, testified that on the evening of February 17, on his way to an 8:00 p.m. meeting, he noticed a tan or gold Chevrolet pickup driving slowly. He stated that the truck had four rear farm tires in the bed. Mr. Carr was able to identify the tires in the back as being new Armstrong rice and cane tires. Mr. Carr also noticed that the truck did not have a license plate and had three trailer hitch balls on the rear bumper. Mr. Carr stated that he was not able to identify the driver nor did he know if there were any passengers.

The next day, Chief Walker identified the appellant's truck as a suspect vehicle based upon the information given to him by Mr. Carr. The appellant agreed to bring his truck to the police station and Chief Walker testified that when he questioned the appellant regarding the theft of the tires, the appellant gave him conflicting statements. The appellant first stated that he had never dealt in tractor tires, but after rubber marks in the back of his truck were pointed out by Chief Walker, he stated that he did regularly haul tractor tires for his father. Chief Walker noticed that the rubber marks appeared to be fresh since they were soft and unfaded. That afternoon, Mr. Carr identified the appellant's truck at the police station as the one he had seen carrying the tires on the previous night.

The appellant gave Chief Walker the names of two alibi witnesses, Brenda Ratliff and Sandy Jones. Ms. Jones testified that on the afternoon of February 17, 1991, the appellant, Raymond Warden, and a woman named Donna came to the apartment that Ms. Jones shared with Brenda Ratliff. The appellant and Mr. Warden later drove Ms. Jones and Donna to a club around 6:00 or 7:00 p.m., and left them there. Ms. Jones stated that she became very intoxicated and did not recall seeing appellant or Mr. Warden again that evening. Ms. Jones testified

that the appellant asked her to state that he had been with her all night on February 17. She initially told the police that she had been with the appellant but later changed her statement after receiving threats from the appellant and Mr. Warden. Ms. Jones also testified that Mr. Warden had offered her money to keep her mouth shut.

Brenda Ratliff testified that around 6:00 p.m. on the evening of February 17, the appellant, Mr. Warden, Donna, and Arlon Dale Ingram arrived at her apartment around 6:00 p.m. in the appellant's truck. She stated that she did not go to the club with the others and that sometime after midnight, Ms. Jones, Mr. Warden, Donna, and the appellant returned to her apartment. She further testified that the appellant subsequently told her that he "did what they said I did" and wanted her to state that he had been at her apartment all evening. When she inquired about the money and the tires, the appellant stated he "couldn't touch that." She stated that she was present when Mr. Warden offered Ms. Jones money to keep quiet and that she suggested Ms. Jones get the money up front. She also stated that the appellant and Mr. Warden had been threatening them. Raymond Warden testified for the defense that he and the appellant owned the truck in partnership. He stated that he was with the appellant and Arlon Dale Ingram until about 7:00 p.m. on February 17, until the appellant took Mr. Warden to his mother's home. He stated that he spoke with the appellant on the telephone forty-five minutes later and saw him again the next morning around 7:00 a.m. Arlon Dale Ingram testified that on the evening of February 17, he left work at the Chapparal Bar and drove his own vehicle to the club where he met Warden and the appellant. He also stated that he could not remember when he last saw the appellant that night.

The appellant contends that the State's evidence was insubstantial because the evidence was circumstantial and the State's witnesses were not credible. We do not agree. Circumstantial evidence may constitute substantial evidence. *Summers* v. *State*, 300 Ark. 525, 780 S.W.2d 540 (1989). When circumstantial evidence alone is relied upon, it must indicate the accused' s guilt and exclude every other reasonable hypothesis. *Brown* v. *State*, 35 Ark. App. 156, 814 S.W.2d 918 (1991). Whether the evidence excludes every other reasonable hypothesis is for the fact finder to decide. *Id.* It is only when circumstantial

evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law. *Hutcherson* v. *State*, 34 Ark. App. 113, 806 S.W.2d 29 (1991).

Weighing the evidence, determining credibility, and resolving conflicts in the testimony are matters to be resolved by the fact finder. *Johnson* v. *State*, 26 Ark. App. 220, 762 S.W.2d 804 (1989). A jury may accept or reject any part of a witness's testimony, and its conclusion on credibility is binding on the appellate court. *Burris* v. *State*, 291 Ark. 157, 722 S.W.2d 858 (1987).

Given the testimony of the witnesses, and that the appellant's truck was identified as the truck carrying the same brand and size of the tires that were stolen, we believe the evidence is sufficient to support the convictions.

The appellant next argues that the buildings entered were not "occupiable structures" and therefore, the trial court erred by not finding as a matter of law that the appellant could not be found guilty of burglary.

We first address the issue of whether the attached supply room that was broken into is an occupiable structure under the burglary statute. Arkansas Code Annotated § 5-39-101 (1987) gives three definitions of an "occupiable structure" as a vehicle, building, or other structure:

> (A) Where any person lives or carries on a business or other calling; or
>
> (B) Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or
>
> (C) Which is customarily used for overnight accommodations of persons whether or not a person is actually present. Each unit of an occupiable structure divided into separately occupied units is itself an occupiable structure.

The appellant relies on *Julian* v. *State*, 298 Ark. 302, 767 S.W.2d 300 (1989) and *Barksdale* v. *State*, 262 Ark. 271, 555 S.W.2d 948 (1977) to support his argument that the buildings were not occupiable structures. However, in *Barksdale* and in *Julian*, the Court, in determining that the buildings entered were

"occupiable structures," based its decision upon the fact that the structures were buildings in which people assembled or stayed overnight. The Court in those cases did not address what constitutes a building or structure where a person carries on a business.

Several Arkansas cases have upheld burglary convictions based upon the illegal entry into business premises. *See, e.g., Hill* v. *State*, 261 Ark. 711, 551 S.W.2d 200 (1977) (building housing auto body shop at auto sales and body shop business was broken into); *Cristee* v. *State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988) (defendant broke into office at lumber company); *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982) (tools stolen from a truck maintenance shop).

Mr. Wyse testified that the supply room was attached to the main warehouse structure although it could not be entered from inside the warehouse. It was used to store smaller tires and other items and had a locked gate covering its entrance. Mr. Wyse stated that although customers did not normally enter the supply room, he and the employees entered it as needed during the normal course of business.

We conclude that the attached supply room is an occupiable structure in that it is functionally interconnected with, and immediately contiguous to the main structure in which the Co-op carried on its business. Simple logic would suffer were we to hold that the supply room was somehow different from an office in a building or a body shop at an auto dealership because no inside entrance connected the two structures.

Furthermore, since we affirm the burglary conviction based on this finding, we do not need to reach the issue of whether the other open-ended structure is an occupiable structure.

We find no error, and affirm.

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

Thomas J. BROADWAY *v.* B.A.S.S. et al.

CA 92-558 848 S.W.2d 445

Court of Appeals of Arkansas
Division I
Opinion delivered March 10, 1993

William Adolph Owings, for appellant.

Anderson & Kilpatrick, by: *Mariam T. Hopkins*, for appellees.

JOHN B. ROBBINS, Judge. Appellant Thomas Broadway appeals from a decision of the Workers' Compensation Commission finding that he was guilty of unreasonable conduct in connection with a work-connected disability. This action was held to constitute an independent intervening event and relieved appellee of further liability. Specifically, appellant contends that failure to wear his wrist splint did not constitute an independent intervening event and that he had no notice that removal of the splint could have adverse consequences to his arm. We disagree and affirm.

On September 15, 1989, while employed by appellee, the appellant suffered a burn injury to his right arm. Following his injury, appellant worked for Smith Custom Repairs from November 1 through November 14, 1989, when he quit due to pain in his right arm.

The Commission found that based upon the medical evidence the appellant's employment with Smith did not aggravate appellant's condition, and that on November 14, 1989, appellant experienced a recurrence of the injury he had suffered while in appellee's employment. Dr. Reid Kilgore was the orthopedic surgeon who initially treated the appellant subsequent to November 14, 1989. Dr. Kilgore testified that appellant suffered from two distinct conditions, one involving his hand and right forearm and the other involving his elbow. Appellant's first condition was

diagnosed as reflex sympathetic dystrophy caused by the burn injury. The second condition was diagnosed as tendinitis of lateral epicondylitis, commonly known as "tennis elbow." Dr. Kilgore and Dr. Thomas M. Ward, a specialist in physical medicine and rehabilitation, both testified that the elbow problems were caused by the manner in which appellant used his hands following the burn injury.

Appellant was referred to Dr. Robert Valentine for treatment of the reflex sympathetic dystrophy. Dr. Valentine performed two series of nerve block treatments. The first series concluded on January 29, 1990, at which time Dr. Valentine believed that appellant's reflex sympathetic dystrophy had probably resolved. A second ganglion block procedure was performed, on April 2, 1991.

Dr. Ward treated appellant after he was released from Dr. Valentine's care following the first series of nerve block treatments. Dr. Ward testified that appellant had returned to work driving a truck in May, 1990, and was not wearing the wrist splint which he was supposed to wear to rehabilitate the elbow problem. On July 3, 1990, Ward examined appellant again because of pain in his elbow and found that appellant had not been wearing his splint as the doctor had advised. Dr. Ward testified that the symptoms appellant complained of were the type that would develop if appellant had been working without wearing his splint. He stated that the purpose of the splint was to allow the area in the lateral epicondyle to decrease in swelling and become less irritated, therefore, less painful. The appellant was still suffering from the lateral epicondylitis (tennis elbow) at the time of the hearing before the administrative law judge.

The administrative law judge found the appellant's behavior in not wearing the wrist splint after returning to work soon after April 10, 1990, was unreasonable under the circumstances and broke the chain of causation between the original burn and the incapacitating lateral epicondylitis. This intervening cause relieved appellee of further liability from the date of removing the split. On February 6, 1992, the Commission affirmed the administrative law judge's findings of fact and conclusions of law.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable

inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Welch's Laundry and Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Varnell* v. *Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 543 (1989). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

On appeal, appellant argues that removal of the splint did not constitute an independent intervening event relieving appellee of liability. In *Guidry* v. *J. R. Eads Construction Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984), we said that the question is whether there is a causal connection between the primary injury and the subsequent disability; and if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances. One of the circumstances to consider in deciding whether the "triggering activity" was reasonable is the claimant's knowledge of his condition. *See* 1 Larson, *The Law of Workmen's Compensation* § 13.11 (1986).

In *Lunsford* v. *Rich Mountain Electric Coop.*, 38 Ark. App. 188, 832 S.W.2d 291 (1992), we reversed the Commission's finding that an employee had engaged in an unreasonable activity which constituted an independent intervening cause. But there the employee believed that the activity, horseback riding, had been cleared by his physician and there was no proof in the record to show that horseback riding would exacerbate the employee's back injury. Furthermore, the incident occurred just after the employee was riding a horse, and not while he was actually on the horse.

In the case at bar, the Commission found that appellant was encouraged by Dr. Ward to wear his splint, and appellant ignored the doctor's advice. The testimony shows that appellant did not wear the splint while shifting gears when driving

a truck for a period of time. The testimony also shows that appellant did not wear his splint for a period of several months. Dr. Ward testified that appellant's failure to wear the splint caused a reaggravation of his symptoms of pain. The Commission has the duty of weighing medical evidence and if the evidence is conflicting, its resolution is a question of fact for the Commission. *Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987). Questions concerning the credibility of witnesses and the weight to be given their testimony are exclusively within the province of the Commission. *Robinson* v. *Ed Williams Construction Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992). Considering the evidence presented, we cannot say the Commission erred in finding that removal of the splint constituted an independent intervening event relieving appellee of liability.

Appellant next contends that he was not given notice that removal of the splint could have adverse consequences to his arm. Dr. Ward testified, "the primary cause of lateral epicondylitis is wrist activity, and we wanted to splint the wrist to avoid any further wrist activity and to allow that area in the lateral epicondyle to decrease in swelling and become less irritated." The appellant was encouraged to wear the splint and try to completely immobilize the wrist to allow healing. Appellant knew Dr. Ward gave him the splint for the expressed purpose of immobilizing his wrist and that the wrist had improved in March, 1990, due to the splint. Yet, appellant did not continue to follow his doctor's orders by wearing the splint. The evidence supports a finding that appellee had notice he should wear the splint, and the Commission did not err in denying further benefits.

Affirmed.

MAYFIELD J., and GEORGE K. CRACRAFT, Special Judge, agree.

Linda Lee HARPER *v.* John M. SHACKLEFORD

CA 92-799 850 S.W.2d 15

Court of Appeals of Arkansas
Division II
Opinion delivered March 17, 1993

Mary Thomason, for appellant.

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

JAMES R. COOPER, Judge. Linda Lee Harper appeals from an order of the circuit court of Union County that awarded the appellee, John M. Shackleford, Jr., $14,786.00 in attorney's fee and $286.00 in expenses for the appellee's representation of the appellant in a divorce proceeding. The appellant presents several points for reversal, all related to the reasonableness of the attorney's fee that was awarded. We affirm as modified.

The appellee, who has practiced as an attorney in El Dorado since 1946, was retained by the appellant on December 12, 1990, to represent her in the divorce proceeding that potentially also involved the issues of child custody, visitation, and the division of extensive property rights. The primary issue became the division of five business entities with a combined gross value of $1,366,559.00. The appellant terminated the appellee's services on July 2, 1991, approximately three months prior to the hearing on the divorce complaint, and thereafter refused to pay the appellee's bill. The appellee then brought suit to collect the debt.

On appeal, the appellant argues that: (1) the court erred in ignoring Rule 1.5 of the Model Rules of Professional Conduct which require that a lawyer communicate to the client the basis or rate of the fee preferably in writing before or within a reasonable time after commencement of representation; (2) the court erred as a matter of law in failing to apply its own experience and knowledge in determining the reasonableness and necessity of the attorney fees; (3) the court erred in failing to apply Rule 1.5(a)(1-8) in determining the reasonableness of a fee; (4) the court erred

as a matter of law in failing to grant a new trial; and (5) the court erred in accepting the appellee's testimony as to the time expended on the case without requiring any verification and documentation as to the time expended.

At trial, the appellee testified that at his initial meeting with the appellant, he explained to her that his final bill would depend on how many issues were contested, the complexity of the issues, and the number of court appearances required. The appellee also said that he told the appellant the bill could easily be $25,000.00 if the issues were contested at a hearing. He could not remember if he gave her an hourly rate but said that his firm's standard rate is $125.00 an hour. He stated that at a later meeting he told the appellant his fee up to that time was between $10,000.00 and $12,000.00. Consequently, he said, the "up front" money the appellant requested in a settlement proposal was increased by $35,000.00 to allow for the appellant's payment of his fee.

After his initial meeting with the appellant, the appellee said he negotiated a temporary settlement of the issues pending trial and a date for the evaluation of property that would be advantageous to his client. The appellee testified to, and itemized in his bill, the time he spent on the preparation of various pleadings, including interrogatories, motions, and correspondence. The appellee also recounted his efforts in meetings with the appellant and an accountant to determine the parties' assets and debts, assess a settlement proposal, and develop a counterproposal.

Included in the record is the appellee's itemized bill, 91 hours billed at $125.00 an hour. The bill was developed, the appellee said, by an examination of his file that enabled him to assess the time expended on the case.

The appellant testified that she sought the appellee's help after hearing that he was a "good" attorney. At their first meeting, she said, he told her that his charge would be $90.00 an hour, but she did not request an agreement in writing. She also said that the appellee knew at that time that the only issue would be the division of property. She asserted that fair compensation for the appellee's services would be $2,500.00, which she said was the amount her ex-husband paid his attorney for representation in the same proceeding. The appellee said that the only issue contested at the hearing on the divorce complaint was the division

of property.

In his letter opinion, the trial judge stated:

> I have reviewed the file, the evidence presented, testimony of the parties and authorities furnished. Please accept this letter as notice of the Court's ruling.
>
> At issue is the reasonableness, necessity and amount of legal services. Mr. Shackleford testified at length concerning his legal service to Ms. Harper. Ms. Thomason extensively cross-examined him. The [appellant] presented evidence as to her contact with Mr. Shackleford and her recollection as to their conversation. There was no expert testimony as to the reasonableness or necessity of the services other than Mr. Shackleford.
>
> Without evidence to the contrary, this Court cannot reduce the billed service except by arbitrary means. Therefore, the prayer for relief as set forth in the complaint is granted.

On January 27, 1992, the appellant filed a motion for new trial, which was denied by the trial court.

One of the appellant's arguments is that the trial court erred in finding that the attorney's fee sought by the appellee was reasonable and in failing to grant the appellant's motion for a new trial. When a motion for a new trial is made to the trial court, the test applied is whether the judgment is against the preponderance of the evidence. Ark. R. Civ. P. 59(a). However, the test on review, where the motion was denied, as here, is whether the judgment is supported by substantial evidence, giving the judgment the benefit of all reasonable inferences permissible under the proof. *Schuster's, Inc.* v. *Whitehead*, 291 Ark. 180, 181, 722 S.W.2d 862, 863 (1987).

Among the factors that should be taken into account in determining the reasonableness of an attorney's fee are the attorney's skill and experience, relationship between the parties, difficulty of services, extent of litigation, time and labor devoted to the cause, fee customarily charged, and the results obtained. *Sutton* v. *Ryder Truck Rental, Inc.*, 305 Ark. 231, 238-39, 807 S.W.2d 905, 909 (1991). The appellant maintains that in

applying these factors, the trial judge impermissibly ignored the appellant's testimony, failed to apply his own experience and knowledge, and based his findings on the appellant's failure to provide expert witness testimony.

The trial judge's letter opinion demonstrates that he carefully reviewed all the evidence. The trial judge may have given more weight to the appellee's testimony than the appellant's testimony, but it is the province of the trier of fact to determine the credibility of the witnesses and resolve any conflicting testimony. *First State Bank of Crossett* v. *Phillips*, 13 Ark. App. 157, 160, 681 S.W.2d 408, 409 (1984). We agree with the appellee that there is no evidence the trial judge did not consider his own experience and knowledge in assessing the fee. And, as the appellee points out in his brief, there is no requirement that the trial judge consider his own experience and knowledge. *See Robinson* v. *Champion*, 251 Ark. 817, 819, 475 S.W.2d 677, 678 (1972). Next, we do not interpret the letter opinion to state that the trial judge's findings were based on the appellant's failure to present expert testimony. We believe that, in weighing the evidence, the trial judge simply noted that the only expert testimony was the appellee's testimony and found that the preponderance of the evidence supported the appellee's claim.

The trial judge reviewed the evidence and found that the preponderance of the evidence supported the reasonableness of the fee. Based upon our review of the record, we cannot say the judgment is not supported by substantial evidence.

In her brief, the appellant has also alleged violation by the appellee of the Model Rules of Professional Conduct. In *Orsini* v. *Larry Moyer Trucking, Inc.*, 310 Ark. 179, 833 S.W.2d 366 (1992), the Supreme Court affirmed a trial court's refusal to allow the introduction of the above rules in a legal malpractice case. The Court said:

> The Rules are not designed for a basis of civil liability, but are to provide guidance to lawyers and to provide a structure for regulatory conduct through disciplinary agencies. No cause of action shall arise from a violation, nor should it create any presumption that a legal duty has been breached. "Scope", Model Rules of Professional Conduct, by per curiam order of Supreme Court of

December 16, 1985.

310 Ark. at 184-85, 833 S.W.2d at 369. We find that the appellant's allegations are not based on any finding of fact by the trial court, were not raised below, and are not proper subjects on appeal.

The appellant further argues that the failure of the appellee to keep detailed time records is fatal to his claim, but the appellant provides no convincing authority for this assertion. In addressing such an argument, the Supreme Court has said:

> It would have been desirable to have had time records, if they were kept, but there is not now, and never has been, any rule of law or procedure in this state that requires submission of time records in support of a request for payment of attorneys' fees. While the time spent is an important element to be considered in determining the reasonable value of an attorney's services, it is not the controlling factor and is sometimes a minor one.

Powell v. *Henry*, 267 Ark. 484, 487, 592 S.W.2d 107, 109 (1980).

Finally, the appellant alleges that the trial court erred in calculating the amount of the attorney's fee and expenses to be awarded to the appellee. We agree. The trial court entered judgment for the appellee in the amount of $14,786.00, plus expenses in the amount of $286.00. Clearly, the trial court's award was based on the $15,000.00 bill for services sent to the appellant by the appellee. Subsequently, however, the appellee itemized his time spent on the case, and his testimony at trial clearly shows that the $15,000.00 bill was not properly calculated. The appellant's abstract contains the following testimony by the appellee:

> I presented Mrs. Harper with an initial bill and she then requested an itemization, which was proper. I furnished her with an itemization of the bill. I billed her on an hourly basis. I expended 91 hours that I could document at my firm's normal regular rate of $125.00 per hour for a total of $15,000.00 for legal services rendered. There was the expenses of the Clerk, telephone calls, and xerox in the amount of $286.00 for a total bill of $15,286.00. Mrs. Harper had given me a check for $500.00 for an initial

retainer leaving him an amount due of $14,786.00.

