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ARKANSAS METHODIST HOSPITAL *v.* Martha ADAMS and Second Injury Fund

CA 92-1062 858 S.W.2d 125

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

Blackman Law Firm, by: *Bill H. Walmsley* and *Keith Blackman*, for appellant.

Terry Pence, for appellees.

JOHN E. JENNINGS, Chief Judge. The claimant in this workers' compensation case, Martha Adams, sustained an admittedly compensable injury September 25, 1989, while working for Arkansas Methodist Hospital. She was diagnosed as having chronic lumbosacral strain with associated degenerative lumbar disc disease. In 1970, Ms. Adams had herniated a lumbar disc while employed with Emerson Electric. As a result of that injury, a laminectomy was performed.

Dr. Ray Tyrer, a neurosurgeon, eventually gave Ms. Adams an anatomical rating of 7 % to the body as a whole resulting from the September 1989 injury. This rating was accepted by the hospital.

On August 29, 1991, a hearing was held before the administrative law judge and the parties stipulated that Ms. Adams had sustained a 15 % permanent partial disability as a result of the injury with Emerson in 1970. The ALJ found that the claimant had sustained an additional 18 % wage loss disability as a result of the September 1989 injury and held that the Second Injury Fund

was responsible for paying the wage loss disability.

On de novo review, the full Commission also found that Ms. Adams had sustained an 18% wage loss disability but held that the Second Injury Fund had no liability. The hospital appeals the Commission's order, contending (1) that the Commission erred in finding that the claimant had sustained an 18% wage loss disability, and (2) that the Commission erred in absolving the Second Injury Fund from liability. We affirm on the first issue but reverse and remand on the second.

The hospital's first contention is based on the provisions of Ark. Code Ann. § 11-9-704(c) (Supp. 1991). The statute provides that "Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Arkansas Code Annotated section 11-9-522(b) (1987) provides, in part:

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

We think it is clear that the reference to "physical impairment" in Ark. Code Ann. § 11-9-704(c)(1) refers to a determination of anatomical disability as opposed to a loss of a wage earning capacity under § 11-9-522(b). This was at least implied by our opinion in *Reeder* v. *Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992).

In the case at bar the appellant hospital had already accepted the anatomical rating of 7% given by Dr. Tyrer. In determining Ms. Adams' loss in wage earning capacity the Commission correctly considered "the claimant's age, education, work experience, and all other factors reasonably expected to affect her future earning capacity." "Objective and measurable physical or mental findings" are necessary to support a determination of "physical impairment." Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1991). They are not necessary to support a determination of wage loss disability.

As to the hospital's second contention, the Commission held that the Second Injury Fund had no liability under the circumstances. The Commission said:

> The second issue on appeal involves liability for payment of those benefits. The Administrative Law Judge found that the Second Injury Fund was liable for those benefits; we disagree. The requirements for finding Second Injury Fund liability were set forth by the Arkansas Supreme Court in *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). Those requirements are that (1) claimant suffer a compensable injury at his present place of employment; (2) that prior to the injury claimant have a pre-existing disability or impairment; and (3) that the disability or impairment must combine with the recent compensable injury to produce the current disability status. We find insufficient evidence that this claimant had a pre-existing disability or impairment. First, it is important to note that the court has distinguished between "disability" and "impairment". *Weaver* v. *Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990). "Impairment" applies to conditions which are not work-related, and "disability" is defined as incapacity because of injury, to earn the wages which the employee was receiving at the time of the injury. A.C.A. § 11-9-102(5); *Weaver*, *supra*, *Danny McWilliams* v. *Arkansas Highway & Transportation Dept.*, Full Commission opinion filed December 6, 1991 (D801186). Here, there is no question but that the claimant's prior injury was work-related. Therefore, in order for the second requirement in *Mid-State* to be met, there must be evidence that the claimant suffered a loss in wage earning capacity as a result of that injury. *Weaver*, *supra*. We find insufficient evidence that the claimant suffered any loss in wage earning capacity as a result of the prior back injury in 1970. Although the claimant underwent surgery and received a permanent physical impairment rating in an amount equal to 15% the body as a whole as a result of that injury, no medical evidence has been offered indicating that any physical limitations were placed upon claimant as a result of that injury. Further, claimant testified that she

> could not remember any physical limitations being placed upon her. Also, claimant testified that following the injury and surgery, she was able to return to work for Emerson Electric performing the same job. Although claimant subsequently terminated her employment with Emerson Electric, she did so for personal reasons. In addition, it is also significant to note that claimant testified that she had very good results following the surgery in 1970 which allowed her to engage in any activities which she desired.
>
> Given this evidence, as well as a lack of credible evidence to the contrary, we find that claimant did not suffer a loss in wage earning capacity as a result of her 1970 injury. For us to find that claimant suffered a loss in wage earning capacity we would have to speculate that such a loss occurred. Speculation and conjecture, no matter how plausible, are not to be substituted for credible evidence by this Commission. *Dena Construction Co.* v. *Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979). Having found insufficient evidence that the claimant suffered a loss in wage earning capacity as a result of the injury in 1970, the claimant did not suffer from a pre-existing disability or impairment and the second requirement for Second Injury Fund liability has not been met. Therefore, we find that the Second Injury Fund is not liable for benefits in this case.