The appellee's testimony reveals that a mathematical error occurred in the calculation of the bill for legal services, which should have been $11,375.00 ($125.00 per hour × 91 hours = $11,375.00). The appellee's misstatement of this sum as $15,000.00 was obviously carried over into the trial judge's opinion. Obvious mathematical errors may be corrected on appeal, and such correction is not precluded even under the doctrine of law of the case. *See Potter* v. *Easley*, 288 Ark. 133, 703 S.W.2d 442 (1986). Therefore, we modify the trial court's award to the appellee to reflect the corrected sum of $11,375.00 for services, plus $286.00 for expenses, minus the $500.00 the appellant paid the appellee for an initial retainer fee, giving a total award of $11,161.00.

Affirmed as modified.

ROBBINS and ROGERS, JJ., agree.

Leroy D. VICKERS *v.* Henry J. FREYER

CR 92-405 850 S.W.2d 10

Court of Appeals of Arkansas
Division II
Opinion delivered March 17, 1993

Truman H. Smith, for appellant.

Charles S. Trantham, for appellee.

JAMES R. COOPER, Judge. The appellant in this civil case asserted a claim for tortious interference with a business relationship against the appellee. The trial court held that the appellant lacked standing to bring the suit and dismissed it. We find no error and affirm.

In February 1989, the appellee filed suit against the appellant, seeking to be reimbursed for a $35,000.00 certificate of deposit which the appellee had used to collateralize a business loan made to the appellant by Northwest National Bank. The appellant defaulted on his payments to the bank, and the bank set off its claim against the appellee's certificate of deposit. In response to the appellee's suit for $35,000.00, the appellant counterclaimed, alleging the appellee had tortiously and maliciously interfered with his business. The appellee was granted summary judgment against the appellant for $35,000.00, and the appellant voluntarily non-suited his claim against the appellee.

On July 19, 1990, appellant filed a petition for Chapter 7 relief in bankruptcy. As of the date the appellant was discharged by the bankruptcy court, April 26, 1991, the appellant's claim against the appellee had not been filed by the bankruptcy trustee; however, the appellant's bankruptcy estate had not been closed.

One year after the appellant had non-suited his claim against the appellee and on the day the statute of limitations was to run on his claim, the appellant again filed the same suit against the appellee for damages and loss of revenue as a result of the appellee's malicious and intentional tortious interference with the appellant's business. The appellee filed a motion to dismiss and a request for sanctions, contending that, because the appellant had listed his claim against the appellee as an asset in his bankruptcy petition, the appellant no longer had standing to bring suit against the appellee. Attached to the appellee's brief in support of his dismissal petition was the affidavit of John T. Lee, bankruptcy trustee, which stated in part:

> 3. In the Debtors' Petition, more particularly in the Statement of Financial Affairs for Debtors engaged in Business, the Debtors listed Henry Freyer vs. Leroy D. Vickers (personally) and Business Equipment Systems Co., Inc. d/b/a BESCO Business Systems as a party to any suits pending at the time of the filing of the original

Petition.

4. Mr. Vickers was informed that any possible causes of actions he had against any other person, entities, etc. was property of the estate and for the determination of the Trustee to decide the validity thereof.

5. It has been brought to my attention that Mr. Vickers has filed a lawsuit against Henry Freyer alleging cause of action which took place prior to filing for Bankruptcy. This cause of action is property of the estate and not Leroy D. Vickers or Shirley R. Vickers.

6. Leroy D. Vickers and Shirley R. Vickers do not have standing, rights or interest to the cause of action they filed against Henry Freyer, CIV 91-539.

The trial court treated the appellee's dismissal petition as a motion for summary judgment. After hearing the arguments of the parties, the court ruled that the appellant's cause of action against the appellee belonged to the bankruptcy trustee and the appellant did not have standing to pursue it. The court, however, agreed to allow the appellant an additional ten days to further research the issue. Thirteen days later, the appellant filed an amended complaint, identical to his original complaint except that the appellant's amended complaint also alleged that he would suffer future damages as a result of the appellee's malicious conduct.

In a letter opinion, dated November 21, 1991, the trial court granted the appellee's motion for summary judgment, dismissing the appellant's complaint and striking the amended complaint because it found it was filed after the hearing on the appellee's motion for summary judgment and that it would unfairly prejudice the appellee to allow it to stand. The court stated:

> I am granting the defendant's Motion to Dismiss both the Complaint and Amended Complaint and am ruling that the Amended Complaint should be stricken. The first reason for this ruling is that Arkansas Rule of Civil Procedure 15(a) tells us that the court may strike any amended pleading if it prejudices the other side. In this case Mr. Smith filed an Amended Complaint to plead future damages in order to better fit his facts into the case

> law that he found. Prior to that amendment there was no pleading for future damages. Therefore, after the hearing and after Mr. Smith's knowledge of the Court's ruling, he finds a case that he feels will aid his cause if he changes his pleadings. This amended pleading would definitely prejudice the other side in that the prior Motion to Dismiss dealt with the original Complaint. Mr. Smith, in essence, would be allowed to have his cake and eat it too. Furthermore, if a party were allowed to amend it's pleadings after it knows how the court is going to rule the other side would never be in a position to file any Motion to Dismiss or Motion for Summary Judgment because he would know that the other party, if the Court rules against him, would simply have to amend his pleadings. Therefore, in all fairness I do not feel that this pleading should be allowed to stand.
>
> The second reason for my ruling is that I still do not feel that these facts fit into the cases Mr. Smith has cited. The damages will still be in the future even if it was heard in my court. Therefore, it could easily have been heard in the bankruptcy court and future damages assessed. Many, many times future damages are assessed in the courts. Therefore, I do not feel that this cause of action is property of Mr. Vickers.

For his appeal, the appellant contends the court erred in finding he lacked standing to pursue his claim against the appellee. It is undisputed that the appellant's cause of action against the appellee existed at the time that the appellant filed his bankruptcy petition for bankruptcy relief and that his claim was listed in his petition. Section 541(a)(1) of Title 11 of the United States Code defines property of a bankrupt's estate as all legal or equitable interest of the debtor in property as of the commencement of the case. *See Jones* v. *Harrell*, 858 F.2d 667, 669 (11th Cir. 1988). All causes of action belonging to a debtor at the commencement of a bankruptcy case are included within the definition of property of the estate, and any actions that are unresolved at the time of filing pass to the trustee, who as representative of the estate has the responsibility of asserting them whenever necessary for collection or preservation of the estate. *See Mixon* v. *Anderson* (In re Ozark Restaurant Equip-

ment Co.), 816 F.2d 1222, 1225 (8th Cir. 1987); *cert. denied sub nom. Jacoway* v. *Anderson*, 484 U.S. 848 (1987); *Folz* v. *Banchio Nat'l Bank*, 88 B.R. 149, 150 (S.D. Ohio 1987).

In the case of *Leird Church Furniture Manufacturing Co.* v. *Union National Bank*, 61 B.R. 444 (E.D. Ark. 1986), the bankruptcy court held that a debtor was not the proper party to bring an action for tortious interference with a business relationship. The court stated:

> When the cause of action was brought, the debtor was a debtor-in-possession in a Chapter 11 case. Since that time, the case has been converted to a case under Chapter 7, and Honorable Richard Smith has been appointed trustee. Consequently, the debtor is no longer in possession. The trustee is now vested with all property of the estate, including this adversary proceeding and all causes of action the debtor formerly possessed. The trustee is vested with the right to object to the allowance of any improper claim.

61 B.R. at 446.

For his first point, the appellant contends that, because his claim involves his ability to earn income in the future, the trial court erred in finding he lacked standing to bring suit against the appellee. In support of his argument, the appellant cites several cases, including *Cowan* v. *Fidelity Interstate Life Insurance Company*, 89 B.R. 564, 570 (E.D. La. 1988), where the bankruptcy court held that damages to a bankrupt's future earning capacity are not property of the bankruptcy estate. There, the court stated:

> The portion of these claims that concern future earning capacity from the date of injury up to the date the bankruptcy case was commenced . . . remains property of the bankruptcy estate. Thus, the trustee is the proper party for the portion of the claims that relate to the debtor's earning capacity from date of injury to date of petition, while the debtor himself is the proper party for the remaining portion of these claims, which relate to his earning capacity after the date of petition.

Id. at 570.

Even should we assume that the appellant is correct in this assertion that damages to his future earning capacity are not property of the bankruptcy estate, we would find no reversible error because those damages were not pled. The appellant's complaint filed on July 10, 1991, stated in part:

> (5) That as a result of a dispute between plaintiff and defendant, the defendant engaged in malicious actions to tortiously interfere with the business of the plaintiff.
>
> (6) That as the defendant embarked in conduct intended to cause the plaintiff to suffer substantial loss of revenue and eventually to be forced out of the office machine sales and service business . . . .

The appellant's complaint then prayed for the following damages:

> The sum of $300,000.00 for the malicious and tortious interference of the plaintiff's business;
>
> The sum of $300,000.00 for damage to the plaintiff's business as a result of the interference by the defendant, which resulted in the loss of several service contracts and sales;
>
> The sum of $100,000.00 for punitive damages against the defendant; and
>
> For his costs herein expended, plus a reasonable attorney's fee, and for all other proper relief to which he may prove himself entitled.

This complaint filed by the appellant is exactly the same as the pre-bankruptcy counterclaim filed by the appellant, which he later non-suited and which he listed in his bankruptcy petition. There was no claim for damages to future earning capacity. It was not until after the court held a hearing on the appellee's motion to dismiss and announced that the appellant lacked standing to bring the suit that the appellant filed his amended complaint, adding his claim for loss to future earning capacity. This amended complaint was stricken by the court in its final order, and the appellant has not appealed that ruling.

Rule 15(a) of the Arkansas Rules of Civil Procedure

gives the court discretion to strike any amendment which would cause prejudice or unduly prolong the disposition of a case. *Schmidt* v. *McIlroy Bank & Trust*, 306 Ark. 28, 31-31, 811 S.W.2d 281, 283 (1991). An argument not raised by the appellant in his brief cannot be considered by this Court on appeal. *Yellow Cab* v. *Sanders*, 250 Ark. 418, 422, 465 S.W.2d 324, 327 (1971). The appellant court considers only those arguments raised by the parties. *Schmidt* v. *McIlroy Bank*, 306 Ark. at 33, 811 S.W.2d at 283.

Because the amended complaint seeking damages for future earnings was stricken by the court and the appellant has not appealed that action, we hold that the trial court correctly found that the appellant lacked standing under his original complaint to pursue his claim for damages.

The appellant further argues that he had standing to pursue his claim because it had been abandoned by the trustee. The bankruptcy code provides that the trustee may abandon "any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). This same section further provides that property is also deemed abandoned by the trustee if it is "not otherwise administered at the time of the closing of a case . . . ." 11 U.S.C. § 554(c). The appellant argues that his claim against the appellee was abandoned by the trustee because the trustee indicated he would not pursue it and the statute of limitations would have run if the appellant had not refiled his claim on the date that he did. The appellant argues that, by the trustee's inaction, the trustee effectively abandoned the cause of action so as to allow the appellant to prosecute the suit.

In order to abandon estate property under 11 U.S.C. § 554(a), the trustee must give notification of his intention to abandon the property as required by Federal Bankruptcy Rule 6007; notification of creditors is essential to abandonment under Rule 6007, and thus, there is no abandonment without notice to creditors. *Barletta* v. *Tedeschi*, 121 B.R. 669, 672 (N.D. N.Y. 1990). In *Bratton* v. *Mitchell, Williams, Selig, Jackson & Tucker*, 302 Ark. 308, 788 S.W.2d 955 (1990), the Arkansas Supreme Court addressed whether a petitioner in a Chapter 7 bankruptcy proceeding had standing to pursue a claim against

the appellees where there was no evidence that the bankruptcy trustee had abandoned the claim. The Court held that the appellant lacked standing, stating:

> In *Vreugdenhil* v. *Hoekstra*, 773 F.2d. 213 (8th Cir. 1985), the Eighth Circuit Court of Appeals addressed the issue of standing and stated:
>
> > As noted, the district court also concluded appellants lack standing to maintain this suit. Authorities have in general agreed (although on varying rationales) that a debtor may not prosecute on his own a cause of action belonging to the estate unless that cause of action has been abandoned by the trustee. *Baker* v. *Data Dynamics, Inc.*, 561 F.Supp. 1151, 1165 (W.D.N.C. 1983) (debtors lack capacity to maintain suit); *In re Homer*, 45 B.R. 15, 25 (Bankr. W.D. Mo. 1984) (debtor has no standing) . . . .
>
> Similarly, in *In re Homer*, *supra*, the court stated:
>
> > The defendants' counterclaim for conversion became property of the bankruptcy estate when the debtors filed their petition for relief under title 11 of the United States Code. *See* § 541 of the Bankruptcy Code. Thereafter, the claim was assertable only by the trustee in bankruptcy unless, after the trustee's refusal to prosecute the claim, the court should restore its ownership to the debtors. That is not shown to be the case at bar.
>
> It is clear that the claim asserted in circuit court remains the property of the bankrupt's estate, and must be prosecuted, if at all, by the trustee unless it is abandoned to the debtor.

Bratton v. *Mitchell, Williams, Selig, Jackson & Tucker*, 302 Ark. at 309, 788 S.W.2d at 956.

Here, as in *Bratton*, cited above, there is no evidence that the trustee, John Lee, abandoned the appellant's claim. In fact, Mr. Lee states in his affidavit that the appellant was informed that his cause of action against the appellee was

property of the estate and that the appellant did not have standing, right, or interest to the cause of action. The mere fact that the trustee had not brought suit as of the day the appellant filed his complaint is insufficient to show the claim was abandoned by the trustee. *See Dallas Cabana, Inc.* v. *Hyatt Corp.*, 441 F.2d. 865 (4th Cir. 1971):

> The fact that the trustee has failed to prosecute a claim does not permit a would-be plaintiff to bring suit without first petitioning the bankruptcy court for an order authorizing abandonment of the property.
>
> . . . .
>
> The remedy of the appellant is to petition the bankruptcy court to compel the trustee to bring suit or to authorize the bankrupt to sue or to make such disposition as appears to be appropriate in the circumstances and under the facts presented to the court. Without such authorization or clear manifestation of the trustee to abandon the claim, or some other disposition as the lower court may deem appropriate, appellant may not maintain this cause of action.

441 F.2d at 868.

The appellant argues that the case of *Barletta* v. *Tedeschi*, 121 B.R. 669 (N.D.N.Y. 1990) is "on all fours" with the case at bar and supports his contention that he has standing to pursue his claim.

In *Barletta*, the bankruptcy court allowed the appellant to pursue a claim against the appellee, although his claim had not been formally abandoned as provided by the bankruptcy rules and, at the time he filed his complaint, his bankruptcy estate had not been closed. The evidence demonstrated that, had the appellant waited until his estate had closed before filing his claim, the statute of limitations would have run. The court stated:

> Dismissing the plaintiff's claim for lack of standing here would create the inequitable result of extinguishing the plaintiff's claim through the inaction of the trustee, who did not intend to pursue the claim but did not abandon it, while at the same time preventing the plaintiff from

taking action until it was too late.

121 B.R. at 674.

In the case at bar, however, there is no statement by the trustee that he intended to abandon the claim. Although the appellant states in his brief that the trustee stated that he would not pursue the appellant's claim, this assertion is not supported by the record. In *Barletta*, the appellant had introduced a letter, acknowledged by the trustee's signature, that the trustee would be abandoning the appellant's claim against the appellee. No such evidence exists in the case at bar.

Moreover, the bankruptcy court in *Barletta* also noted that the appellant's bankruptcy case had been officially closed by final decree of the bankruptcy court at the time it considered whether the appellant had standing to pursue his claim. Here, the appellant's bankruptcy estate remains open. "[A]s long as a bankruptcy proceeding is still open there can be no abandonment by the trustee of any property of the estate, including causes of action without formal order of the bankruptcy court authorizing such abandonment." *Hessen* v. *Beagan* (*In re Teltronics Servs., Inc.*), 39 B.R. 446, 449 (1984).

We hold that the trial court correctly found that the appellant lacked standing to pursue his claim against the appellee, and we therefore affirm the dismissal of his complaint.

Affirmed.

ROBBINS and ROGERS, JJ., agree.

HAROLD GWATNEY CHEVROLET COMPANY *v.*
Clint COOPER

CA 92-711 850 S.W.2d 19

Court of Appeals of Arkansas
Division I
Opinion delivered March 17, 1993

Walker & Black, by: *Kendell R. Black*, for appellant.

Paul A. Schmidt, for appellee.

MELVIN MAYFIELD, Judge. The trial court denied a deficiency judgment to appellant, Harold Gwatney Chevrolet Company, after finding that it failed to comply with Ark. Code Ann. § 4-9-504(3) (Repl. 1991), which requires that reasonable notification of the time and place of sale be given to the debtor before disposition of the collateral securing a debt. Appellant contends that its notice was in compliance with the statute and that the trial court erred in finding the vehicle was sold at public, rather than private, sale.

On March 15, 1989, appellant sold a 1988 Chevrolet Cavalier to appellee, Clint Cooper. The vehicle was financed through a retail installment contract with General Motors Acceptance Corporation (GMAC) which required appellant to repurchase the contract in the event of appellee's default. Appellee defaulted under the terms of the contract, and the automobile was repossessed by appellant. On August 21, 1989, appellant sent appellee the following notice by certified mail, return receipt requested:

> Please be advised that Harold Gwatney Chevrolet Company, Jacksonville, Arkansas, will sell at private sale to foreclose their lien on your 1988 Chevrolet Cavalier, serial number 1G1JC5115JJ114046, after August 28, 1989, at their place of business in the regular couse [sic] of business.
>
> Anytime prior to August 28, 1989, you can redeem the automobile by paying to Harold Gwatney Chevrolet Company, the balance due on this vehicle in the amount of $7,538.76, plus expenses.
>
> The amount for which the vehicle is sold at private sale will be credited against the balance you owe on the vehicle. If the sale price is less than the amount owed, Harold Gwatney Chevrolet Company will hold you liable for the balance due them. To the amount owed will be

added the following items:

1. The cost of getting the vehicle returned.

2. The cost of getting the vehicle in a saleable condition.

3. Selling expense.

4. Attorney fees if it is necessary to give the account to an attorney for collection.

The vehicle was reconditioned by appellant and placed on its used car lot for sale. The vehicle was sold two months later for $4,907.93, leaving a deficiency of $2,962.31. Appellant sued for judgment on the deficiency, but appellee denied it was entitled to judgment, contending that appellant failed to give him adequate notice of the sale of the vehicle and that the vehicle was not disposed of in a commercially reasonable manner.

At trial, the appellee maintained he did not receive notice of the sale and that the vehicle was disposed of by public sale although the notice of sale specified it would be sold by private sale. The trial court found that the appellant sent notice of private sale to appellee as required by § 4-9-504(3) but held the notice was insufficient because "placing a vehicle on a lot and selling it a good deal of time subsequent to the redeemable time to the general public off of the used car lot is a public sale." On appeal, appellant contends the trial court erred in finding appellee's vehicle was sold by public sale. We agree.

The Uniform Commercial Code does not define "public sale" or "private sale"; however, this court has held that a sale made at auction to the highest bidder "generally" is a public sale. *General Elec. Credit Auto Lease, Inc.* v. *Paty*, 29 Ark. App. 30, 32-33, 776 S.W.2d 829, 831 (1989). In his treatise, *Uniform Commercial Code*, author Ronald Anderson discusses the elements of a public sale:

> A sale of collateral is "public" when it is publicly advertised, the sale is open to the public, and the sale is made, after competitive bidding, to the highest genuine bidder; as at an auction.

> The opportunity of the public to bid at the sale is the essential criterion that determines that the sale is a public sale and the fact that no bids are made and that the property is transferred by the assignee to the assignor under a repurchase agreement by which the assignor was deemed to have bid an amount equal to the balance due does not bar the conclusion that the transaction was a "public sale."
>
> . . . .
>
> The fact that the collateral is publicly displayed before being sold does not make the sale a public sale.

9 Ronald A. Anderson, *Uniform Commercial Code* § 9-504:32, at 733 (3d ed. 1985). Another treatise has stated:

> The text of the Code is silent on how public and private sales are to be differentiated. Comment One to 9-504 directs us to 2-706 where Comment 4 defines a public sale as an auction. Yet not every sale by auction is a public sale. Some case law is more helpful. Thus, in *Lloyd's Plan, Inc.* v. *Brown* [268 N.W.2d 192 (Iowa 1978)], the Iowa Supreme Court said that: "The essence of a public sale is that the public is not only invited to attend and bid but is also informed when and where the sale is to be held." Other courts have, in the same spirit, stressed that a public sale is one open to the general public or a major segment thereof, and thus contemplates advertising of the notice, time and place of the sale. A private sale, by contrast, is not open to the general public, usually does not occur at a pre-appointed time and place, and may or may not be generally advertised.

James J. White & Robert S. Summers, *Uniform Commercial Code* § 27-10, at 594 (3d ed. 1988). And in *Benton v. General Mobile Homes, Inc.*, 13 Ark. App. 8, 678 S.W.2d 774 (1984), this court stated:

> The Code does not define either "public sale" or "private sale", but in *Union and Mercantile Trust Co. v. Harnwell*, 158 Ark. 295, 250 S.W.2d 321 (1923), the Arkansas Supreme Court adopted the definition of a public sale as one made at auction to the highest bidder.

Although the case relied upon in *Benton* was not decided under the Commercial Code, other jurisdictions which have addressed this issue have concluded that simply because a vehicle is displayed for sale in a public place does not make the sale a public sale. *See Lloyd's Plan, Inc.* v. *Brown*, 268 N.W.2d 192, 196 (Iowa 1978); *Boatmen's Nat'l Bank of Carthage* v. *Eidson*, 796 S.W.2d 920, 923 (Mo. Ct. App. 1990). And merely because a vehicle is placed on the creditor's car lot for sale does not make the sale a public sale. *Security Fed. Sav. & Loan* v. *Prendergast*, 108 N.M. 572, 775 P.2d 1289, 1290-91 (1989); *Chrysler Dodge Country, U.S.A., Inc.* v. *Curley*, 782 P.2d 536, 539-40 (Utah Ct. App. 1989). *See also Contois Motor Co.* v. *Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977).

Here, the trial court, in finding that the disposition of appellee's vehicle was by public sale, cited this court's holding in *Jones* v. *Union Motor Co.*, 29 Ark. App. 166, 779 S.W.2d 537 (1989). In that case, the appellant's vehicle was repossessed after she defaulted on the payments due under the retail installment contract. GMAC, the finance company, sent her a notice which stated in part:

> Since you have not made your payments, we have taken your vehicle. It is to be held at *Union Motor Co., Hwy 81 S., Monticello, AR*. It must be held at least until 9:00 a.m. *Nov. 3, 1986*. It may be sold at any time after that. (A sale includes a lease.)

29 Ark. App. at 168, 779 S.W.2d at 538. The automobile in the *Jones* case was placed on the appellee's lot for sale to the general public and remained there for approximately four months, when it sold for $275.00. There was evidence that several automobile wholesalers looked at the automobile in order to ascertain its value and that $275.00 was all the appellee could get for it. The circuit court subsequently awarded a $1,347.92 deficiency to the appellee. On appeal, the appellant argued, among other things, that the notice was not sufficient under the requirements of the Uniform Commercial Code and that the sale was not conducted in a commercially reasonable manner. This court disagreed with the appellant, pointing out that Ark. Code Ann. § 4-9-504(3) does not require that the words "public" or "private" be used in the notice and that the notice clearly indicated the automobile

was located at the appellee's address, where it was ultimately sold by private sale. In holding there was adequate compliance with the statute we quoted from White & Summers, *Uniform Commercial Code* § 27-12 at 598-99 (3d ed. 1988) as follows:

> Before the creditor can sell or otherwise dispose of the collateral, 9-504(3) requires the creditor to send notice to the debtor.
>
> The purpose of notice is to give the debtor an opportunity either to discharge the debt and redeem the collateral, to produce another purchaser or to see that the sale is conducted in a commercially reasonable manner.
>
> Cases involving notice issues should be resolved with these three purposes in mind.

Jones, 29 Ark. App. at 173, 779 S.W.2d at 541.

In the case at bar, the notice sent appellee stated his vehicle would be sold by private sale at appellant's place of business in the regular course of business. There is no evidence that appellant disposed of the vehicle in a manner inconsistent with this notice, and the trial court did not find that it was disposed of in a manner which was commercially unreasonable. The court denied appellant a deficiency judgment on the finding that the vehicle was disposed of by public sale. We hold that the trial court's finding on this point is clearly erroneous.

The trial court's finding also contained a reference to the length of time it took to dispose of appellee's vehicle. The notice stated the vehicle would be sold after August 28, 1989, and the vehicle was sold two months later on October 30, 1989. In *Brown* v. *Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983), the supreme court held that a notice of private sale given sixteen months before the sale actually took place was sufficient, stating: "The secured party has only a duty to give reasonable notice of the time after which any private sale will be made. A second notice is not required even though a significant period of time passes before resale." 280 Ark. at 264, 658 S.W.2d at 357. In *Jones* v. *Union Motor Co.*, *supra*, this court affirmed a sale as commercially reasonable that took place four months after the date specified in the notice of private sale. *See* 29 Ark. App. at 174, 779 S.W.2d at 542.

In the instant case, it is not clear that the trial court actually found that the two-month period between the date of sale given in the notice and the date the vehicle was sold prevented the sale from being "commercially reasonable." At any event, we do not think the evidence in the case would support such a finding.

The appellee also cites our case of *Womack* v. *First State Bank of Calico Rock*, 21 Ark. App. 33, 728 S.W.2d 194 (1987), where we cited White and Summers, *Uniform Commercial Code* § 26-11 (2d ed. 1980) as suggesting that "even in cases which cite the failure to give proper notice as the reason for holding that a sale was not commercially reasonable, the true, though unarticulated reason, may be an insufficiency of the sale." 21 Ark. App. at 40, 728 S.W.2d at 197. However, at the beginning of the trial in this case both parties stipulated that "if the car was sold in a reasonable commercial manner under the UCC and if Mr. Cooper did receive notification," the balance owed on the contract, as shown on Exhibit "B" to appellant's complaint, would be $2,962.31.

With the above stipulation and the appellee's failure to cross-appeal or question the trial court's finding that appellee received notification of the sale, the only issues presented are whether the sale was private and whether the two-month period between notice and sale was commercially reasonable. On appeal, these two issues have been resolved against the appellee. It appears that this case has been fully developed and that appellant is entitled to recover. In law cases, we do not remand for new trial if the case has been fully developed. *See Follett* v. *Jones*, 252 Ark. 950, 481 S.W.2d 713 (1972); *St. Louis Southwestern Railway Co.* v. *Clemons*, 242 Ark. 707, 415 S.W.2d 332 (1967); *Bolan* v. *Bolan*, 32 Ark. App. 65, 796 S.W.2d 358 (1990). Therefore, we reverse and remand this case for the trial court to enter judgment in keeping with this opinion.

Reversed and remanded.

JENNINGS, C.J., and PITTMAN, J., agree.

Rodney BURRELL *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 92-584 850 S.W.2d 8

Court of Appeals of Arkansas
Division I
Opinion delivered March 17, 1993

Simes & Simes, by: *L.T. Simes*, for appellant.

Candice B. Dickson, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order of paternity finding appellant to be the father of Mildred McClure's child. On appeal, appellant contends that service of process was invalid and that the order for paternity testing and the blood test results should be set aside as violating his right to counsel. We affirm.

The record reveals that Mildred McClure alleged that appellant was the father of her child. At the initial hearing appellant moved for an order requiring that the parties participate in paternity testing. This motion was granted. The test

revealed a 99.85% probability that appellant was the father. A later hearing was held and appellant was found to be the father of appellee's child and was ordered to pay child support.

Appellant's first argument on appeal challenges the service of process. Appellant contends that service was improper because it was not served by a deputy sheriff and it was not delivered to his home or usual place of abode.

Rule 4 (c)(1) and (d)(1) of the Arkansas Rules of Civil Procedure states:

> (c) Service of summons shall be made by (1) a sheriff of the county where the service is to be made, or his or her deputy;
>
> (d)(1) Upon an individual, other than an infant by delivering a copy of the summons and complaint to him personally, or if he refuses to receive it, by offering a copy thereof to him, or by leaving a copy thereof at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age, or by delivering a copy thereof to an agent authorized by appointment or by law to receive service of summons.

Appellant testified that he resides at P.O. Box 192, Cotton Plant, Arkansas, and contends that the summons was given to his brother in downtown Cotton Plant and not at his residence as required under Rule 4. Appellant, however, did not raise this argument until the middle of the second hearing. Any defects in the process, the return thereon or the service thereof are cured or waived by the appearance of the defendant without raising an objection, and he is precluded from thereafter taking advantage of the defect. *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979). Without citation to authority, appellant also argues that, at the initial hearing when he was ordered to submit to a paternity test, he was not represented by counsel. He contends that this was a violation of his constitutional right to counsel.

We note that in criminal cases an accused has a constitutional right to counsel, but there is no corresponding right to counsel in post-conviction proceedings or most civil actions. *Howard* v. *Lockhart*, 300 Ark. 144, 777 S.W.2d 223 (1989). In the case of *Honor* v. *Yamuchi*, 307 Ark. 324, 820 S.W.2d 267

(1991), the supreme court found a right to an attorney in a civil proceeding where physical liberty was in jeopardy. In that case, the appellant was involuntarily committed to a mental institution. Such a commitment involves a substantial curtailment of liberty and thus requires due process protection. *Id.* In the case before us, the appellant's physical liberty was not in jeopardy. Thus, appellant was not guaranteed the right to counsel in this paternity proceeding.

Affirmed.

MAYFIELD and ROBBINS, JJ., agree.

TRI-STATE INSURANCE CO. *v.* Perry SING, et al.

CA 92-363 850 S.W.2d 6

Court of Appeals of Arkansas
Division I
Opinion delivered March 17, 1993
[Rehearing denied April 14, 1993.]

Hardin, Jesson, Dawson & Terry, by: *J. Rodney Mills*, for appellant.

Hixon, Cleveland & Rush, by: *David L. Rush*, for appellees.

JUDITH ROGERS, Judge. The appellant, Tri-State Insurance Company, appeals from an order declaring that it was obligated under a contract of insurance to provide a defense for appellees Perry Sing and Big Cat, Inc., in a lawsuit brought against them. On appeal, appellant claims error in the chancellor's ruling, contending that Sing was not an insured under the policy and that no coverage existed based on an exclusion contained in the policy. We agree that appellant had no duty to defend under the insurance policy in question, and reverse.

On the morning of May 7, 1990, appellee Perry Sing, while driving his own vehicle, was involved in an automobile accident in which Kathy Conley, the driver of the other car, was killed. As a consequence of the accident, Ms. Conley's estate pursued a wrongful death action against Sing and appellee Big Cat, Inc., Sing's employer. It was alleged in the complaint that Sing's negligence was imputed to Big Cat based on the allegation that the accident occurred during the course and scope of Sing's employment. Appellees made demand on appellant to provide them with a defense in the lawsuit, claiming that the duty to defend arose out of two policies of insurance issued by appellant to Big Cat. One of the policies was a commercial automobile policy which listed coverage for eleven scheduled vehicles, while the other was a general commercial liability policy. Appellant thereafter filed this declaratory action contending that it had no

duty to defend appellees under either policy. The chancellor found that appellant was not obligated to provide appellees with a defense pursuant to the automobile policy since Sing's vehicle was not one of those listed for coverage. The chancellor determined, however, that appellant owed the duty to defend both Sing and Big Cat under the commercial liability policy.

Appellant's first argument is that the chancellor erred in finding that Sing was an insured under the policy. This argument is based on the provision in Section II of the policy defining an "insured" as:

> (a) Your employees, other than your executive directors, but only for acts within the course and scope of their employment by you.

It is the appellant's contention that Sing was not an insured because the evidence reflects that he was not acting in the course and scope of his employment when the accident occurred.

As its second issue, appellant contends that the chancellor's decision was in error because coverage was excepted under the "automobile exclusion" contained in the policy. On this point, appellant relies on the provision which states that coverage does not extend to:

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

The law governing an insurer's duty to defend is well-settled. As a general rule, the pleadings against the insured determine the insurer's duty to defend. *Insurance Co. of North America* v. *Forrest City Country Club*, 36 Ark. App. 124, 819 S.W.2d 296 (1991). The duty to defend is broader than the duty to pay damages and the duty to defend arises where there is a possibility that the injury or damage may fall within the policy coverage. *Commercial Union Ins. Co. of America* v. *Henshall*, 262 Ark. 117, 553 S.W.2d 274 (1977).

We find it unnecessary to address appellant's first argument questioning whether Sing was an insured under the policy. Even

assuming that Sing was an insured as an employee acting in the course and scope of his employment (as was alleged in the wrongful death action), we conclude that there was no possibility that the claim would fall within the policy coverage in light of the exclusion mentioned above.

The language in an insurance policy is to be construed in its plain, ordinary and popular sense. *Columbia Mutual Casualty Ins. Co.* v. *Coger*, 35 Ark. App. 85, 811 S.W.2d 345 (1991). Here, the policy plainly excluded coverage for injuries "arising out of the . . . use . . . of any auto . . . owned or operated . . . by any insured." It is undisputed that the wrongful death action arose out of an accident involving Sing's operation of an automobile which he owned. By its clear language, the policy did not cover the claimed injuries.

Moreover, the insurance contract in question was a general commercial liability policy. As is stated in 7A Appleman, *Insurance Law and Practice* (Berdal ed.), § 4500.04 (1979):

> Liability insurance is generally written for a specific hazard in order to enable the underwriter to calculate premiums on some equitable as well as predictable basis. As a result, the hazard to be covered under each policy is carefully defined and others are excluded. Thus, any automobile liability policy will, generally, exclude manufacturing and other business activities *whereas a general liability policy provides protection only for the specific hazard for which premiums have been paid. All others are excluded, and unless the automobile hazard is included in a general liability policy, use of automobiles is excluded, or only covered within narrow limits such as on premises.*

Contracts of insurance should receive a practical, reasonable and fair interpretation consonant with the apparent object and intent of the parties in the light of their general object and purpose. *Northwestern National Ins. Co.* v. *Stanley*, 268 Ark. 1058, 598 S.W.2d 439 (Ark. App. 1980). The terms of an insurance contract are not to be rewritten under the rule of strict construction against an insurer so as to bind the insurer to a risk which is plainly excluded and for which it was not paid. *Southern Farm Bureau Casualty Ins. Co.* v. *Williams*, 260 Ark. 659, 542 S.W.2d 467 (1976). From our reading of the policy, the exclusion reflects

the intent to exclude from coverage damages arising from the use of automobiles. Cogent evidence of such a construction is that Big Cat held a separate policy providing coverage for its automobiles. *See Allstate Ins. Co.* v. *Jones*, 188 Cal. Rptr. 557 (Cal. Ct. App. 1983). In sum, we hold that appellant was not obligated to furnish appellees with a defense under the terms of the policy. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

COOPER and ROBBINS, JJ., agree.

Christine M. JONES *v.* Jerry A. JONES

CA 93-91 852 S.W.2d 325

Court of Appeals of Arkansas
Opinion delivered March 17, 1993

Samuel Perroni, for appellant.

Helen Rice Grinder, for appellee.

PER CURIAM. The appellee in this child custody case filed a petition for permanent change of custody and for temporary emergency *ex parte* relief alleging that a change of custody was

required because the mental health and stability of the minor child was being jeopardized while he resided with his mother, the appellant. On December 13, 1992, the chancellor entered an order granting the relief and indicating that an emergency hearing would be scheduled on the matter. After a hearing on December 16, 1992, the chancellor entered a "temporary order of change of custody."

The appellant has filed in this court a motion to expedite appeal, requesting that the briefing schedule in this case be accelerated and alleging, among other things, that the appellant received insufficient notice of the hearing on the *ex parte* motion to change custody to adequately prepare or obtain witnesses and evidence to support a continuation of custody in her. She further alleges in her motion that the chancellor changed custody from the appellant to the appellee without making an adequate investigation into the merits of that action.

The appellee, in response to the appellant's motion to expedite, has moved to dismiss the appeal on the theory that the temporary custody order is nonappealable for lack of finality. We agree with the appellee's argument. In *Chancellor* v. *Chancellor*, 282 Ark. 227, 667 S.W.2d 950 (1984), the Arkansas Supreme Court clarified the law regarding appealability of temporary child custody orders by holding that a mere temporary award of custody pending trial on the merits is not appealable, but an award of custody, even if expressly stated to be temporary, is final for purposes of appeal if the issue of custody was decided on the merits and the parties have completed their proof. In the case at bar, the appellant's motion to expedite is grounded on her assertions that she had not yet completed her proof in this case. Therefore, the decree in this case is a temporary award pending trial on the merits, and is nonappealable pursuant to *Chancellor* v. *Chancellor*, *supra*.

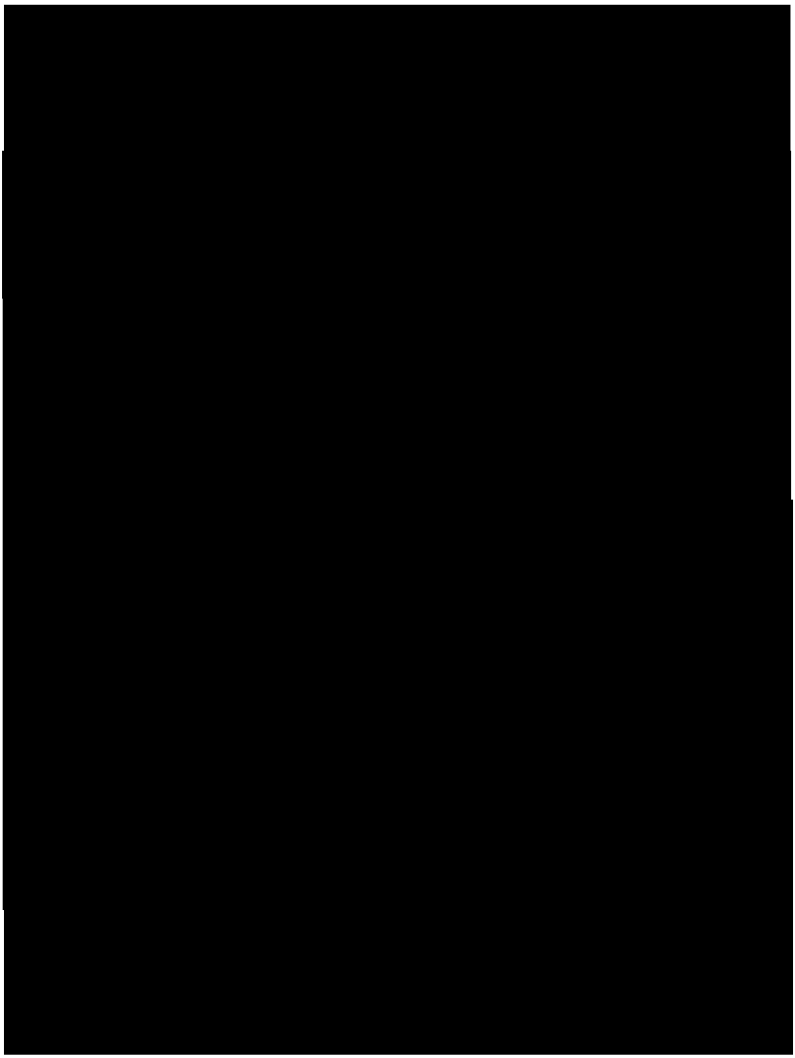
The appellee's motion to dismiss is granted. Given our resolution of this issue, the appellant's motion to expedite the appeal is moot, and we do not address it.

Appeal dismissed.

Carl DUVALL *v.* STATE of Arkansas

CA CR 91-288 852 S.W.2d 144

Court of Appeals of Arkansas
Division I
Opinion delivered March 24, 1993



Christopher M. Jester, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Charles Duvall appeals from his conviction at a jury trial of sexual abuse in the first degree, for which he was sentenced to five years in the Arkansas Department of Correction. He contends that the trial court erred in allowing witnesses to present hearsay statements made by appellant's five-year-old daughter (the alleged victim in this case), in finding appellant's daughter competent to testify, and in not allowing appellant to present allegedly exculpatory evidence. We find no error and affirm.

The victim testified that her father had penetrated her anus and vagina and that he had required her to engage in oral intercourse. The medical testimony indicated that she was red and raw around her anus and vagina and had sores around her mouth. There were tears and fissures around her vaginal and rectal areas that were consistent with sexual abuse.

As provided in then-existing Ark. R. Evid. Rule 803(25), the State moved for a pre-trial hearing to prove the "reasonable trustworthiness" of the five-year-old child's out-of-court statements to Betty Simmons, a SCAN worker; Margaret Kesterson of the Arkansas State Police; Dr. Rick Harrison, Dr. Gary Russell and his nurse, Loraine Love; Dorothy Richardson, a babysitter; and her daughter, Ann Reed. After the hearing, the trial court ruled the statements admissible, and at trial the State introduced the child's hearsay statements through the various witnesses.