We cannot agree with the Commission's conclusion. The applicable statute, Ark. Code Ann. § 11-9-525(b)(3) (1987), provides, in pertinent part:

> (3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment

which would have resulted from the last injury had there been no preexisting disability or impairment.

In the case at bar the record contains the order of the administrative law judge approving, on behalf of the Commission, a 1971 joint petition between Ms. Adams and Emerson Electric Company. The order recites: "Based upon the evidence in this case, it is established that the claimant has suffered a 15% permanent partial disability to the body as a whole. . . ." That finding, on behalf of the Commission, necessarily carries with it a determination of loss of earning capacity at the time of the entry of the order. Once the Commission has made a determination of the existence of permanent partial disability, whether as a result of a hearing after the issues have been controverted or on a hearing to approve a joint petition, we do not think that the issue is subject to reexamination in the context of the Second Injury Fund statute. In the language of § 11-9-525(b)(3), Ms. Adams was an employee who had "a permanent partial disability" prior to her 1989 "subsequent compensable injury."

We conclude that the Commission erred in finding that the second requirement of *Mid-State Construction* was not met. Because the Commission did not rule on the third requirement of *Mid-State*, i.e., whether the disability combined with the recent compensable injury to produce the current disability status, we remand the case to the Commission to make that determination.

Affirmed in Part; Reversed and Remanded in Part.

COOPER and ROGERS, JJ., agree.

Kimberly Kay JONES *v.* Brian Keith JONES

CA 93-124 858 S.W.2d 130

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

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Austin & Osborne, by: *Brenda Horn Austin*, for appellant.

John F. Buergler, for appellee.

JOHN MAUZY PITTMAN, Judge. Kimberly Kay Jones appeals from a decree of the Crawford County Chancery Court ordering appellee, Brian Keith Jones, to pay $112.00 per week in child support for the parties' two minor children. Appellant also appeals from that part of the divorce decree awarding appellee the right to claim the children as dependents for income tax purposes. After a hearing in April 1992 regarding temporary support and related issues, the chancellor ordered appellee to pay $78.00 per week in child support based upon appellee's testimony at trial that his approximate net weekly income was $296.68 per week. The chancellor ordered appellee to keep health insurance in effect for the benefit of the children; to be solely responsible for all extraordinary medical and dental expenses of the children; to make all of the mortgage payments on the marital home, the exclusive use of which was awarded to appellant; and to pay the debt on appellant's 1989 Chevrolet Corsica automobile. The chancellor also held that the parties were to equally divide any tax refunds received for 1991.

At the temporary hearing, counsel for appellee stated that, in the past, appellee had received bonuses and overtime pay but, at that time, appellee's current weekly net take home pay was $296.00. Appellant disputed this figure. The court found that, for the purposes of that hearing, appellee was taking home $296.00 per week and, according to the child support chart, was obligated to pay $78.00 per week for the two children.

At the hearing held on August 4, 1992, appellee produced a pay stub for the work week ending July 25, 1992, which showed that appellee's net pay was $383.45. This pay stub indicated that appellee had worked seven hours overtime; had earned $18,035.98 during the year to date; had paid $1,726.60 in federal income tax to date; had paid $1,385.38 in social security tax to date; and had paid $870.37 in state income tax to date. Appellant introduced the parties' 1991 federal income tax return, which showed their total income at $33,996.00 and indicated that a refund was owed to the parties in the amount of $986.00. Also

included in the record is a copy of the 1991 1099-G form submitted by the state, indicating a refund in the amount of $499.00.