Appellant argues that *Vann* v. *State*, 309 Ark. 303, 831 S.W.2d 126 (1992), requires that his conviction be reversed and remanded. In *Vann*, the Arkansas Supreme Court held that Ark. R. Evid. 803(25)(A) was unconstitutional in criminal cases because it required a lesser standard (reasonable likelihood of trustworthiness) for admissibility of hearsay statements than is required by the Confrontation Clause of the Sixth Amendment. However, introduction of the hearsay statements does not require reversal because appellant did not preserve this issue for appeal. Appellant's motion to exclude all hearsay testimony was based on his contention that the child had been coaxed into accusing him of sexual abuse. He contended that the hearsay was not sufficiently trustworthy *under the rule of evidence*. Appellant made no objection to the hearsay statements on any constitutional ground. Even constitutional issues may not be raised for the first time on appeal. *Killcrease* v. *State*, 310 Ark. 392, 836 S.W.2d 380 (1992); *Harris* v. *State*, 295 Ark. 456, 748 S.W.2d 666 (1988). Moreover, the victim testified at trial and was subject to cross-examination. Appellant had the opportunity to question her regarding statements she made to third persons. The danger of the admission of hearsay statements without the opportunity to question the reliability of the assertion is alleviated by the opportunity to cross-examine the declarant. *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990).

In *Vann*, the Arkansas Supreme Court recognized that the harmless error doctrine could apply if the error was harmless beyond a reasonable doubt. In *Vann*, the court stated that the admission of impermissible hearsay evidence was not harmless beyond a reasonable doubt because it constituted the only direct evidence of penetration on the rape charge. In the case at hand, the victim testified to the elements of the crime. In addition, Dr. Rick Harrison testified that when he asked the victim where appellant hurt her, she pointed to her vaginal and rectal areas and to her mouth. She also stated that her father had her open her mouth up wide and he urinated in her mouth. Dr. Harrison's testimony was admissible under Ark. R. Evid. 803(4), which provides for the admission of statements made for the purpose of medical diagnosis or treatment and describing medical history, past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. *Stallnacker* v. *State*, 19 Ark. App. 9, 715 S.W.2d 883 (1986). The additional hearsay testimony from the other aforementioned witnesses was duplicative and harmless under *Vann*.

Appellant further argues that the trial court erred in ruling that the victim was competent to testify. As stated, a pre-trial hearing was held to determine the admissibility of hearsay statements. The victim appeared at that hearing and the judge found her competent to testify. She was four years old at the pre-trial hearing. She also testified at the trial and answered questions as to her obligations to tell the truth. She was five years old at the time of trial.

In *Richard* v. *State*, 306 Ark. 543, 815 S.W.2d 941 (1991), the court recited the following standards for determining competency:

> A trial court must begin with the presumption that every person is competent to be a witness. A.R.E. Rule 601. The burden of persuasion is upon the party alleging that the potential witness is incompetent. To meet that burden the challenging party must establish the lack of at least one of the following: (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; or (2) an understanding of the consequences of false

> swearing; or (3) the ability to receive accurate impressions and to retain them, to the extent that the capacity exists to transmit to the fact finder a reasonable statement of what was seen, felt, or heard. The competency of a witness is a matter lying within the sound discretion of the trial court and, in the absence of clear abuse, we will not reverse on appeal.

Richard, 306 Ark. at 544-45, 815 S.W.2d at 942 (quoting *Logan* v. *State*, 299 Ark. 266, 272, 773 S.W.2d 413, 416 (1989)).

If the child's overall testimony shows an ability to understand the obligation of an oath and the consequences of false swearing, the child may be held competent to testify although the child states she does not know what a lie is or what happens to people who lie. *Curtis* v. *State*, 301 Ark. 208, 738 S.W.2d 47 (1990). The evaluation of the trial court in these cases is particularly important due to its opportunity to observe the child witness and to assess the child's intelligence and understanding of the need to tell the truth. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986). Here, the victim's answers were at times inconsistent, but she demonstrated an understanding of the obligation to tell the truth and the consequences of false swearing, and a capability of receiving and retaining accurate impressions and communicating a reasonable statement of what she had perceived. *See Richard* v. *State, supra; Barrett* v. *State*, 23 Ark. App. 144, 744 S.W.2d 741 (1988); *Chappell* v. *State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986). From our review of the record, we cannot conclude that the trial court abused its broad discretion in finding the victim competent to testify.

Appellant finally contends that the trial court erred in refusing to allow appellant to present evidence that his former wife (the victim's mother) and her boyfriend, Floyd Hankins, had devised a plan to have appellant charged with this crime. Appellant argues that he should have been allowed to present testimony that the victim's mother had previously threatened to call the police and report appellant to Suspected Child Abuse and Neglect (SCAN) in response to a heated custody battle. Appellant further sought to produce evidence that Hankins had in the past encouraged another woman to make allegations of abuse in order to gain custody of her children. The court ruled that this

proffered evidence addressed a collateral matter and was therefore inadmissible. Appellant argues that the trial court's denial amounted to a violation of his constitutional right to present a defense.

Collateral matters are issues not directly involved in the case. The bias of a witness is not a collateral matter, and extrinsic evidence is admissible thereon if the witness denies or does not admit the facts claimed to show bias. *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988). Here, evidence of the ex-wife's threat to call SCAN might be relevant as to the witnesses' bias had the victim's mother or Hankins made the allegations of sexual abuse against appellant or had they offered evidence against him in that regard. However, the initial charges of sexual abuse were made by the babysitter, Dorothy Richardson. The SCAN investigation ensued as a result of those allegations and not as a result of any actions of the victim's mother or Hankins. The same is true of this criminal charge. Neither Hankins nor the victim's mother were in the state at the time the allegations were made against appellant. The victim's mother testified for the State only as to the name by which the victim called appellant. Hankins was not called as a witness for the State at all. Appellant *was* allowed to question the victim's mother about the threats to call SCAN but was bound by her answer. *See* Ark. R. Evid. 608(b); *Randall* v. *State*, 239 Ark. 312, 389 S.W.2d 229 (1965). Furthermore, appellant was allowed to testify personally as to those threats. Appellant's attempt to prove that Hankins had previously encouraged falsely charging another man with similar allegations stands in the same light as his attempt to prove the prior threats. The probative value of evidence must outweigh the danger of undue diversion of the trial by the injection of collateral issues. Under the particular facts of this case, we cannot conclude that the trial court erred in holding the issues in question to be collateral or in refusing to allow appellant to offer extrinsic evidence on these points.

Affirmed.

JENNINGS, C.J., and ROBBINS, J., agree.

John F. GIBSON *v.* STATE of Arkansas

CA CR 92-784 852 S.W.2d 326

Court of Appeals of Arkansas
Division I
Opinion delivered March 24, 1993

Thomas D. Deen, for appellant.

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

JOHN MAUZY PITTMAN, Judge. John F. Gibson, III, appeals from his convictions at a non-jury trial of burglary and theft of property. He contends that insufficient evidence was presented to corroborate the testimony of an admitted accomplice. We agree and reverse and dismiss.

Appellant and Shane Smith were charged with having burglarized the Monticello Country Club and stolen various items. Smith entered a negotiated guilty plea and agreed to testify against appellant. At trial, the State presented evidence establishing that the Monticello Country Club was burglarized on September 8, 1990, and that a cash register, liquor, stereo equipment, and several dozen golf balls were stolen. Smith testified that he and appellant committed the offense and that they hid the stolen property in a barn near Smith's residence. Smith stated that they later disposed of the property. After Smith confessed, the investigating officers retrieved much of the property from those locations where Smith indicated it had been placed, including parts to a cash register on a bridge, liquor in a slough, and speakers in a pond.

Smith also directed the officers to a truck in front of his home from which they retrieved a box containing a dozen golf balls matching the general description of those reported stolen. The truck was owned by appellant's father and used by appellant. It had broken down and had been parked there for about six weeks. Finally, Smith's roommate, Richard Pambianchi, testified that in December 1990 he overheard Smith and appellant talking in an adjoining room and stated that appellant made reference to "having to hide some liquor."

[redacted] Appellant argues that the evidence was insufficient to corroborate the testimony of Smith, an admitted accomplice, and, therefore, that the case must be reversed and dismissed. Arkansas Code Annotated § 16-89-111(e)(1) (1987) provides:

> A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982). In other words, the test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Daniels* v. *State*, 308 Ark. 53, 821 S.W.2d 778 (1992). The corroborating evidence may be circumstantial so long as it is substantial. *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988). While the question of whether every other reasonable hypothesis but that of guilt has been excluded is for the fact finder to determine, *Rhodes* v. *State, supra*, evidence that only raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Henderson* v. *State*, 279 Ark. 435, 652 S.W.2d 16 (1983); *Pollard* v. *State*, 264 Ark. 753, 574 S.W.2d 656 (1978).

In this case, only two pieces of evidence tend to corroborate Smith's testimony regarding appellant's connection to the crimes; the golf balls found in the truck used by appellant and the testimony of Richard Pambianchi that he overheard appellant make reference to hiding liquor. We agree with appellant that this evidence is insufficient corroboration.

Possession of stolen property by an accused is a proper circumstance to consider in determining whether there is evidence tending to connect him with the crimes of burglary and theft. *Daniels* v. *State, supra*. However, recovery of stolen goods from a place jointly occupied by an accomplice is not sufficient corroboration standing alone. *Id.*; *Olles* v. *State*, 260 Ark. 571, 542 S.W.2d 755 (1992). In *Cockrell* v. *State*, 256 Ark. 19, 505 S.W.2d 204 (1974), the supreme court held that the mere fact that stolen property was found in a vehicle belonging to the accused, but to which the accomplice had full accessibility, was insufficient to corroborate the accomplice's testimony.

Here, the truck had been parked at Smith's mobile home for several weeks prior to the search and recovery of the golf balls, and Smith admitted that the key to the truck was kept in his trailer while the truck remained at his residence. Smith denied placing the golf balls in the truck but could not explain how he

knew where they would be found. He also testified that he did not see appellant place the golf balls in the truck. Moreover, the golf balls could not be identified as the stolen property, and were of a variety that could be purchased at most sports stores.

The testimony that appellant had been overheard in December 1990 stating to Smith that he (appellant) "ha[d] to hide some liquor" likewise does not connect appellant to the burglary and theft with which he was charged. Liquor is a commodity that a minor, such as appellant, may have good cause to hide. Based on the testimony, it is not possible to determine whether the liquor allegedly referred to was, in fact, even stolen property. It would certainly be speculative to assume that appellant was making reference to the liquor stolen in a September 8, 1990, burglary of the Monticello Country Club.

The State concedes that the above evidence, standing alone, "might not be sufficient corroborating evidence," but argues that there was other abundant physical evidence adduced that was consistent with the accomplice's inculpatory testimony. This argument, however, does not comport with the rule requiring that corroborative evidence be of a substantive nature, directed toward proving the connection of the accused to the commission of the crime and not merely toward corroborating the accomplice's testimony. *See Henderson* v. *State, supra.* The fact that cash register parts, liquor, and speakers were found where Smith, the accomplice, stated they would be found corroborates Smith's participation in the burglary and theft but does not "tend to a substantial degree to connect the defendant with the crime[s]." *Rhodes* v. *State*, 276 Ark. at 210, 634 S.W.2d at 111. Because the State failed to offer sufficient corroborating proof, the evidence is insufficient to support the conviction, and we reverse and dismiss. *See Carr* v. *State*, 300 Ark. 158, 777 S.W.2d 846 (1989).

Reversed and dismissed.

JENNINGS, C.J., and ROBBINS, J., agree.

Shaine KASPAR *v.* STATE of Arkansas

CA CR 92-673 852 S.W.2d 141

Court of Appeals of Arkansas
Division II
Opinion delivered March 24, 1993

[redacted]

Richard W. Atkinson, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was convicted of second degree assault. On appeal, the appellant argues that his assault conviction is barred by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and Article 2, Section 8 of the Arkansas Constitution.

On May 5, 1991, the appellant was involved in an accident on Highway 64 in Conway, Arkansas, in which his car struck a police officer. The record reveals that traffic was stopped and police officers were on the highway directing and congested traffic. The officers were wearing yellow reflective raincoats, carrying flashlights, and the lights on their police vehicles were flashing. The appellant pulled out of the line of traffic and, while attempting to pass another vehicle, struck and injured a police officer.

The appellant was charged with driving while intoxicated and pled guilty to that charge in municipal court. He was subsequently charged in circuit court with aggravated assault. The appellant filed a pretrial motion to dismiss based on double jeopardy grounds which, after a hearing, the trial court denied. A jury trial was held and the appellant was convicted of second degree assault.

The appellant relies on *Grady* v. *Corbin*, 495 U.S. 508 (1990), in arguing that the subsequent prosecution for aggravated assault was barred by the double jeopardy clause. The Arkansas Supreme Court in *State* v. *Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991), discussed the holding in *Grady* and stated:

> The Court formulated a two (2) part inquiry to determine whether double jeopardy bars a prosecution. First, the *Blockburger* test should be applied. If it reveals that the offenses have identical statutory elements or that one offense is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. If the subsequent prosecution is not barred under the first inquiry, it should be subjected to the second inquiry, the 'proof of the same conduct' analysis. The holding of the case concisely sets out this second inquiry as follows: 'We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.'

306 Ark. at 405 (citations omitted).

In *Grady*, the State filed a bill of particulars that identified the reckless or negligent acts on which it would rely to prove the homicide and assault charges in the subsequent prosecution: (1) operating a motor vehicle in an intoxicated condition, (2) failing to keep to the right of the median, and (3) driving 45 to 50 miles per hour, which was too fast for the prevailing conditions. In finding that the subsequent prosecution was barred, the Court stated:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted — driving while intoxicated and failing to keep right of the median — to establish the essential elements of the homicide and assault offenses. . . . This holding would not bar a subsequent prosecution on the homicide or assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e. if the State relied solely on Corbin's driving too fast in heavy rain to establish

recklessness or negligence).

495 U.S. at 523. The Court in *Thornton* stated that the key to the second inquiry of the *Grady* analysis is determining on what conduct the State will rely to prove the subsequent prosecution, and held that the burden is on the State to demonstrate that it will rely on conduct other than that for which the defendant has already been prosecuted.

A hearing was held on January 22, 1992, regarding the appellant's motion to dismiss. The municipal court judge testified that due to the circumstances surrounding the accident he may have given the appellant a harsher than normal punishment for a first time offense.[1]

For reversal, the appellant asserts that (1) the municipal court judge who accepted his plea of guilty to the offense of DWI took into account the circumstances of the accident in giving the appellant a harsher than usual sentence for DWI, and (2) that the State did not meet its burden under *Thornton*. For his first argument, the appellant thus contends that *Grady* prohibits a subsequent prosecution, if in the previous prosecution the appellant was given a greater than normal sentence based on conduct the State intends to rely on to establish the offense charged in the subsequent prosecution.

The Supreme Court has observed that the double jeopardy clause embodies three protections: (1) protection against a second prosecution after acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for the same offense. *Grady* 495 U.S. at 516 (citation omitted). In *Grady*, the Supreme Court reviewed the standard for determining whether successive prosecutions violate the double jeopardy clause. The Court concluded that the comparison of statutory elements of the charged offenses under the *Blockburger* test was insufficient to protect defendants from the harassment and anxiety of multiple trials. *Id* at 520. The Court was concerned that multiple prosecutions would "give the

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[1] We note that when a trial court sentences a defendant, it has the discretion to set punishment anywhere within the statutory range provided for the particular offense. *Noland* v. *State*, 265 Ark. 764, 580 S.W.2d 953 (1979).

State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged." *Id.* at 518. To address these concerns, the Court adopted the "proof of the same conduct" analysis in *Grady*.

We do not find support for the appellant's argument in the *Grady* holding nor does the appellant cite to us any authority that interprets the test pronounced in *Grady* to bar a subsequent prosecution under the circumstances in the case at bar.

The offense of DWI is committed when a person who is intoxicated operates or is in actual physical control of a motor vehicle or when a person with a blood alcohol content of 0.10% or more operates or is in actual physical control of a motor vehicle. Ark. Code Ann. § 5-65-103 (1987). In the subsequent prosecution, the felony information filed by the State alleged that the appellant committed aggravated assault, under circumstances manifesting extreme indifference to the value of human life, by purposely engaging in conduct that created a substantial danger of death or serious physical injury to another person, as provided in Ark. Code Ann. § 5-13-204 (1987).

At the hearing, the State informed the court that in order to establish that the appellant committed aggravated assault, it intended to prove that the appellant, in a congested traffic area where policemen were directing traffic and blue lights were flashing, chose to pull out of the line of traffic and, in trying to pass another car, struck and injured a policeman. The court also had before it the statement of the police officer who would testify to the events which took place on the night of the accident. We find that the State demonstrated that it intended to rely on conduct of the appellant other than that of driving while intoxicated to establish assault.

At the trial, the State, in its closing argument, mentioned that the appellant had been drinking and suggested that the jury believe the testimony of the witnesses who had not. The prosecutor did not mention that the appellant had been charged and pled guilty to DWI. Also, the appellant himself had already admitted on the record that he had been drinking.

The facts in the case at bar are similar to those in *State* v. *Robideaux*, 493 N.W.2d 210 (N.D. 1992). Robideaux was

involved in an accident in which the car he was driving struck and killed someone. He was first charged in district court with manslaughter and five months later pled guilty to the charge of leaving the scene of an accident causing death. Relying on *Grady*, Robideaux argued that the subsequent prosecution was barred. The court noted that the prosecutor and another witness mentioned that Robideaux had left the scene of the accident. However, the prosecutor did not mention that he had pled guilty to this charge. Furthermore, Robideaux admitted to being convicted of leaving the scene of the accident and his counsel referred to this conduct in his opening statement. The court felt that Robideaux was thus in a poor position to complain about this evidence. The court held that it was unable to conclude that the prosecutor used evidence of Robideaux's conduct in leaving the scene of the accident to prove any of the elements of manslaughter.

We find that the prosecutor's reference to the fact that the appellant had been drinking was indirect and brief and from reviewing the record, we are unable to conclude that the State used the appellant's conduct of operating a motor vehicle in an intoxicated condition to prove the assault charge. Therefore, in applying the *Grady* analysis to the case at bar, we find that the State did not establish an essential element of the assault offense by proving conduct constituting an offense for which the appellant had already been prosecuted and therefore, the appellant was not placed in double jeopardy.

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

Jerry RUCKER *v.* STATE of Arkansas

CA CR 92-728 852 S.W.2d 139

Court of Appeals of Arkansas
Division I
Opinion delivered March 24, 1993

R. Brent Crews, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Jerry Rucker was convicted by an all-white jury of delivery of a controlled substance and sentenced to twenty-five years in the Arkansas Department of Correction. The sole issue before us is whether the prosecutor exercised a peremptory challenge with the discriminatory purpose of excluding black persons from the jury. We find no error and affirm.

Appellant, a black man, contends that he was denied his right to a fair trial by a jury of his peers when the trial judge, over appellant's objection, allowed the prosecutor to use a peremptory strike against the only black juror drawn to serve on the jury. The black juror, Ida Rowe, and twenty-three white jurors were drawn in the jury selection process. Ida Rowe's nephew had just been tried by the same prosecutor in an earlier case, and that jury was still in deliberation. On voir dire, the prosecutor asked Ms. Rowe:

> Mr. Stallcup (prosecutor): I don't know any other way to ask this, you know I'm doing my best to send your nephew to the penitentiary for as long as I possibly can. Of course, it's up to the jury whatever happens, but will you hold that against me in this case?
>
> Ms. Rowe: No.
>
> Mr. Stallcup: You understand I'm just the elected prosecutor trying to do the job the taxpayers pay me to do. Okay. I don't ever mean to embarrass anybody with my questions, the only way I know to do it is just ask them and look somebody in the eye and see if they answer.

Appellant objected to the prosecution's strike and the prosecutor responded:

> Mr. Stallcup (prosecutor): Judge, surely I am not, surely the state is not going to be made to take a[n] aunt of a defendant that the state's trying to put in the penitentiary that a jury's out on right at this moment. We think she might be a little biased against the state for wanting to send her family members to jail.

Appellant had the burden of making a prima facie case of discrimination in the selection of jurors. *Batson* v. *Kentucky*, 476 U.S. 79 (1986); *Ward* v. *State*, 293 Ark. 88, 722 S.W.2d 728 (1987). In *Batson* v. *Kentucky*, the Supreme Court, while recognizing that a prosecutor ordinarily is allowed to exercise his peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, held that the Equal Protection Clause forbids the prosecutor from challenging potential jurors solely on the basis of race. *See also Pacee* v. *State*, 306 Ark. 563, 816 S.W.2d 856 (1991). A

prima facie case may be established by: (1) showing the totality of the relevant facts give rise to an inference of a discriminatory purpose; (2) demonstrating total or seriously disproportionate exclusion of blacks from the jury; or (3) showing a pattern of strikes, questions, or statements by a prosecuting attorney during voir dire. *Owens* v. *State*, 300 Ark. 73, 777 S.W.2d 205 (1989). In a similar case, the Arkansas Supreme Court held:

> [W]here the use of a peremptory challenge results in exclusion from the jury of all members of the defendant's minority race, it is not necessary to show exclusion of more than one minority juror of the same race as the defendant to make a prima facie case of discriminatory use of a peremptory challenge, and thus invoke the "sensitive inquiry" requirement.

Mitchell v. *State*, 295 Ark. 341, 351, 750 S.W.2d 936, 941 (1988).

Inasmuch as the only black juror was excluded, a prima facie case was made. The burden then shifted to the prosecutor to give a sufficiently neutral explanation for the peremptory strike in the context of a "sensitive inquiry" by the court. *Thompson* v. *State*, 301 Ark. 488, 785 S.W.2d 29 (1990). Following such inquiry, the trial court must state its ruling as to the sufficiency or insufficiency of the racially neutral explanation given by the prosecution. *Colbert* v. *State*, 304 Ark. 250, 255, 801 S.W.2d 643, 646 (1990). The standard of review on appeal of the trial court's evaluation of the sufficiency of the explanation is whether the court's findings are clearly against a preponderance of the evidence. *Id.*

In this case, the prosecutor explained that the instant trial involved the sale of cocaine, that the black juror's nephew had just been tried for the sale of cocaine, and that he was the prosecutor in the nephew's trial. The trial court correctly pointed out that the burden was on the prosecutor, but stated that "the court in the past has not seen any pattern of strikes, racial strikes by the prosecutor." The court then announced its ruling:

> I'm going to allow it even though, even though she's the only black on the jury. I'm going to allow it by reason of her connection with the previous case.

The prosecutor's reason for the strike as well as the judge's ruling are clearly stated. The record in the case fails to reflect a discriminatory purpose in the prosecutor's use of a peremptory strike. Appellant has failed to demonstrate that the trial court's finding in this regard was clearly against a preponderance of the evidence.

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

Johnny Austin BENTON *v.* STATE of Arkansas

CA CR 92-610 850 S.W.2d 36

Court of Appeals of Arkansas
Division I
Opinion delivered March 31, 1993

Hubert W. Alexander, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Johnny Austin Benton was charged in Lonoke County Circuit Court with theft of property and being an habitual offender. For reversal he argues that the trial court erred in refusing to grant a mistrial and that he was denied the effective assistance of counsel at trial. Because we must reverse and remand for new trial on the first issue, we need not reach the second.

At the beginning of the trial proceedings the court swore in the jury panel and read the information which included the phrase, "[s]aid defendant having previously been convicted of more than one but less than four felonies, or having been found guilty of more than one but less than four felonies. . . ." After reading the information, the trial court conducted a brief preliminary voir dire and then directed the clerk to draw the names of eighteen prospective jurors in preparation for the voir dire of counsel. At this point defense counsel moved for a mistrial on the grounds that it was error for the court to read the portion of the information charging appellant as an habitual offender. The motion was denied.

Arkansas Code Annotated section 5-4-502 (1987) establishes a bifurcated procedure when a defendant is charged as an habitual offender. The jury first decides guilt or innocence and, if the defendant is found guilty, the trial court then hears evidence as to prior convictions. The purpose of bifurcation is to protect the defendant from undue prejudice by withholding proof of his prior convictions until the jury has found him guilty. *Heard* v. *State*, 272 Ark. 140, 612 S.W.2d 312 (1981); *Tatum* v. *State*,

21 Ark. App. 237, 731 S.W.2d 227 (1987).

The State does not contend that it was proper for the trial judge to read the habitual offender portion of the information to the jury panel, but contends primarily that the motion for mistrial was untimely. It is true that as a general rule a motion for mistrial may be denied when the request is not made at the first opportunity to do so. *See Dixon* v. *State*, 310 Ark. 460, 839 S.W.2d 173 (1992). The reason for the rule was expressed in *Dumond* v. *State*, 290 Ark. 595, 721 S.W.2d 663 (1986): "The defendant cannot wait to see the full strength of the State's case before bringing his request to the attention of the trial court."

In the case at bar we believe the motion for mistrial was sufficiently timely. Counsel may have waited, simply out of courtesy to the trial court, until the judge finished his brief opening remarks. This is not a situation where the defendant has waited to see how the trial progressed before deciding to move for a mistrial.

The State also contends that any error was cured by statements of the trial court, immediately after having read the information, telling the jury that the information was not evidence of guilt and that the defendant is clothed with a presumption of innocence. While it is true, as the State argues, that an admonition may frequently cure error, under the circumstances presented we cannot agree that it did so here.

For the reasons stated, we reverse and remand the case for new trial.

PITTMAN and ROBBINS, JJ., agree.

Jason A. WHITE *v.* STATE of Arkansas

CA CR 92-716 850 S.W.2d 34

Court of Appeals of Arkansas
Division II
Opinion delivered March 31, 1993

Robert S. Blatt and *Timothy C. Sharum*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with driving while intoxicated. He filed a

motion to suppress all evidence obtained subsequent to his stop and arrest, alleging that the City of Waldron police officers acted outside their territorial jurisdiction, and that they lacked probable cause to stop him because they never observed him commit any traffic violation. After a hearing, the appellant's motion to suppress was denied and he was found guilty of DWI, first offense, upon a stipulation that the court would determine guilt or innocence based upon the testimony presented during the hearing on his motion to suppress. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in denying his motion to suppress evidence obtained by a police officer acting outside this territorial jurisdiction. We affirm.

The record shows that an Arkansas State Trooper observed the appellant driving erratically on Highway 71 north of Waldron, Arkansas. The trooper was transporting a prisoner and was unable to stop the appellant's vehicle; instead, the trooper used his radio to contact Officer Scott Squires, Waldron police officer, and arranged for Officer Squires to stop the appellant's vehicle. Officer Squires intercepted, stopped, and arrested the appellant approximately one mile north of the city limits of Waldron, Arkansas. It is undisputed that Officer Squires was acting outside of his territorial jurisdiction at the time he arrested the appellant.

A local law enforcement officer acting without a warrant outside his territorial jurisdiction is empowered to make an extraterritorial arrest only if he is authorized to do so by state statute. *Perry* v. *State*, 303 Ark. 100, 794 S.W.2d 141 (1990). The state statute governing authority to arrest is Ark. Code Ann. § 16-81-106 (Supp. 1991), which in pertinent part provides that:

> (c) A certified law enforcement officer who is outside his jurisdiction may arrest, without warrant, a person who commits an offense within the officer's presence or view, if the offense is a felony or a misdemeanor. A certified law enforcement officer making an arrest under this subsection shall, as soon as practicable after making the arrest, notify the law enforcement agency having jurisdiction where the arrest was made. The law enforcement agency shall then take custody of the person committing the offense and take the person before a magistrate. Statewide arrest powers for certified law enforcement officers will only be in effect

> when the officer is working outside his jurisdiction at the request of or with the permission of the municipal or county law enforcement agency having jurisdiction in the locale where the officer is assisting or working by request. Any law enforcement agency exercising statewide arrest powers under this section must have a written policy on file regulating the actions of its employees relevant to law enforcement activities outside its jurisdiction.

Ark. Code Ann. § 16-81-106(c) (Supp. 1991) (as amended by Acts 1989, No. 846, Section 1).

Pursuant to the above-quoted statute, the City Council of the City of Waldron, Arkansas, adopted Resolution Number 141, which provides in pertinent part that:

> Section I
>
> A Police Officer of the city of Waldron, Arkansas is hereby granted arrest authority anywhere in Scott County, Arkansas; when he/she is working at the request of or with permission of the Municipal or County Law Enforcement Agency having jurisdiction in that local area.
>
> Section II
>
> Police Officers of this City shall obtain permission from the Chief of Police or his designate prior to assisting another Law Enforcement Agency. In the event of an emergency call for assistance from another Law Enforcement Agency, the Chief of Police or his designate may grant permission to officers to respond to the call for assistance.
>
> Section III
>
> Police Officers are discouraged from making arrests in another jurisdiction unless accompanied by an officer from the agency having jurisdiction. In the event of a serious crime, officers who have received permission from the agency having jurisdiction may take the necessary Law Enforcement action if it can be done safely.

. . . .

The appellant first contends that, because the arrest

was made at the request of an Arkansas State Police Trooper, the arrest was not made pursuant to the request of a municipal or county law enforcement agency having jurisdiction in the local area as required by Ark. Code Ann. § 16-81-106(c), and by City of Waldron Resolution Number 141, Section 1. We do not agree. Although it is true that neither the statute nor the resolution specifies the Arkansas State Police as a law enforcement agency having jurisdiction, we think that such specification was unnecessary in light of the state-wide arrest power granted to the Arkansas State Police pursuant to Ark. Code Ann. § 12-8-106(b) (Supp. 1991), which provides that the Arkansas State Police "shall have the powers possessed by police officers in cities and sheriffs in counties, except that the Arkansas State Police may exercise such powers anywhere in this State." Given this statutory grant of authority equivalent to that possessed by municipal police officers and county sheriffs, we think that a request for assistance by an Arkansas State Police Trooper is sufficient to give rise to extraterritorial arrest authority pursuant to Ark. Code Ann. § 16-81-106(c) (Supp. 1991), and City of Waldron Resolution Number 141, Section 1.

The appellant further contends that Officer Squires failed to comply with Section 2 of Resolution Number 141 in that there was no evidence that Officer Squires obtained permission from the Chief of Police or his designate prior to responding to the State Trooper's request for assistance. However, we think that the record shows that this section of the city resolution likewise was complied with. Officer Squires testified at the hearing that, at the time of the arrest, there were six City of Waldron police officers. He further testified that he had been designated acting officer on duty on the night in question by the Chief of Police, and that, following his radio conversations with the State Trooper, he considered that the suspected DWI observed by the State Trooper constituted an emergency situation. We think that this evidence clearly shows that Officer Squires was the designate of the Chief of Police on the night in question, and as such was empowered to grant permission to officers to respond to emergency calls for assistance. Insomuch as Officer Squires could clearly have authorized another officer to make the arrest, we think that Officer Squires' actions in effecting the arrest himself was in compliance with Resolution Number 141.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Amy E. BEARD *v.* FORD MOTOR CREDIT COMPANY

CA 92-1010 850 S.W.2d 23

Court of Appeals of Arkansas
Division I
Opinion delivered March 31, 1993

Pope, Shamburger, Buffalo & Ross, by: *Brad A. Cazort*, for appellant.

The Hicks Law Firm, by: *Mickey L. Scott*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Amy Beard appeals from an order of the circuit court of Pulaski County granting appellee Ford Motor Credit Company a deficiency judgment of $5,378.08 against her. Appellant contends that appellee was not entitled to a deficiency judgment because it did not adhere to the provisions of the Uniform Commercial Code. We find no error and affirm.

On October 20, 1989, appellant signed a contract for the purchase of a 1989 Ford Tempo. Appellant had difficulty making the payments on the car and on May 10, 1991, she returned the car to appellee. By letter dated that same date, appellant received notice that the car would be sold at a private sale any time ten days after the date of the notice. The car was sold the next month by 166 Auto Auction of Springfield, Missouri, for $3,300.00

For reversal, appellant argues that the trial court erred in (1) admitting unqualified testimony and hearsay to establish that the sale was by a dealers-only auction and commercially reasonable; (2) finding that the auction was a private sale rather than a public sale; and (3) failing to find that appellee was estopped to collect a deficiency judgment.

At trial, Michael Rattler, customer service representative for appellee, testified that in his job he deals with all aspects of the customers' accounts. He stated that appellant's car was sold at a dealers-only auction at the 166 Auto Auction in Springfield, Missouri. Although he is not familiar with this particular auction company, he said, dealers-only auctions are the standard method

used by Ford, Chrysler, and GMAC to sell repossessed cars. He stated that dealers are notified of the auctions by flyers and the public is not invited to the sales nor allowed to participate in the sales. He said that Ohio is the only state that requires public auctions.

Included in the record is a two-page exhibit. One page sets forth 166 Auto Auction's rules and polices and contains information about the sale of appellant's car. The second page is a copy of a check issued to appellee from 166 Auto Auction and the check stub which summarizes the expenses of the sale. The rules and policies page includes a statement that no retail sales are allowed and that failure to comply with the rules prohibits doing business with the company. At the bottom of the page is a statement that: "This sale is solely a transaction between the buying and selling dealers."

Appellant first argues that the trial court erred in admitting unqualified testimony and hearsay. Appellant contends that Mr. Rattler was not qualified to testify as to how repossessed cars are generally sold and in particular how appellant's car was sold. Initially, we note that a trial judge has wide discretion in determining the qualification of witnesses and the admissibility of evidence. *Mitchael* v. *State*, 309 Ark. 151, 156, 828 S.W.2d 351, 354 (1992). A witness may not testify to a matter unless he has personal knowledge of the matter, *see* Ark. R. Evid. 602, and based on Mr. Rattler's statements regarding his familiarity with appellee's business, we cannot say that the trial judge abused his discretion in finding the witness competent to testify to the practice employed by appellee in the sale of repossessed cars or to the practice generally followed by the automobile industry.

Appellant also contends that the trial court erred in admitting the statement from 166 Auto Auction as a business record within the hearsay exception provided in Ark. R. Evid. 803(6). The rule provides that records of a regularly conducted business activity are not excluded by the hearsay rule from evidence "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The business records exception to the hearsay rule has been interpreted to have seven requirements. To be admissible under

this exception, the evidence must be (1) a record or other compilation, (2) of acts or events, (3) made at or near the time the act or event occurred, (4) by a person with knowledge, or from information transmitted by a person with knowledge, (5) kept in the course of a regularly conducted business, (6) which has a regular practice of recording such information, (7) as shown by the testimony of the custodian or other qualified witness. *Terry* v. *State*, 309 Ark. 64, 67, 826 S.W.2d 817, 819 (1992). Mr. Rattler testified that he is familiar with, and on a daily basis has access to, the records which are maintained by appellee in the regular course of its business. He stated that the records are maintained by people with knowledge of the events and are prepared near or at the time these events took place. He testified that appellant's file showed the car had been sold at a dealers-only auction. The statement received by appellee from 166 Auto Auctions, which was included in appellee's business records, was admitted into evidence.

Appellant argues that the check and itemization of expenses were properly admitted under the business records exception but that it was error to admit that part of the exhibit stating that the company which sold the car conducts dealers-only auctions exclusively. Appellant asserts that this court's holding in *Marshall Trucking Co.* v. *State*, 23 Ark. App. 110, 743 S.W.2d 16 (1988), supports her argument. In that case, Marshall attempted to prove that a police officer's assessment of the weight of Marshall's truck was inaccurate by admitting into evidence a different weight ticket resulting from Marshall's truck being weighed upon arrival at a mill and again after being emptied of its timber cargo. We stated:

> Although there is no prohibition against one company integrating records made by another into its own business records, the party offering the record must still establish by a competent witness that its content is worthy of belief. The mere fact that the memorandum is retained in appellant's files does not supply the required foundation for admission.

23 Ark. App. at 114, 743 S.W.2d at 18 (citation omitted). In that case the trial court noted that no one had testified to the accuracy of the scale used at the mill, the qualifications of the operator to weigh the truck and make the record entry, or any of the other

circumstances under which the record was made. We concluded that the trial court did not abuse its discretion in holding that the record was not competent to prove the truth of the matters asserted in it, was not worthy of belief, and should be excluded. *Marshall Trucking Co.* v. *State*, 23 Ark. App. at 114-15, 743 S.W.2d at 18.

Appellee refers this court to a case in which the trial court, in making a determination of the commercial reasonableness of a sale, admitted into evidence an exhibit consisting of the seller's record of the auction sale which was prepared by the company that conducted the auction. *United States* v. *Whitehouse Plastics*, 501 F.2d 692 (5th Cir. 1974), *cert. denied* in *sub nom. Baker* v. *United States*, 421 U.S. 912 (1975). Included in the exhibit were copies of advertisements placed by the auction company concerning the sale, records of expenses incurred in conducting the sale, and invoices to buyers at the sale with a description of and the prices received for the property sold. The court rejected an argument that the exhibit was not properly within the business records exception to the hearsay rule. *Id.* at 697.

In the case at bar, we believe the trial court could have found the information on the statement from 166 Auto Auction competent evidence. The information is supported by Mr. Rattler's testimony, in which he also said that it is appellee's practice to sell repossessed cars at dealers-only auctions because appellee has determined that such sales bring the highest prices for repossessed cars. We also note that the statement from the auction company is the type of record a company such as appellee must rely on for assurance that their directives are being followed. It would be unrealistic to expect appellee to have a representative at each sale of a repossessed car, especially when that sale is in another state. We find that the information on the exhibit about how the sales are conducted is no less credible than the statement of expenses and the sale price, to which appellant does not object, nor any less credible than the advertisements allowed into evidence in *United States* v. *Whitehouse Plastics*, cited above. We do not find the same lack of trustworthiness that this court found in *Marshall Trucking Co.* v. *State*, cited above. Therefore, we cannot say the trial court abused its discretion in finding the information on the exhibit competent testimony.

With the admittance of appellee's evidence, it is established that appellant's car was sold at a dealers-only auction and we must address appellant's argument that a dealers-only auction is a "public sale." Appellant contends that because she did not receive notice of the time and place of the sale of her car, appellee is not entitled to a deficiency judgment.

Arkansas Code Annotated § 4-9-504(3) (Repl. 1991) provides in pertinent part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. . . .

See also Anglin v. *Chrysler Credit Corp.*, 27 Ark. App. 173, 175, 768 S.W.2d 44, 45 (1989). Here, the notice stated that the car would be sold at a private sale any time ten days after the date of the notice. While the Code requires that notice of the place of the sale must be given to the debtors when disposition is to be made by public sale, no such requirement exists for disposition by private sale. In their treatise, *Uniform Commercial Code*, James White and Robert Summers note that:

> [N]otice of a public sale must contain different information from that announcing an intent to sell privately. In the latter case, the notice need only state "the time after which" the collateral is to be sold; in the case of a public sale, it must state "the time and place" at which the sale will occur.

James J. White & Robert S. Summers, *Uniform Commercial Code*, § 26-10, at 1113 (2d ed. 1980). The distinction between private sale and public sale was also recognized by the Arkansas Supreme Court in *Barker* v. *Horn*, 245 Ark. 315, 316, 432 S.W.2d 21, 22 (1968), where the court stated that, although the statute requires notice of the time and place of public sale, only reasonable notification of the time after which a private sale will be made is required.

The Code does not define either public sale or private sale,

and this court has not previously addressed whether a dealers-only auction is a public sale or a private sale in the context of Article 9 of the Uniform Commercial Code. Appellant contends that Arkansas courts have consistently followed the definition of public sale as "one made at auction to the highest bidder," as established in *Union & Mercantile Trust Co.* v. *Harnwell*, 158 Ark. 295, 301, 250 S.W. 321, 323 (1923). We held in *General Electric Credit Auto Lease, Inc.* v. *Paty*, 29 Ark. App. 30, 32-33, 776 S.W.2d 829, 831 (1989), that under the facts of the case we could not say that a sale made at auction to the highest bidder was not a public sale as found by the trial court. However, in that case there was nothing in the record that suggested that the auction was restricted to dealers only or that it was not open to the general public. We also note that the supreme court in *Union & Mercantile Trust Co.* v. *Harnwell* went on to say that "a public sale could not be conducted unless the public were invited to participate therein." 158 Ark. at 303, 250 S.W. at 323. Therefore, it is clear that other factors may be relevant to the determination of whether an auction to the highest bidder is a public sale.

In his treatise, *Uniform Commercial Code*, author Ronald Anderson discusses the elements of a public sale:

> A sale of collateral is "public" when it is publicly advertised, the sale is open to the public, and the sale is made, after competitive bidding, to the highest genuine bidder; as at an auction.
>
> The opportunity of the public to bid at the sale is the essential criterion that determines that the sale is a public sale . . . .

9 Ronald A. Anderson, *Uniform Commercial Code* § 9-504:32, at 733 (3d ed. 1985).

> The text of the Code is silent on how public and private sales are to be differentiated. Comment One to 9-504 directs us to 2-706 where Comment 4 defines a public sale as an auction. Yet not every sale by auction is a public sale. Some case law is more helpful. Thus, in Lloyd's Plan Inc. v. Brown [268 N.W.2d 192 (Iowa 1978)], the Iowa Supreme Court said that: "The essence of a public sale is

> that the public is not only invited to attend and bid but is also informed when and where the sale is to be held." Other courts have, in the same spirit, stressed that a public sale is one open to the general public or a major segment thereof, and thus contemplates advertising of the notice, time and place of the sale. A private sale, by contrast, is not open to the general public, usually does not occur at a pre-appointed time and place, and may or may not be generally advertised.