Appellant also introduced the following worksheet:

Wage Information from 1991 Federal Tax Return:

$32,945.00	
2,042.00	Social Security withheld
$30,903.00	
1,646.00	State withholding
$29,257.00	
3,692.00	Federal withholding
$25,565.00	
270.00	Insurance deduction
$25,295.00	

$25,295.00 divided by 52 weeks = $486.00 weekly income

$486.00 = $116.00 c/s per week

Wage Information from check stub from week ending 06/20/92:

$15,124.48	Year-to-Date income
1,458.29	Federal withholding
$13,666.19	
1,157.02	FICA
12,509.17	
729.26	State withholding
$11,779.91	
135.00	Insurance deduction
$11,644.91	

$11,644.91 divided by 25 weeks = $465.80 weekly income

$465.80 = $112.00 c/s per week

Appellant also introduced pay stubs from appellee's employer dated June 13, 19, and 20, 1992, indicating bonuses, regular work time, and overtime. Appellant testified that the $296.00 net take-home pay that appellee had claimed to make at the temporary hearing was not correct; she stated that his average weekly take-home pay, based on her own personal knowledge from his earnings in 1991, amounted to $486.00 per week. She testified that the mortgage payment was $554.00 per month; the

insurance on the house was $62.00 every three months; and the annual real property taxes amounts to $496.00.

Appellee testified that, although he had been working five and six days per week, his work schedule was not predictable and, on some days, he was sent home early and ended up working less than forty hours per week. He stated that, at the time of the hearing, he was working a short week and had been scheduled for four days each week since the fall of 1991. He stated that he had been making the house payment and appellant's car payment, and had been forced to borrow money from his parents in order to meet his child support obligations. He testified that his net pay the week before the hearing was $383.00 and that his average net pay per week was $465.80.

In the final decree entered October 16, 1992, the chancellor awarded custody of the two children to appellant and gave reasonable visitation with the children to appellee. The chancellor ordered appellee to pay $112.00 per week (the chart amount for weekly take-home pay of $460.00) in child support through a wage assignment. The chancellor also held that appellee must provide health insurance for the children and that, as soon as it is available at her place of employment, appellant must also do so. The chancellor ordered the parties to share extraordinary health expenses for the children not covered by either party's health insurance. The chancellor also held that appellee shall be entitled to claim the two children as dependents for income tax purposes. In the decree, the chancellor ordered the parties to sell their marital home within ninety days and ordered each party to make one-half of the mortgage, taxes, and insurance payments on the house.

On appeal, appellant first argues that the chancellor erred in determining the amount of child support at both hearings.

The controlling law on what is required to determine the amount of child support is set forth in Ark. Code Ann. § 9-12-312(a)(2) (Supp. 1991):

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a refutable presumption for the

> award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the support chart, shall the presumption be rebutted.

"Reference to the chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by written findings stating why the chart amount is unjust or inappropriate." *Black* v. *Black*, 306 Ark. 209, 214, 812 S.W.2d 480, 482 (1991). The chancellor, in his discretion, is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case. *Waldon* v. *Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991). The presumption may be overcome if the chancellor determines, upon consideration of all the relevant factors, that the chart amount is unjust or inappropriate. *Id.* The relevant factors include food, shelter, utilities, clothing, medical and education expenses, accustomed standard of living, insurance, and transportation expenses. *Id.* The amount of child support lies within the sound discretion of the chancellor, and we will not disturb the chancellor's finding absent an abuse of discretion. *Grable* v. *Grable*, 307 Ark. 410, 821 S.W.2d 16 (1991).

At the temporary hearing, appellee testified that his net take-home pay was approximately $296.00 per week. The chancellor agreed and awarded temporary child support according to the chart based on this amount. On appeal, appellant argues that this fact was shown to be untrue by the evidence produced four months later at the final hearing. Chancery cases are reviewed *de novo* on appeal, and the appellate court will not disturb the chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence, and because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court will defer to the chancellor's superior opportunity to assess credibility. *Appollos* v. *Int'l Paper Co.*, 34 Ark. App. 205, 808 S.W.2d 786 (1991); Ark. R. Civ. P. 52(a).

We note that the evidence produced at the final hearing

in August related to the parties' 1991 income and also showed appellee's weekly and year-to-date earnings through the summer of 1992. This evidence showed a greater average amount of take-home pay than the amount to which appellant testified in April 1992 at the first hearing. Nevertheless, the temporary hearing occurred four months before the final hearing, where evidence showed appellee to have a higher take-home pay. There was evidence to support the chancellor's finding in the temporary order, and we cannot say that this finding is clearly against the preponderance of the evidence.

We also note that, in the temporary order, appellee was not only ordered to pay child support according to the family support chart, based upon his net income as found by the chancellor, but he was also ordered to make the entire mortgage, taxes, and insurance payments on the marital home where appellant and the children continued to live. Additionally, he was ordered to provide health insurance and medical care for the children and to make appellant's car payment. Even if appellant had shown that the finding as to appellee's net take-home pay in April 1992 was clearly against the preponderance of the evidence, we would not reverse on this issue in light of the substantial additional payments that appellant made on behalf of the children during that time period. Error is no longer presumed to be prejudicial; unless the appellant demonstrates prejudice, we do not reverse. *Hibbs* v. *City of Jacksonville*, 24 Ark. App. 111, 749 S.W.2d 350 (1988).