James J. White & Robert S. Summers, *Uniform Commercial Code* § 27-10, at 594 (3d ed. 1988).

The RESTATEMENT OF SECURITY § 48, comment c at 139-40 (1941), defines a public sale as "one to which the public is invited by advertisement to appear and bid at auction for the goods to be sold." *Accord Roanoke Indus. Loan and Thrift Corp.* v. *Bishop*, 482 F.2d 381, 384 (4th Cir. 1973); *Fidelity Consumer Discount Co.* v. *Clark*, 333 Pa. Super. 306, 482 A.2d 580, 582 (1984); *Lavender* v. *AmSouth Bank, N.A.*, 539 So.2d 193, 195 (Ala. 1988); *Liberty Nat'l Bank of Fremont* v. *Greiner*, 62 Ohio App. 2d 125, 405 N.E.2d 317, 321 (1978). In *Ford Motor Credit Co.* v. *Solway*, 825 F.2d 1213 (7th Cir. 1987), the court found an auction in which only automobile dealers could participate a private sale. The court concluded that to term the auction a public sale would not conform with the usual meaning of the word public because the public consists of more than automobile dealers. 825 F.2d at 1218. In *Garden National Bank of Garden City* v. *Cada*, 241 Kan. 494, 738 P.2d 429 (1987), the court found a dealers-only auction was not public in character. The court concluded that a sale at an auto auction, which is limited to automobile dealers and from which the public is precluded from participating, is a private sale. 738 P.2d at 432.

In *John Deery Motors, Inc.* v. *Steinbronn*, 383 N.W.2d 553 (Iowa 1986), the court also found a dealers-only auction not public in character. This case is discussed by Professor Barkley Clark in his treatise on secured transactions as follows:

> It is important that the notice of sale correctly indicate whether the sale is public or private. In *John Deery Motors, Inc.* v. *Steinbronn*, the notice indicated a private sale. The repossessed automobile was sold through

> a dealer auction. When the secured creditor sought a deficiency, the debtor argued that the notice was defective because the dealer auction was in reality a public sale. The Iowa Supreme Court, in the absence of a definition of "public sale" in the UCC itself, turned to Webster's, where the term "public" is defined as "accessible to or shared by all members of the community." Since the dealer auction was open only to automobile dealers, it was closed to some aspect of the market; therefore, the court held that it was a private sale, notwithstanding that the method of disposition at the sale was an auction. Because the sale was private, and thus consistent with the language in the notice sent to the debtor, the deficiency claim was allowed. The holding is significant, because a dealer auction is a very typical method of disposing of motor vehicle collateral. The analysis of the Iowa court seems correct.

Barkley Clark, *Law of Secured Transactions Under the Uniform Commercial Code*, § 4.08(2) at 4-98 (1988). The court in *John Deery Motors, Inc.*, also noted that case authority, commentators, and the RESTATEMENT OF SECURITY supported its determination that the sale was not a public sale. 383 N.W.2d at 555.

In light of the foregoing, we are persuaded that the court was correct in finding that the dealers-only auction, which was restricted to the participation of other dealers, was a private sale. Therefore, the notice received by appellant of the sale of her car satisfied the requirements of the Uniform Commercial Code.

Appellant also argues that the sale of her car was not commercially reasonable, as required by Ark. Code Ann. § 4-9-504(3) (Repl. 1991). Whether a sale of collateral was conducted in a commercially reasonable manner is essentially a factual question; and the findings of fact of a circuit court sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence. In making that determination, this court gives due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given their testimony. *Jones* v. *Union Motor Co., Inc.*, 29 Ark. App. 166, 174, 779 S.W.2d 537, 542 (1989).

Appellant contends that the trial court erred in admitting

Mr. Rattler's testimony as to the value of appellant's car. However, we need not address this issue because we do not believe that Mr. Rattler's opinion of the car's value is essential to a determination of the commercial reasonableness of the sale in this case. Appellant cites *Holiman* v. *Hagan's Motors, Inc.*, 32 Ark. App. 62, 796 S.W.2d 356 (1990), as authority for his contention that in order to prove that the sale was commercially reasonable appellee was required to show that the sales price of the collateral reflected the fair market value. Appellant's reliance is misplaced. *Holiman* involved a private sale of a repossessed vehicle by the secured creditor where a trade-in was accepted as part of the sales price. This court stated:

> *Thrower* v. *Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984), holds that surplus or deficiency should be computed on the basis of the fair market value of any trade-in vehicle together with cash received by the dealer, rather than on the basis of the trade-in allowance given by the dealer to the purchaser of the collateral.

Here, we do not have a trade-in vehicle which must be taken into account in arriving at a deficiency.

The sale of the car may not have brought as high a price as appellant would have hoped, but Mr. Rattler testified that the car had unusually high mileage on it for a year-old car. Mr. Rattler also said that the car was sold at a dealers-only auction because appellee believed such a sale would bring the highest price possible for the car. In addition, appellee sold the car promptly after repossession.

In light of the evidence, we cannot say the trial court's finding that the sale was commercially reasonable is clearly against the preponderance of the evidence.

Appellant's final point for reversal is that the trial court erred in not finding appellee estopped to collect a deficiency judgment. At trial, appellant testified that after returning the car to appellee, she arranged for a friend who is a car dealer to buy the car and then refinance it for appellant. When she received notice that the car would be sold at a private sale, appellant said, she called Ford Motor Credit Company and was told by an employee that the car would be repaired and then sold on the car lot. After

finding out the car would be sold on the lot, appellant stated, she and her friend decided it would be best not to buy it because they thought the price of the car would be raised. On appeal, she contends that she relied to her detriment on the employee's statements. Appellee argues that appellant did not preserve the issue of estoppel for appeal.

A party who by his acts, declarations, or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled. *Bethell* v. *Bethell*, 268 Ark. 409, 424, 597 S.W.2d 576, 583 (1980). As a general rule, estoppel must be affirmatively pled; however, this rule disappears when facts regarding estoppel are admitted into evidence or become an issue in the case without objection. *Arkansas Dept. of Human Servs.* v. *Cameron*, 36 Ark. App. 105, 107-08, 818 S.W.2d 591, 593 (1991).

In the case at bar, appellant received proper notice of the time after which the car would be sold by appellee, and she chose not to take that opportunity to redeem the car. Appellee was not required to notify appellant of the date and time of the private sale of the car, but even if appellee had done so, appellant would not have been allowed to participate in the auction. A party claiming estoppel must prove she has relied in good faith on wrongful conduct and has changed her position to her detriment, *Christmas* v. *Raley*, 260 Ark. 150, 158, 539 S.W.2d 405, 410 (1976), and appellant failed to present such proof in this case.

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

TRACOR/MBA *v.* ARTISSUE FLOWERS

CA 92-613 850 S.W.2d 30

Court of Appeals of Arkansas
Division I
Opinion delivered March 31, 1993

Walter A. Murray, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal from the Arkansas Workers' Compensation Commission which found that appellant's notice of appeal from a decision of the administrative law judge to the full Commission was untimely filed.

Artis Stevens died as a result of a work-related injury. On October 2, 1991, the administrative law judge filed an opinion finding that the appellee, Artissue Flowers, is the illegitimate, posthumous child of Artis Stevens and, as such, is entitled to workers' compensation dependency benefits.

Arkansas Code Annotated § 11-9-704(b) (6) (Supp. 1991), provides that application for review from a law judge's decision must be filed in the office of the Commission within thirty (30) days from the date of the receipt of the award. In a response to a motion to dismiss this appeal, appellant's counsel alleged that he "faxed" a notice of appeal from the law judge's decision to the Commission on November 1, 1991. Counsel's motion also stated that by mistake the notice indicated the appeal was to the Court of Appeals instead of the full Commission; that on December 6, 1991, counsel had received no confirmation from the Commission of receipt of the notice of appeal; that on December 6, counsel's secretary contacted the law judge's office and his secretary advised there was no notice of appeal in the file; that counsel's secretary was advised to send to the full Commission a copy of everything that had been faxed on November 1, 1991, and that this was done.

The record contains a notice of appeal filed with the Commission on December 6, 1991. It states, however, that appellant appeals from the full Commission to the Court of Appeals. In any event, the notice was filed more than thirty days after the law judge's award had been filed, and as could be expected, the record contains a motion to dismiss appeal, filed January 3, 1992. The motion alleges that appellant's counsel had received the law judge's decision on October 4, 1991, and that the notice of appeal filed December 6, 1991, was untimely filed.

The record also contains an amended notice of appeal filed by counsel for the appellant on January 7, 1992. This notice states:

> That on November 1, 1991, a Notice of Appeal was filed with the Arkansas Workers' Compensation Commission.
>
> 1. That a scribbers error indicates that the Appeal was to the Arkansas Court of Appeals.
>
> 2. That the Appeal as filed on November 1, 1991, is herein and hereby corrected to reflect the following:
>
> (a) That it is to be Appealed to the Full Commission.
>
> (b) That it was from the Administrative Law Judge's Order on October 2, 1991.

On January 9, 1992, the appellee filed a motion to dismiss the amended notice of appeal, alleging that both the original and the amended notices of appeal were untimely filed. On January 13, 1992, counsel for appellant filed by facsimile machine a response to the appellee's motion to dismiss the original and the amended notices of appeal; an affidavit of his secretary stating that she had filed the notice of appeal in this case to the administrative law judge's fax number on November 1, 1991; and a copy of the law firm's "Transmit Journal" for its facsimile machine for proof that a notice of appeal was transmitted to the Commission on November 1, 1992. And on January 6, 1992, the appellee filed a reply to the appellant's response. The reply included the affidavit of the legal assistant to the administrative law judge. The affidavit, in pertinent part, states:

> 3. I have no recollection of ever receiving correspondence and/or Notice of Appeal relative to the case of *Artissue Flowers, child of Artis W. Stevens, deceased employee vs. Tracor MBA*, WCC File D510481, from the offices of Walter Murray Law Firm, P.A., via fax or otherwise.

On February 5, 1992, the full Commission dismissed the appeal pursuant to Ark. Code Ann. § 11-9-704(b)(6) (1987), which provides that all applications for review by the Workers' Compensation Commission must be filed within thirty days from the date the law judge's decision is received by the party. The timely filing of a notice of appeal is jurisdictional and should be raised by the Commission even if the parties do not raise it. *Lloyd* v. *Potlatch Corporation*, 19 Ark. App. 335, 344, 721 S.W.2d 670, 676 (1986). If a notice of appeal is not received by the Commission within thirty days, the decision becomes final and the Commission is without authority to review the case. *Williams* v. *Luft Construction Co.*, 31 Ark. App. 198, 790 S.W.2d 921 (1990). In *Williams* the clerk of the Court of Appeals had refused to docket the case. We stated:

> It is clear that the appellant's notice of appeal was mailed to the Commission in a timely manner and that, but for some unforeseeable circumstance, it would have been received by the Commission well within the period allowed for timely filing. Although we are not unsympathetic to the appellant's dilemma, we nevertheless find no error on the part of our clerk because the timely filing of a notice of appeal is essential to our jurisdiction. *Blevins* v. *UIS*, 29 Ark. App. 102, 780 S.W.2d 584 (1989). This is not a procedural rule but is instead a jurisdictional one, and although a person can consent to jurisdiction over his person, jurisdiction cannot otherwise be conferred by consent. *Id.* This rule applies to appeals from the Workers' Compensation Commission, *Lloyd* v. *Potlatch Corp.*, [*supra*], and the rule of unavoidable casualty does not apply to failure to file a timely notice of appeal. Therefore, because the appellant's notice of appeal was not timely filed within thirty days of the Commission's opinion, we do not have jurisdiction to hear the appeal. (Citations omitted.)

31 Ark. App. at 199. Although *Williams* involved filing a notice of appeal to the Arkansas Court of Appeals, it was relied upon by the Commission in the instant case as support for the Commission's holding that it has no power to review a case once thirty days has passed and the decision of the law judge has become final. In its opinion the Commission stated:

> [A] timely transmitted facsimile which is not received by the Commission in a timely manner does not differ from a timely mailed document which is not received by the Commission within the thirty day time limit, as was the situation in *Williams*, *supra*. Logs of facsimile activity such as that submitted to the respondents only establish that some document was transmitted to the Commission; the logs do not establish that the document in question was actually transmitted. Moreover, such logs do not establish that the document was actually received by the Commission. . . . [T]he Commission has agreed to accept facsimile transmission to expedite filings where urgency is required, but this agreement in no way affects the requirement that documents must be received within the statutory time limits. In the present case, there simply is no evidence that the Notice of Appeal was received in the office of the Commission in a timely manner.

We think this reasoning is sound. Transmitting legal documents by facsimile machine does not relieve the attorney of his duty to ensure that documents which *must* be timely filed have been timely received. This may require transmitting the documents (whether by hand, mail, or facsimile machine) earlier in the time period to allow for a follow-up phone call and further transmission within the thirty-day filing period if the previous notice of appeal or other document was somehow not received. But in any event, the statutory period for filing a notice of appeal is jurisdictional.

■ Appellant argues that the claimant's motion to dismiss was a motion for summary judgment and that there was a genuine issue of fact raised by the responses, replies, and affidavits filed. We do not agree that the summary judgment procedure provided by Rule 56 of the Arkansas Rules of Civil Procedure applies to matters filed in the Arkansas Workers' Compensation Commis-

sion. No authority for this view is cited by appellant and the appellee cites Rule 1 of the Rules of Civil Procedure which expressly provides that the Rules apply in the circuit, chancery, and probate courts. The Commission is not mentioned.

The appellant also argues that it was not given an opportunity to complete discovery prior to the Commission's decision on the motion to dismiss the appeal. However, we are not cited to any place in the record — and we have found none — where the appellant asked for time to complete discovery or made any objection to the Commission acting on the motion to dismiss before discovery was completed.

Finally, the appellant argues that the Commission failed to discuss or give consideration to the presumption that when a letter, that is properly and sufficiently addressed and stamped, is mailed it will be received by the addressee in the due course of mail. *See Swink & Company, Inc.* v. *Carroll McEntee & McGinley, Inc.*, 266 Ark. 279, 290, 584 S.W.2d 393, 399 (1979).

In the first place, as the appellant concedes, the Commission is not bound by the technical or statutory rules of evidence. *See* Ark. Code Ann. § 11-9-705(a) (1) (1987). And in the second place, the presumption of receipt is rebutted by denial that the letter was actually received — and this leaves an issue of fact to be determined. *Swink*, *supra*, 266 Ark. at 290-91.

The denial in the instant case came from the following situation: The appellant's response to the motion to dismiss alleged that the secretary to appellant's counsel had discussed the situation with the law judge's office, and the affidavit of the secretary for appellant's counsel stated that she had faxed the notice of appeal to the law judge's fax number. However, the affidavit of the law judge's legal assistant stated that she had no recollection of ever receiving correspondence or notice of appeal relative to this case from appellant's counsel or his law office. This, we think, was sufficient to rebut the presumption that a notice of appeal was faxed to the law judge on November 1, 1992.

Moreover, the Commission's decision stated that the Commission's records do not indicate that the facsimile transmission was ever received by the Commission. The Commission stated that a timely transmitted facsimile which is not received

does not differ from a timely mailed document which is not received. The *Williams* v. *Luft Construction Co.* case, *supra*, is then cited by the Commission in support of its holding that the notice of appeal is jurisdictional, and even if timely mailed, unless it is timely received, the Commission has no jurisdiction to consider the appeal. Clearly, the Commission found that the notice of appeal was not received even if it had been properly faxed (mailed), and the evidence supports that decision.

Affirmed.

ROBBINS and ROGERS, JJ., agree.

HOME ICE COMPANY, INC. *v.* BIG "R" ICE COMPANY, INC.

CA 92-920 850 S.W.2d 333

Court of Appeals of Arkansas
Division II
Opinion delivered April 7, 1993

Anderson, Crumpler & Bell, P.A., by: *Ronny J. Bell*, for appellant.

Bridges, Young, Matthews & Drake, by: *Michael J. Dennis*, for appellee.

JOHN E. JENNINGS, Chief Judge. Home Ice Company, Inc., a manufacturer of block ice, sued Big "R" Ice Company, Inc., a retailer, for breach of contract. The trial court held there was no legally enforceable contract between the parties. On appeal Home Ice argues that the trial court erred in so holding. We agree and reverse.

The relevant facts are not in dispute. The president of Home Ice, Allison Schultz, entered into negotiations with Russell Ratliff, who ran Big "R" Ice, for the sale of ice. Schultz had a "Contract of Sale" drafted stating that Home Ice was to sell, and Big "R" Ice was to buy, a minimum of three thousand 300 pound blocks of ice between May 1, 1990, and December 31, 1990, at a price of $7.00 per block. The document further stated:

> 3. *Additional Terms.* Purchaser agrees *not* to sell block ice to the following individuals/businesses during the term of the contract:
>
> (a) Jim Creech or Camden Ice Services, Camden, Arkansas;
>
> (b) Vestal Ice Co., Strong, Arkansas;
>
> (c) Barham Ice Co., Monroe, Louisiana.
>
> Purchaser agrees pursuant to the terms of this contract to purchase and make payment for a minimum of three thousand 300 lb. blocks of ice at the stated price of $7.00 per 300 lb. block whether or not Purchaser takes delivery of the full three thousand 300 lb. blocks of ice. Full payment for the contracted three thousand 300 lb. blocks of ice will be made on or before December 31, 1990.

Ms. Schultz dated the contract May 29, 1990, signed it, and sent it to Big "R" Ice. A few weeks later Schultz received the contract back from the Big "R" Ice, signed by Russell L. Ratliff. Under the "Additional Terms" paragraph, this typed addition appeared: "(d) Larry Heinrich, d/b/a Custom Cubes or any other business." This additional was initialed "RLR." Schultz testified that she was confused by this addition, but that she had no problem with it. After further conversations with Big "R" Ice, Schultz added another handwritten paragraph to the agreement

on June 26th:

> 6. Seller agrees not to sell block ice to Larry Heinrich d/b/a Custom Cube or Larry Heinrich doing business under any other name during the term of this contract.

Schultz initialed this addition and sent the contract back to Big "R" Ice.

The trial court made the following findings of fact:

> Plaintiff Corporation was at all times during pertinent times represented by its sole stockholder, Allison Schultz.
>
> Defendant Corporation was at pertinent times hereto represented by Russell Ratliff, now deceased.
>
> Plaintiff's attorney prepared the typewritten portions of the purported contract which was attached as Exhibit A to the Complaint.
>
> Plaintiff signed the contract May 29, 1990, and mailed it to the Defendant May 29 or May 30, 1990.
>
> Plaintiff received the contract back June 16, 1990, signed by Defendant but modified with the addition of paragraph 3(d).
>
> Plaintiff was "confused" about the addition of paragraph 3(d) by Defendant and recognized the inclusion of 3(d) was most likely a mistake and not representative of the agreement with Defendant.
>
> Discussions ensued and Plaintiff confirmed her thought that paragraph 3(d) was a mistake.
>
> Defendant purchased three loads of ice from Plaintiff between June 16, 1990, and June 27, 1990, at the price mentioned in the proposed contract.
>
> Plaintiff added paragraph 6 as to what she believed Defendant wanted in the contract and mailed it to the Defendant for ratification on or about July 7, 1990.
>
> Defendant never ratified paragraph 6 and never returned the document to plaintiff.
>
> Neither party deleted the erroneous paragraph 3(d) from

the document sued on.

The court then concluded that the evidence was insufficient to establish a contract between the parties. While each of the findings of fact made by the trial court is fully supported by the evidence, we cannot agree with the court's legal conclusion.

Arkansas Code Annotated section 4-2-207 (1987), provides in pertinent part:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract.

Here, the written contract signed by an authorized representative of Home Ice was an offer. It invited acceptance by means of the signature of an authorized representative of Big "R" Ice. *See generally Restatement (Second) of Contracts* § 50 (1979). When Russell Ratliff signed the document on behalf of Big "R" Ice there was a contract between the parties, notwithstanding the insertion of an additional term. Ark. Code Ann. § 4-2-207(1). The additional term, under Ark. Code Ann. § 4-2-207(2), is to be construed as a proposal for an addition to the contract.[1]

■ On the facts before us we hold that there was a contract between the parties and reverse and remand the case to the trial court for further proceedings. We need not and do not determine whether the additional term inserted into the contract by Russell Ratliff, or paragraph 6, subsequently inserted into the contract by Home Ice, became a part of the parties' agreement.

Reversed and remanded.

PITTMAN and COOPER, JJ., agree.

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[1] For the relationship between § 4-2-207 and the so-called "mirror image" rule of the common law *see Restatement (Second) of Contracts* § 59 cmt. a (1979) and Reporter's Note; *Dorton* v. *Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972). *See also Restatement (Second) of Contracts* § 61 (1979) and comment a thereto.

John L. CURETON and Joyce A. Cureton *v.* Charles FRIERSON III

CA 92-527 850 S.W.2d 38

Court of Appeals of Arkansas
Division I
Opinion delivered April 7, 1993

Chet Dunlap, for appellant.

Charles Frierson III, for appellee.

JOHN MAUZY PITTMAN, Judge. John and Joyce Cureton appeal from an order granting appellee, Charles Frierson III, judgment in the amount of $12,000.00, $2,000.00 of which represented an award of attorney's fees. Appellants attack both aspects of the judgment. We reverse the award of attorney's fees but affirm in all other respects.

Appellants sold a parcel or real property to the City of Cash for use in a sewer improvement project financed by the Farmers' Home Administration (FmHA). Appellee was the city attorney for Cash and also served as the closing attorney who issued a title opinion to FmHA, with copies to appellant John Cureton and the Mayor of Cash. The accompanying letter stated in part, "Please note that [a] release[] will have to be obtained from . . . Farmers' Home Administration . . . before this transaction can be completed." In connection with the sale, appellants made

application to FmHA for a partial release of a first mortgage encumbering the property in question. According to the application, appellants were to pay $10,000.00 to FmHA in exchange for the partial release.

On November 6, 1990, appellants conveyed the two-acre tract to the City of Cash by warranty deed. A check in the amount of $10,000.00 was issued by the District Office of the FmHA to the appellants individually. Appellants were to take the check to the County Office of the FmHA and obtain the partial release. It is undisputed that appellants never paid any amount to FmHA and did not obtain the partial release. Appellee contacted appellants several times regarding these failures. On March 13, 1991, appellee wrote appellants for the last time, stating that unless they obtained the release within ten days:

> 1. I will have to personally pay to Farmers Home whatever it takes to get them to release the property since I was responsible for closing the transaction and I trusted you with the money, believing that you had it taken care of.
>
> 2. I will immediately file suit against you to recover what I have to pay Farmers Home plus expenses.

On April 23, 1991, appellee, having failed to secure appellants' performance, paid $10,000.00 to FmHA and obtained the release. This action was filed the next day, with appellee contending that he was entitled to be subrogated to the rights of FmHA. After a trial, the court entered judgment in favor of appellee.

Appellants first contend that the trial court erred in finding appellee subrogated to the rights of FmHA. They contend that appellee, in paying FmHA, was nothing more than a volunteer or intermeddler and, therefore, was not entitled to any rights of subrogation. We cannot agree.

■ Subrogation may be broadly defined as "[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." *Black's Law Dictionary* (5th ed. 1979). It is the machinery by which the equities of one man are worked out through the legal rights of another. *Southern Cotton Oil Co.* v. *Napoleon Hill Cotton Co.*, 108 Ark. 555, 158

S.W. 1082 (1913). Subrogation arises when one not primarily bound to pay a debt or remove an encumbrance nevertheless does so, either from his legal obligation, as in the case of a surety, or to protect his own secondary right. *Blackford* v. *Dickey*, 302 Ark. 261, 789 S.W.2d 445 (1990).

Subrogation will not generally be ordered in favor of a mere volunteer or intermeddler. *Id.*; *Baker* v. *Leigh*, 238 Ark. 918, 385 S.W.2d 790 (1965). Generally speaking, one is a volunteer if, in making payment, he has no right or interest of his own to protect, and acts without obligation, moral or legal. *Blackford* v. *Dickey*, *supra*; *Baker* v. *Leigh*, *supra*. However, the right of subrogation is not necessarily confined to those who are legally bound to make a payment, but extends as well to those persons who pay a debt in self-protection, since they might suffer loss if the obligation is not discharged. *See Baker* v. *Leigh*, *supra*. In 83 C.J.S. *Subrogation* § 25-26 (1953), the text states:

> One who, acting in a representative or fiduciary capacity, incurs and satisfies obligations to the benefit of his principal, is subrogated to the rights of the principal against others primarily liable, and to the rights of the creditor against others primarily liable.
>
> . . . .
>
> Where an agent pays on behalf of his principal, the agent is subrogated to any rights his principal may have to reimbursement from third persons. . . . An agent who is compelled by his mistake or mismanagement of his principal's affairs to pay his principal for a debt or default primarily due by a third person is subrogated to the rights of the principal against that person . . . .

See Murrell v. *Henry*, 70 Ark. 161, 66 S.W. 647 (1902).

Here, appellants received instructions from the County Office of the FmHA as to what would be required from them if they were to obtain a release of the property in question. Appellants accepted funds from the City of Cash, through its lender, the District Office of the FmHA. Appellants failed to use the funds as prescribed to obtain the required release. Although appellant Joyce Cureton testified that appellee "jumped in there and filed suit against me," the record establishes that suit was not

filed until five and one-half months after appellant's receipt of the funds. The record also reflects that appellee represented both FmHA and the purchaser of the property sold by appellants. FmHA was making demands on appellee to secure the release, and appellee had contacted appellants regarding the release on several occasions, but to no avail. We think that this constitutes evidence that appellee was acting in a representative or fiduciary capacity when he paid the $10,000.00 necessary to obtain the release. From our review of the record, we cannot conclude that the trial court clearly erred in finding that appellee was not a mere volunteer or in holding that he was entitled to be subrogated to FmHA's rights against appellants. *See Murrell* v. *Henry*, *supra*; 83 C.J.S. *Subrogation* §§ 25-26. Therefore, we affirm that part of the judgment that represents appellee's entitlement to reimbursement for his payment to FmHA.

Appellants next contend that the trial court erred in awarding appellee a $2,000.00 attorney's fee. Appellants contend that the trial court erred in finding that they raised and presented "no meritorious defense" and, therefore, erred in basing its award of a fee on that finding.

Generally, attorney's fees are not allowed in Arkansas unless expressly authorized by statute. *Transportation Properties, Inc.* v. *Central Glass & Mirror of Northwest Arkansas, Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992); *City of Little Rock* v. *Quinn*, 35 Ark. App. 77, 811 S.W.2d 6 (1991). As noted above, the court awarded the fee on grounds that appellants presented "no meritorious defense." The only statute that we have found authorizing attorney's fees on that particular basis is Ark. Code Ann. § 27-53-402 (Supp. 1991), which deals with small damage claims growing out of motor vehicle accidents. The only statute cited by the parties on the issue of fees, and the one to which the trial court most likely was referring, is Ark. Code Ann. § 16-22-309 (Supp. 1991). That section provides for a fee to the prevailing party in any civil action in which the court finds that there was a *complete absence of a justiciable issue of either fact or law* raised by the losing party or his attorney. In order to find an action or defense to be lacking a justiciable issue:

> the court must find that the action . . . or defense was commenced, used, or continued in bad faith solely for

> purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known that the action . . . or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Ark. Code Ann. § 16-22-309(b).

On appeal, the question as to whether there was a complete absence of a justiciable issue is determined *de novo* on the record of the trial court alone. Ark. Code Ann. § 16-22-309(d); *Elliot* v. *Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991); *Bailey* v. *Montgomery*, 31 Ark. App. 1, 786 S.W.2d 594 (1990). We do not reverse the trial court's finding, however, unless it is clearly erroneous. *Ward* v. *Davis*, 298 Ark. 48, 765 S.W.2d 5 (1989). While appellants' defense in this case was unsuccessful, that fact alone does not amount to a complete failure to raise a justiciable issue of law or fact. From our review of this record, we must conclude that the trial court's finding is clearly erroneous, and we reverse that part of the judgment representing the award of a $2,000.00 attorney's fee.

Affirmed in part; reversed in part.

JENNINGS, C.J., and ROBBINS, J., agree.

Sharon STEVENS *v.* MOUNTAIN HOME SCHOOL DISTRICT

CA 92-621 850 S.W.2d 335

Court of Appeals of Arkansas
Division I
Opinion delivered April 7, 1993

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

Frank Gobell, Public Employee Claims, for appellee.

JOHN B. ROBBINS, Judge. Appellant Sharon Stevens suffered a scheduled injury and appeals from a finding by the Workers' Compensation Commission that she was not entitled to disability benefits during her healing period. We agree with appellant's contention that the Commission erred in its interpretation of Ark. Code Ann. § 11-9-102(5), and reverse and remand.

This case was submitted to the administrative law judge on stipulations and the briefs of the parties. Around 1978 appellant began a part-time job with the Mountain Home School District as a school bus driver. On September 7, 1989, appellant sustained a compensable injury to her left knee when the clutch of the school bus she was operating malfunctioned. At that time, appellant was

earning $162 per week from this part-time job. At the time of her injury, appellant was also working a full-time job with the Federal Housing and Urban Development Agency (HUD), which involved flexible hours and sedentary job duties. Appellant's earnings at HUD were $260 per week. The parties have stipulated that following her compensable injury appellant was unable to continue her work for the school district through her healing period, but continued employment with HUD.

As part of the treatment for her compensable injury, appellant underwent arthroscopic surgery in September of 1989 and August of 1990. Appellant's healing period ended February 7, 1991. Temporary total disability benefits were paid by appellee from the date of the injury until August 8, 1990, when appellee discontinued benefits on the theory that appellant was not disabled because she continued to earn wages at HUD equal to or higher than those she was earning from the school district.

Appellant sought temporary total benefits from August of 1990 until her healing period ended in February of 1991. The administrative law judge found that appellant had failed to prove by a preponderance of the evidence that she was entitled to additional benefits, and the Commission affirmed.

The only issue we address is the Commission's interpretation of Ark. Code Ann. § 11-9-102(5) (1987). In interpreting statutes, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, contemporaneous legislative history, or other appropriate matters that throw light on the matter. *Total Disability Trust Fund* v. *Tyson Foods*, 32 Ark. App. 138, 798 S.W.2d 120 (1990).

Disability is defined as "incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury." Ark. Code Ann. § 11-9-102(5) (1987). Focusing on the "same or any other employment" language, the Commission reasoned that because appellant was earning wages at HUD in excess of what she earned from the part-time bus driving job, she was not disabled under this definition. We find that the Commission erred in its interpretation of "the same or any other employment," and hold that, for the purpose of defining disability, "any other employment"

means any other employment in lieu of the one in which the employee was injured. Since appellant was working both jobs when she was injured, the job with HUD was not "any other employment" undertaken in the place of the part-time bus driving job.

Appellee cites three cases dealing with concurrent employment in support of its contention that the Commission correctly interpreted Ark. Code Ann. § 11-9-102(5): *Marianna School District* v. *Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Curtis* v. *Ermert Funeral Home*, 4 Ark. App. 274, 630 S.W.2d 57 (1982); and *Hart's Exxon Service Station* v. *Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ark. App. 1980). These cases hold that wages from a concurrent employment are not to be considered in computing a claimant's wage rate to determine benefits. In *Hart's*, the court explained the reasoning behind this rule: "The premiums received by the insurance carrier to cover the risk must be determinable. They are generally based on the payroll of the employer. Quite obviously, the risk insured by a policy of workers' compensation [insurance] could not be determined with any degree of accuracy if compensation rates were computed on incomes outside the covered employment." 268 Ark. 961 at 965-66.

In the cases cited above, the issue was not whether a claimant was "disabled," or eligible for benefits, but rather the method to be used in computing the amount of those benefits. Appellant's position does not offend the rationale set out in *Hart's*; she asked only for benefits calculable with reference to her job as a school bus driver. The cases cited by appellee are not applicable to determining whether one is disabled under Ark. Code Ann. § 11-9-102(5).

■ We reverse the Commission's decision that appellant was not disabled as defined by the act, and remand for an award of temporary total disability benefits from August 8, 1990, until her hearing period ended on February 7, 1991, based upon appellant's wages from the appellee.

Appellant also argues that one who has sustained a scheduled injury is entitled to temporary disability benefits during his healing period regardless of whether he is "disabled" as defined in Ark. Code Ann. § 11-9-102(5). Because we are reversing and

remanding for an award of temporary disability benefits, this issue becomes moot and will not be addressed.

Reversed and remanded.

JENNINGS, C.J., and PITTMAN, J., agree.

Troy BRADLEY *v.* STATE of Arkansas

CA CR 92-782 849 S.W.2d 8

Court of Appeals of Arkansas
Division I
Opinion delivered April 7, 1993

Howard M. Holthott, for appellant.

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

PER CURIAM. The appellant's only argument in this case is that the evidence is insufficient to support his conviction. He was tried by the judge without a jury.

In an eleven sentence argument, the State's only response is that we should not consider the issue of the sufficiency of the evidence because appellant failed to make a motion for directed verdict at trial, either at the close of the State's case or at the close of all the evidence. The State relies on Ark. R. Crim. P. 36.21, *Greer* v. *State*, 310 Ark. 522, 837 S.W.2d 884 (1992) and *Collins*

v. *State*, 308 Ark. 536, 826 S.W.2d 231 (1992). Rule 36.21 provides:

> When there has been a trial by jury, the failure of a defendant to move for a directed verdict at the conclusion of the evidence presented by the prosecution and at the close of the case because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict.

In *Igwe* v. *State*, 312 Ark. 220, 849 S.W.2d 462 (1993), the Arkansas Supreme Court held there is no authority for applying the requirement of Rule 36.21 in a non-jury situation and cited several cases of this court in which we held the rule does not apply in non-jury situations. Our supreme court pointed out that *Collins* was an appeal from a judgment which resulted from a jury trial and overruled *Greer* to the extent it required a criminal defendant in a non-jury trial to move for a directed verdict at the conclusion of the evidence to preserve the issue of the sufficiency of the evidence.

Because the State's brief in the instant case was filed before the supreme court's opinion in *Igwe* was filed, we think it is proper to afford the State an opportunity to file a new brief and respond to appellant's argument on the sufficiency of the evidence. This is in keeping with our past procedure where we allowed an appellant to file a new brief when his abstract was insufficient, *Gass* v. *State*, 16 Ark. App. 202, 699 S.W.2d 408 (1985), and where we directed *both* sides to rebrief an issue not mentioned by either side, *Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989).

The State is given 30 days from today to file its brief, and the appellant may file a reply within 20 days thereafter.

Cullen R. HARRIS and Sandra K. Harris *v.* STATE of Arkansas

CA 92-520 850 S.W.2d 41

Court of Appeals of Arkansas
Division I
Opinion delivered April 14, 1993
[Rehearing denied March 3, 1993.]

Thomas R. Newman, for appellant Cullen R. Harris; and *James E. Davis*, for appellant Sandra K. Harris.

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

JOHN MAUZY PITTMAN, Judge. Cullen and Sandra Harris appeal from an order of the Pike County Circuit Court declaring $211,714.00 in currency forfeited to the State pursuant to Ark. Code Ann. § 5-64-505 (Supp. 1991). Appellants contend that the trial court had no jurisdiction at the time of the hearing because the case had been removed to federal court, and that the currency was not subject to forfeiture since it was found during an illegal search. We find sufficient merit in appellants' first argument to require reversal. Therefore, the second argument will not be addressed.

On April 3, 1991, the State filed a petition for forfeiture of $211,714.00, alleging that it was seized along with a quantity of contraband on a farm that appellants occupied near Glenwood, Arkansas. Both appellants were served within a week thereafter and both subsequently filed answers. A trial was scheduled for July 12, 1991. According to the attorneys for appellants, they learned on July 10, 1991, that the court had dismissed several Arkansas residents from the action. Appellants contended that they were residents of Louisiana and that, as a result of those dismissals, complete diversity of citizenship existed. On July 11, 1991, appellants filed a "Notice of Removal of Civil Action" to the United States District Court for the Western District of Arkansas pursuant to 28 U.S.C. § 1446. Copies of the notice were filed with the Pike County Circuit Clerk and served on opposing counsel.

On July 12, 1991, appellants appeared with counsel in circuit court and objected to the court's taking any action on the State's petition. Appellants asserted that the case had been removed to federal court and that the state court lacked jurisdiction to proceed. Over appellants' objection, the circuit court ruled that it would hold the hearing as scheduled but would not issue a ruling unless and until the case was remanded by the federal

court. The case then proceeded to trial. At the conclusion of the State's evidence, the court announced that the State had successfully presented a prima facie case that the currency was subject to forfeiture and that the burden fell on appellants to overcome the presumption of Ark. Code Ann. § 5-64-505. After appellants offered proof, the hearing was adjourned. On July 23, 1991, the State filed a "Motion to Remand" in the United States District Court. On August 26, 1991, that court remanded the case to state court on grounds that appellants' notice of removal had not been timely filed under the federal removal statute. The Pike County Circuit Court thereafter entered an order forfeiting the $211,714.00 to the State.

On appeal, appellants contend that the case was effectively removed to federal court on July 11 and, therefore, that the state trial court lacked jurisdiction over the action at the time of the hearing on July 12. Appellants contend that, although the order of forfeiture was not entered until after the case had been remanded to the state court, the order is void because it is based on evidence taken at a time when the court had no jurisdiction. We agree.

Federal law governs removal proceedings. *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699 (1972). The procedure for removing a case from state to federal court is outlined in 28 U.S.C. § 1446. A defendant desiring to remove an action to federal court must file a notice of removal in the appropriate federal district court, together with a copy of all process, pleadings, and orders served upon the defendant in the action. 28 U.S.C. § 1446(a). The notice of removal of a civil action, as here, shall be filed within the shorter of thirty days from receipt of the initial pleading or thirty days from service of summons. If the case stated by the initial pleading is not removable, however, notice of removal must be filed within thirty days after receipt of a copy of an amended pleading, motion, or order from which it may first be ascertained that the case is one that is or has become removable. 28 U.S.C. § 1446(b). Filing a notice of removal, together with giving written notice thereof to all adverse parties and filing a copy of the notice with the clerk of the state court, "shall effect removal *and the State court shall proceed no further unless and until the case is remanded.*" 28 U.S.C. § 1446(d) (emphasis added). Upon such filings, removal is automatic, jurisdiction of

the federal court is complete, and state court jurisdiction ceases or is suspended. Generally, any judicial action taken by a state court, after removal is effected but before remand by the federal court, is null and void. *See Moreda* v. *Honda Motor Co., Ltd.*, 861 F.2d 1248 (11th Cir. 1988); *South Carolina* v. *Moore*, 447 F.2d 1067 (4th Cir. 1971); *Arkansas* v. *Howard*, 218 F. Supp. 626 (E.D. Ark. 1963); *see also* 29 *Federal Procedure, L.Ed.* § 69.95 (1984); 32B Am. Jur. 2d *Federal Practice and Procedure* § 2512 (1982).

Admittedly, appellants' notice of removal in this case was filed more than thirty days after they were served. However, while it is often stated that the time limits prescribed in § 1446 are mandatory and must be strictly construed, meeting the time requirements is not jurisdictional and is not a prerequisite to removal being "effected." *See Loftin* v. *Rush*, 767 F.2d 800 (11th Cir. 1985); *Fristoe* v. *Reynolds*, 615 F.2d 1209 (9th Cir. 1980); *see also* 1A *Moore's Federal Practice and Procedure* ¶ 0.168[3.-5-7] (1987); 29 *Federal Procedure, L.Ed.* § 69:77 (1984). Here, it is undisputed that appellants filed their notice of removal in federal court, filed a copy with the clerk of the state court, and gave prompt notice of those filings to the State prior to the date of the hearing in state court. We conclude that removal to federal court was thereby effected.

It is also true that the state court's forfeiture order was not entered until after the case was remanded by the federal court. However, that fact is not determinative of whether the state court acted without jurisdiction. In this context, some courts have drawn a distinction between judicial acts and mere clerical or ministerial acts, holding that a court retains power to perform purely ministerial acts. *See Master Equipment, Inc.* v. *Home Insurance Co.*, 342 F. Supp. 549 (E.D. Pa. 1972); *Worsham* v. *Union Life Insurance Co.*, 483 S.W.2d 44 (Tex. Civ. App. 1972). The Arkansas Supreme Court has also drawn a distinction between judicial and ministerial acts in an analogous situation. In *Chester* v. *Arkansas State Board of Chiropractic Examiners*, 245 Ark. 846, 435 S.W.2d 100 (1968), the appellee Board had held a hearing on a Sunday and entered an order based thereon eighteen days later, on a Thursday. The appellant argued that the Board's order was void because Sunday was *dies non jurisdicus*, or a non-judicial day, and no judicial acts could be performed on

Sundays. The supreme court agreed with the appellant and declared the order void because it was based on the Sunday hearing, the holding of which was clearly judicial as opposed to ministerial in nature. In this case, the circuit court's order of forfeiture was based on evidence taken at a time when the court had no jurisdiction. As in *Chester*, the hearing was void and so is the order entered as a result.

The State contends that any error in holding the forfeiture hearing on the date in question was harmless. The State argues that, if another hearing were ordered, the same evidence would be presented and the same decision reached by the trial court. Appellants make several arguments why this is not true in this particular case. We need not decide this issue, however, as we are not convinced that the harmless error rule has any application where, as here, the court's order is void because it has acted without jurisdiction.

Reversed and remanded.

MAYFIELD, J., agrees.

JENNINGS, C.J., concurs.

Michael BROUGH *v.* Carol BROUGH

CA 92-848 850 S.W.2d 337

Court of Appeals of Arkansas
Division II
Opinion delivered April 14, 1993

Harold W. Madden, for appellant.

Mitchell, Blackstock & Simmons, by: *David E. Simmons*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Michael Brough appeals from the trial court's imposition of Rule 11 sanctions against him. We find no error and affirm.

Appellant Michael Brough and appellee Carol Brough Stoneman were divorced in 1982. Appellee received custody of the parties' minor daughter. Appellee remarried in 1991 and moved to California. On March 14, 1992, appellee called appel-

lant and informed him that she had been offered a job in Philadelphia, Pennsylvania, and that she was leaving immediately to investigate the new position. She told him that their daughter would remain with appellee's husband for a few weeks and would then go live with her maternal grandmother in Little Rock for the balance of the school year.

On April 7, 1992, appellant filed a motion for change of custody, requesting an ex parte order granting him temporary custody. The court denied an ex parte change of custody but scheduled an emergency hearing for April 22, 1992.

In his motion, appellant alleged, in part, that (1) he had learned that appellee was currently living in Philadelphia and that her employer and her whereabouts were unknown; (2) appellee had effectively abandoned custody of the minor child; (3) appellee's marriage was unstable and that appellant believed there was a possibility of a pending divorce; and (4) an emergency existed, as appellant believed that once appellee had knowledge of the action, she would remove the child to the State of Pennsylvania, secreting her away from appellant and the jurisdiction of the court.

At the April 22, 1992, emergency hearing, the court denied appellant's motion for an emergency temporary change of custody and ordered that sanctions be imposed upon appellant for his request for an emergency temporary change of custody. Appellant argues that the trial court erred in finding a violation of Rule 11 of the Arkansas Rules of Civil Procedure because appellant's argument was supported by Arkansas case law and an emergency did exist. Appellant also argues that, assuming Rule 11 sanctions were justified, the trial court imposed inappropriate and overly harsh sanctions in this case.

Rule 11 of the Arkansas Rules of Civil Procedure provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded

> in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Whether a violation of Rule 11 has occurred is a matter for the trial court to determine. This determination involves matters of judgment and degree, and in reviewing the trial court's determination, we do not reverse unless the court has abused its discretion. *Ward* v. *Dapper Dan Cleaners and Laundry, Inc.*, 309 Ark. 192, 828 S.W.2d 833 (1992).

The record reflects that appellee had informed appellant of her own plans and the arrangements she had made for their daughter. Though appellant did not know appellee's telephone number in Philadelphia, he was in contact with appellee's husband and her mother and never tried to ascertain her number. The chancellor found that there was no evidence of an abandonment of custody; rather, appellee made very deliberate plans regarding where her daughter would finish out the school year. Appellant made allegations of marital problems between appellee and her husband without ever speaking to either of them about the matter. These allegations were refuted by appellee. The chancellor also found that the evidence was insufficient to show any emergency or need for ex parte relief. She noted that appellant had knowledge of what was going on and did not present all this knowledge to the court in the motions for emergency relief.

Rule 11 sanctions are appropriate if motions presented to the court are not "well grounded in fact" and are "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Considering the allegations contained in appellant's motion for emergency relief and the testimony subsequently

adduced at the hearing, we cannot say the chancellor abused her discretion in finding that appellant's motion had no merit and in imposing Rule 11 sanctions.

Appellant also argues that, assuming sanctions were justified, those imposed by the court were unduly harsh. Rule 11 provides that upon a violation of that rule, the court may impose an appropriate sanction which may include an order to pay the other party her reasonable expenses incurred because of the filing of the motion, and a reasonable attorney's fee. The sanctions which were imposed against appellant included $1,331 for appellee's and her husband's travel expenses to and from the emergency hearing and $989 for attorney's fees. Appellant contends that since appellee's husband was not a party to the action, his expenses should not have been included. However, appellant had made allegations that there were marital problems between appellee and her husband, and it is reasonable to expect the husband's presence at the hearing to refute these allegations. Appellant also argues the attorney's fee was excessive. Upon review of the record, we cannot say the chancellor abused her discretion in determining the nature and amount of the sanctions to be imposed.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

Joe Bryan McGARRAH, a Minor, by John and Sharon McGarrah, His Next Friends *v.* SOUTHWESTERN GLASS COMPANY, et al.

CA 92-657 852 S.W.2d 328

Court of Appeals of Arkansas
En Banc
Opinion delivered April 21, 1993
[Rehearing denied May 12, 1993.]

James R. Filyaw, for appellant.

S. Walton Maurras, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the denial of coverage for medical expenses under an employee benefits plan issued by Southwestern Glass Company, appellee. Appellant contends that the court erred in finding that injuries he received in an automobile accident were not covered under appellee's health plan based on certain exclusions contained in the plan. We agree and reverse.

The record reflects that appellant, who was sixteen years old, attended a party on the night of May 19, 1990. Upon entering the party, those in attendance placed their car keys in a bowl. During the party, appellant consumed twelve to fifteen beers and, although appellant could not recall any of the events which transpired after he had fallen asleep, he was subsequently placed in his truck, on the passenger side, by two other boys at the party. Richard McDonner, who was also intoxicated, drove appellant's truck. McDonner and appellant were subsequently involved in a one-vehicle accident when the truck left the road and struck a tree. Appellant incurred substantial medical expenses as a result of the injuries he sustained in the accident, and a claim for benefits was submitted under his mother's health plan with appellee.

Appellee refused to accept appellant's claim contending that coverage was barred under three separate exclusions found in the contract of insurance. Appellant thereafter filed this suit for declaratory judgment seeking a determination as to his rights

under the plan.

Before we review the merits of the argument raised by appellant in this appeal, we must first address appellee's contention that this appeal is governed, not by Arkansas law, but by federal law under the Employee Retirement Income Security Act of 1974 (ERISA), which requires an arbitrary and capricious standard of review. Appellee bases this argument on the circumstance that the health insurance agreement in question was designated as an employee benefits plan under ERISA.

In the case of *Firestone Tire and Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the United States Supreme Court addressed the question of the appropriate standard of review for actions brought under the Act. In deciding the issue, the Court found guidance in and applied the principles of trust law. The Court held:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under subsection 1132(a)(1)(B) is to be reviewed under a *de novo* standard *unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.*

Id. at 115. (Emphasis supplied.)

In light of the decision in *Firestone*, the question becomes whether the administrator of the plan at issue has been given the discretionary authority to determine eligibility for benefits or to construe the terms of the plan. From our review of the plan, there is no indication that the plan administrator was expressly granted such discretionary authority, and the record is void of any evidence on this issue. In the absence of some proof indicating that the administrator possesses such authority, we simply cannot accept appellee's proposition that its denial of coverage should be reviewed under an arbitrary and capricious standard of review.

In Arkansas, a loss suffered by an insured is a covered one unless it is excluded by an exception. *Shelter Ins. Co.* v. *Hudson*, 19 Ark. App. 296, 720 S.W.2d 326 (1986). Courts are required to strictly interpret exclusions to insurance coverage and to resolve all reasonable doubt in favor of an insured who had no part in the preparation of the contract. *Geurin Contractors, Inc.*

v. *Bituminous Casualty Corp.*, 5 Ark. App. 229, 636 S.W.2d 638 (1982). If there is doubt or uncertainty as to the policy's meaning and it is fairly susceptible to two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. Provisions contained in a policy of the insurance must be construed most strongly against the insurance company which prepared it, and if a reasonable construction may be given to the contract which would justify recovery, it is the duty of the court to do so. *Arkansas Farm Bureau Ins. Federation* v. *Ryman*, 309 Ark. 283, 831 S.W.2d 133 (1992).

The chancellor ruled in favor of appellee based on the following exclusions contained in the plan:

> 18. ANY EXPENSES INCURRED *AS A RESULT OF* SELF-INDUCED OVERDOSE AND/OR ABUSE AND/OR USE OF DRUGS, ALCOHOL AND/OR CHEMICALS, AND CONDITIONS AND/OR TREATMENTS RELATED THERETO.
>
> 27. DRUG ADDICTION OR TREATMENT THEREOF, OR SERVICES AND/OR SUPPLIES FOR INJURIES OR ILLNESSES *ARISING AS A RESULT OF* BEING LEGALLY INTOXICATED OR UNDER THE INFLUENCE OF ANY NARCOTIC (UNLESS PRESCRIBED BY A PHYSICIAN).

In making his ruling, the chancellor stated "[w]hile the Court did have some hesitancy at first in finding a casual connection between the [appellant's] intoxication and the cause of the accident, since the [appellant] was not driving the automobile at the time of the accident, . . . it cannot argue . . . that if the [appellant] had not been intoxicated he would not have been injured." The chancellor found that, "but for" the appellant's intoxication, appellant would not have been harmed as he would not have allowed anyone else to drive his truck or left the party that night.

On appeal, appellant contends that a causal connection must be shown between his intoxication and the resulting injuries in order for the exclusions to apply. He argues that his intoxication was not the proximate cause of the accident, and that there were intervening causes which directly caused the accident which led

to his injuries. In this regard, appellant contends that the causal connection between his intoxication and his injuries was severed when he was placed in his truck, as a passenger, by two other individuals, and when the driver of the truck, who was drunk, wrecked the vehicle. Appellee argues that no causal connection need be shown and that the mere fact that there is intoxication present is sufficient to exclude coverage based on the contract language.

It can be stated as a general rule that in order to avoid liability under a clause excepting liability for injury or death in case of the insured's intoxication, the insurer must establish that the intoxication has some causative connection with the death or injury of the insured. The causal relationship required depends on the language of the exclusion in question. C.T. Drechsler, Annotation, *Clause in Life, Accident, or Health Policy Excluding or Limiting Liability in Case of Insured's Use of Intoxicants or Narcotics*, 13 A.L.R.2d 987 (1950). *See e.g. Cummings* v. *Pacific Standard Life*, 516 P.2d 1077 (Wash. App. 1973).

In reference to the two exclusions in the plan, the issue here is the meaning of the phrases "as a result of" and "arising as a result of". There are no cases in Arkansas in which these precise terms have been interpreted. In the case of *State Farm Mutual Automobile Ins. Co.* v. *LaSage*, 262 Ark. 631, 559 S.W.2d 702 (1978), however, the court held that the term "arising out of" does not mean "proximately caused by." The court, quoting *Manufacturers Casualty Ins. Co.* v. *Goodville Mutual Casualty Co.*, 403 Penn. 603, 170 A.2d 571 (1961), noted that the words "arising out of" are very broad, general, and comprehensive terms. Therefore, the court found the language "arising out of" to encompass a "but for" analysis in terms of the causal connection to be applied.

Unlike the terms in *State Farm Mutual Automobile Ins. Co.* where the term "arising out of" was used, the terms in this policy read "as a *result* of" and "arising as a *result* of." In considering the phraseology of an insurance policy the common usage of terms should prevail when interpretation is required. Legal effect must be given to all the language used. *Continental Casualty Co.* v. *Davidson*, 250 Ark. 35, 463 S.W.2d 652 (1971). The *American Heritage Dictionary* 1054 (Second College ed.

1985) defines "result" as "[t]o occur or exist as a consequence of a particular cause." While the language "arising out of" has been said to encompass a "but for" causal connection, we find that the inclusion of the word "result" in that phrase implies that a more narrow causal connection need be shown.

We do not set aside findings of fact by a chancellor unless they are clearly against the preponderance of the evidence. *Belue* v. *Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992). A finding is clearly against the preponderance of the evidence when we are left with the definite and firm conviction that a mistake has been committed. *American States Ins. Co.* v. *Tri Tech, Inc.*, 35 Ark. App. 134, 812 S.W.2d 490 (1991).

In this case, the chancellor found that appellant was placed in his truck by two individuals without the appellant being aware of the event. Another individual, who was intoxicated, was driving the truck when the accident occurred. Based on these facts, we find the causal connection between appellant's intoxication, the accident, and his injuries to be tenuous at best. In sum, we conclude that the judge's determination that "but for" appellant's intoxication he would not have been injured is far reaching and clearly against the preponderance of the evidence in light of the contract language found here. Appellee could have, by the use of different language, excluded coverage for this type of situation. If only a tenuous causation is the standard to use in interpreting this contract language, it could be argued that a person who is intoxicated and in bed asleep is not covered, even though he may be injured by a falling ceiling.

Reversed and Remanded.

MAYFIELD, J., concurs.

JENNINGS, C.J., and ROBBINS, J., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority opinion. The law, as cited by the majority, is very clear that if there is doubt or uncertainty as to the meaning of an insurance policy and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. It is also very clear to me that the phrases "incurred as a result" and "arising as a result" are fairly susceptible to an interpretation favorable to the insured.

The case of *State Farm Mutual Automobile Ins. Co.* v. *LaSage*, 262 Ark. 631, 559 S.W.2d 702 (1978), cited in the majority opinion, clearly holds that the phrase "arising out of" does not mean "proximately caused by" but means "causally connected with" or a "but for" connection. I agree, however, as the majority holds, that the addition of the word "result" in the policy in this case means that more than a "but for" causal connection must be shown. Moreover, in my view, under a reasonable and common sense meaning of the policy provision "arising as a result of being legally intoxicated," the evidence in this case simply does not bring the appellant's injuries within that exclusion. Although the appellee argues, and the trial judge agreed, that if the appellant had not been drunk, the wreck — and consequently the appellant's injuries — would not have occurred, that is simply not true except in the most ethereal sense. If one holds that "the fatal trespass done by Eve was the cause of all our woe," then one might believe that the appellant's intoxication caused his injuries; however, I do not think that is the causal relationship involved in the policy exclusion in this case.

The appellee says that "under contract law, the parties are free to select their own agreement" and could have provided for "no coverage on even numbered days of the week." Public policy considerations aside, the problem with appellee's argument is that its insurance policy simply did not provide that "an insured who is injured while intoxicated is not covered." At the very least, the policy is fairly susceptible to an interpretation that requires a causal relation as lay people would view it between the intoxication and the injuries. The appellant is entitled to that interpretation, and viewed in that light, the evidence in this case does not support the trial judge's finding that the appellant would not have been injured had he not been intoxicated.

I would also add that I cannot attach any importance to the statement, referred to in the dissenting opinion, in which McDonner said the appellant had "yanked" the steering wheel at the time of the accident. McDonner did not testify, and the appellant (although he admitted that McDonner made the statement referred to) testified that he had no recollection of "yanking" the steering wheel. The trial judge's opinion made no reference to any testimony about "yanking" the steering wheel and the appellee's brief makes no argument that relies on such testimony. I do not

think this out-of-court statement by McDonner is sufficient to support even an implied finding of a causal relationship between appellant's intoxication and his injuries.

This case was filed in chancery court as a declaratory judgment action. I concur in reversing the finding of no liability made by the chancellor and agree that the case should be remanded for a determination of the amount of the recovery to which the appellant is entitled.

JOHN B. ROBBINS, Judge, dissenting. I dissent because I fully agree with the trial court's decision that paragraph 27 of the exclusions section of appellee's benefit plan excluded appellant Joe Bryan McGarrah's medical expenses from coverage. This paragraph excluded:

> 27. DRUG ADDICTION OR TREATMENT THEREOF, OR SERVICES AND/OR SUPPLIES FOR INJURIES OR ILLNESS ARISING AS A RESULT OF BEING LEGALLY INTOXICATED OR UNDER THE INFLUENCE OF ANY NARCOTIC (UNLESS PRESCRIBED BY A PHYSICIAN).

The above language very clearly excludes "injuries . . . arising as a result of being . . . intoxicated . . . ." The majority cites *State Farm Mutual Automobile Ins. Co.* v. *LaSage*, 262 Ark. 631, 559 S.W.2d 702 (1978), as holding that the words "arising out of" encompasses a "but for" standard for determining whether a causal connection exists. With this I would agree. The majority then distinguishes the phrase "arising out of" from the language of the exclusion in paragraph 27 where the words "arising as a result of" appear. This is a distinction without any real difference. To occur as a result or consequence of being intoxicated is merely another form of expressing that a particular event or condition arose out of being intoxicated.

The majority holds that a "but for" test is inapplicable without articulating the test or standard which it contends should have been applied, saying only that "a more narrow causal connection need by shown." It also holds that upon application of this undefined test, the appellant's injuries did not arise as a result of appellant being intoxicated.

Appellant's sixteen-year-old friend, Richard McDonner,

who was driving appellant's truck at the time of the accident had drunk "about fourteen beers" within the immediately preceeding five or six hours. I submit that one would have to be suicidal or drunk to ride as a passenger under these circumstances. There was no evidence that appellant was suicidal, but there was very clear and convincing evidence that he was drunk. This court is holding that appellant's injuries are too far removed from appellant's intoxication to have arisen "as a result of" his intoxication. Certainly, a somewhat more direct connection between appellant's intoxication and resulting injury could be imagined, e.g., impaired equilibrium which results in a fall, or diminished reaction time resulting in the loss of control of a vehicle, as apparently occurred with Mr. McDonner at the time of the accident. Virtually as closely connected, however, are injuries received by an intoxicated person with such diminished judgment that he would ride as a passenger with a driver who just earlier had consumed about fourteen beers.

The majority seems to suggest that appellant's presence in the truck may not be attributed to his intoxication because he was not aware that he was being placed in his truck by the other boys. This rationale defies any logical analysis. The fact he was so intoxicated that he was unaware and unable to resist when his friends placed him in his truck with a drunk driver simply demonstrates the connection between his intoxication and his resulting injuries. Furthermore, the trial court had before it a statement made by appellant that McDonner had said that plaintiff "yanked" the steering wheel at the time of the accident. While appellant testified that he had no recollection of "yanking" the steering wheel, he was intoxicated to such an extent that he had no recollection of the truck ride at all. I respectfully disagree with the majority's conclusion that "the causal connection between appellant's intoxication, the accident, and his injuries [are] tenuous at best." Appellant was not in bed asleep when his injuries occurred. He was drunk, riding as a passenger with a drunk driver, and may have jerked the steering wheel when the vehicle ran off the road and crashed into a tree.

The chancellor's findings of fact were not against, but clearly consistent with, the preponderance of the evidence.

I would affirm the trial court.

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

William CROW *v.* WEYERHAEUSER COMPANY

CA 91-479 852 S.W.2d 334

Court of Appeals of Arkansas
En Banc
Opinion delivered April 21, 1993

Don P. Chaney, for appellant.

Wendell Griffin, for appellee.

PER CURIAM. In an unpublished opinion, handed down on December 23, 1992, we reversed the above case and remanded it to the Workers' Compensation Commission for reconsideration in light of our opinion in *Keller* v. *L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992).

Counsel for appellant has now filed a motion for attorney's fee under the provisions of Ark. Code Ann. § 11-9-715(b) (1987). That provision will apply "if the claimant prevails on appeal" at the "appellate court" level. Thus, the question presented is whether our remand for reconsideration means that the claimant prevailed in his appeal to this court.

We allowed an attorney's fee to the appellee-claimant in *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 37 Ark. App. 85, 827 S.W. 2d 600 (1992), and *Deffenbaugh Industries* v. *Angus*, 39 Ark. App. 93, 837 S.W.2d 297 (1992), but the claimant clearly prevailed in this court in those cases and the dissenting opinion in those cases simply took the position that since review by the Arkansas Supreme Court had been granted in each case, the allowance of attorney's fee for prevailing on appeal should wait until the supreme court rendered its decision.

We also allowed a fee to the appellee-claimant in *Gina Marie*

Farms v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989). The employer had appealed in that case and we dismissed the appeal because there was no final, appealable order in the case, but we allowed a fee to counsel for the appellee-claimant because "the appellee has in fact prevailed as the appeal has been dismissed." 28 Ark. App. at 97, 770 S.W.2d at 684. In the instant case, the claimant was denied permanent disability by the Commission. He appealed to this court, and the matter was remanded for reconsideration. Here, as in *Gina Marie Farms*, the claimant "has in fact prevailed" in this court. Therefore, we allow appellant's attorney the maximum fee of $500.00 to be paid as provided in Ark. Code Ann § 11-9-715 (1987).

The appellant has also asked for costs under Rule 24 of the Rules of the Arkansas Supreme Court and Court of Appeals. These costs are taxed by the Clerk of the courts and should have been set out in a mandate issued by the clerk. Any problem in that regard will be addressed if a motion is filed setting out the details of the problem.

[redacted]