Appellant also argues in her first point on appeal that the chancellor did not properly determine appellee's weekly take-home pay, because he did not include in appellee's income the 1991 tax refund received by appellee in 1992 and the monetary value of the two dependent exemptions. First, we note that, at most, appellee was entitled to only one-half of the income tax refund for the year 1991. Additionally, appellant produced no evidence that appellee would be entitled to a refund for the tax year 1992, when the decree establishing child support was entered, or that appellee's receipt of a tax refund would be a recurring event. The burden is upon the appellant to bring up a record sufficient to demonstrate that the trial court was in error, *Smith* v. *Smith*, 32 Ark. App. 175, 798 S.W.2d 442 (1990), and, where the appellant fails to meet this burden, the appellate court

has no choice but to affirm the trial court. *McLeroy* v. *Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987). Appellant has cited, and we have found, no Arkansas case holding that prior tax refunds paid months before a divorce hearing must be included in income for purposes of calculating child support to be paid in the future. We therefore find no error in the chancellor's refusal to include appellee's receipt of one-half of the 1991 income tax refund in appellee's income.

Appellant also argues that, because appellee would receive a benefit from claiming the children as dependents for income tax purposes, this benefit should be added to his net income for purposes of determining child support. Appellee responds to this argument by stating that, if he cannot claim the children as dependents, his weekly tax withholding will go up and his net take-home pay will go down, thereby warranting a reduction in his child support obligation according to the family support chart. We note that appellant introduced no evidence to show the actual monetary value of these exemptions to appellee and, therefore, failed to bring up a record sufficient to demonstrate error in this regard. *See Smith* v. *Smith*, *supra*. Accordingly, we affirm the chancellor on this issue.

In her second point on appeal, appellant argues that the chancellor erred in awarding appellee the right to claim the children as dependents because this matter was not raised by either party in the pleadings or testimony. We disagree. In *Freeman* v. *Freeman*, 29 Ark. App. 137, 778 S.W.2d 222 (1989), we held that the right to claim the parties' children as tax exemptions is accurately characterized as a matter of child support. In his complaint, appellee requested that he be ordered to pay child support according to the family support chart if appellant was awarded custody of the children; in her counterclaim for divorce, appellant also requested that appellee be ordered to pay child support according to the family support chart. Clearly, the issue of the right to claim the children as dependents for tax purposes was within the issues at trial and could be addressed by the chancellor in the final decree.

In her third point on appeal, appellant argues that the chancellor erred in awarding appellee the right to claim the children as dependents for income tax purposes because he lacked

authority to award the federal income tax dependency exemptions to appellee, the non-custodial parent, under 26 U.S.C.A. § 152(e) (Supp. 1993), which provides in subsections (1) and (2) as follows:

> (e) Support test in case of child of divorced parents, etc.-
>
> (1) Custodial parent gets exemption.-Except as otherwise provided in this subsection, if-
>
> (A) a child (as defined in section 151(c)(3)) receives over half of his support during the calendar year from his parents-
>
> (i) who are divorced or legally separated under a decree of divorce or separate maintenance,
>
> (ii) who are separated under a written separation agreement, or
>
> (iii) who live apart at all times during the last 6 months of the calendar year, and
>
> (B) such child is in the custody of one or both of his parents for more than one-half of the calendar year, such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the "custodial parent").
>
> (2) Exception where custodial parent releases claim to exemption for the year.-A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if-
>
> (A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.

Appellant argues that, under this code section and the Supremacy Clause of the United States Constitution, state courts are without authority to grant the non-custodial parent the right to claim the children as tax exemptions. Appellant argues that, in granting appellee these exemptions, the chancellor exerted the power of taxation, which has been preempted by the federal government and is not subject to state control.[1]

Appellant cites *Blanchard* v. *Blanchard*, 261 Ga. 11, 12-13, 401 S.E.2d 714, 717 (1991), in support of her argument that the state courts lack authority to award non-custodial parents the right to claim the children as tax exemptions. There, the Georgia Supreme Court held that, since state courts cannot exert the power of taxation, they cannot award the right to claim the exemption to the non-custodial parent. The majority of state courts which have decided this issue, however, have held that state courts may still make this determination. *See Monterey County* v. *Cornejo*, 53 Cal.3d 1271, 812 P.2d 586, 592, 283 Cal. Rptr. 405 (1991). In *Serrano* v. *Serrano*, 213 Conn. 1, 6, 566 A.2d 413, 415-16 (1989), the Connecticut Supreme Court explained:

> Our analysis of whether state law frustrates the purpose of § 152(e) must start from certain well established principles of federal law. The United States Supreme Court has repeatedly held that, because the field of

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[1] Appellant has not argued that, in granting appellee these exemptions, the chancellor violated the terms of the Arkansas Supreme Court's per curiam order, *In re: Guidelines for Child Support Enforcement*, 305 Ark. 613, 804 S.W.2d XXIV (1991). In that per curiam, the supreme court stated: "Allocation of dependents for tax purposes belongs to the custodial parent unless the parties otherwise agree. See Sec. 152(e) of the Internal Revenue Code." 305 Ark. at 617-18, 804 S.W.2d at XXVIII. Because, in regard to this point on appeal, appellant has made no argument concerning state child support guidelines, we need not decide the effect of this per curiam on this appeal.

> domestic relations has traditionally been regulated by the states, the standard for demonstrating a preempting conflict between federal law and a state domestic relations provision is high: "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted. *Wetmore* v. *Markoe*, 196 U.S. 68, 77, [25 S.Ct. 172, 175, 49 L.Ed. 390] (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.

There, the court noted that the 1984 amendments to the Internal Revenue Code set forth in 26 U.S.C.A. § 152(e) were adopted by Congress to ease the Internal Revenue Service's administrative burden:

> [S]tate courts have been allocating the exemption for decades. Moreover, as the defendant concedes, state courts developed the practice long before the Internal Revenue Code made explicit reference to it by adopting the first version of § 152(e) in 1967. In light of the great deference accorded to state courts in the area of domestic relations, we are persuaded, as the courts in a significant number of jurisdictions have held . . . that Congress would have explicitly prohibited states from allocating the exemption if it had intended to do so.
>
> . . . [T]he purpose of the 1984 amendments was to extricate the Internal Revenue Service from the burdensome administrative function of determining the value of the child support contributions of the parties. The amendments accomplished this purpose by eliminating the exceptions that required a determination of how much the parties contributed. Thus, under the current version of § 152(e), the Internal Revenue Service no longer need determine whether a noncustodial parent to whom a state court has allocated the exemption has made child support contributions worth at least $600. In addition, the amend-

> ments eased the administrative burden on the Internal Revenue Service by requiring that a noncustodial parent claiming the exemption attach a declaration from the custodial parent promising not to claim the exemption, thereby ensuring that both parents could not simultaneously claim the exemption.
>
> The trial court's order in no way frustrates the congressional objective of eliminating the involvement of the Internal Revenue Service in disputes concerning the allocation of the dependent child exemption. Under the order, the allocation is made without any involvement by the Internal Revenue Service. The trial court's allocation imposes no cost on the federal government but rather facilitates the goal of administrative certainty by requiring that the defendant execute a declaration indicating that she will not claim the exemption. Since we find no conflict between § 152(e) and the trial court's order, we conclude that § 152(e) is not preemptive of the practice of allocating the dependent child exemption.

213 Conn. at 9-11, 566 A.2d at 417-18 (citations omitted).

We hold that the Supremacy Clause does not prohibit state courts from providing for the allocation of dependency tax exemptions so long as they do so through the exercise of their contempt powers. In making these determinations, chancellors may, without offending federal law, direct the custodial parent to sign a written declaration that he or she will not claim their children as dependents for tax purposes. *See* 26 U.S.C.A. § 152(e)(2). Although such orders by the chancellor cannot change the allocation of dependency exemptions as far as the Internal Revenue Service is concerned, compliance with such orders by custodial parents may be enforced through the chancery courts' contempt powers.

Although we have the power to decide chancery cases *de novo* on the record before us, we may, in appropriate cases, remand such cases for further action. *Black* v. *Black*, 306 Ark. at 215, 812 S.W.2d at 483. We think that this case should be remanded for the chancellor to reconsider the dependency tax exemption issue. If, on remand, he deems it appropriate, the chancellor may, in keeping with the Internal Revenue Code,

direct appellant to sign the necessary written release. If the chancellor decides on remand, however, not to require appellant to release the exemptions, he must consider the fact that the loss of the dependency exemptions would, most likely, cause appellee to be liable for more income taxes and would necessitate increased withholding of federal and state taxes from his pay checks. Since that would reduce his take-home pay, an appropriate adjustment of his child support obligation would be in order. Therefore, the chancellor may take evidence regarding the reduction in appellee's take-home pay if the chancellor decides not to order appellant to release the dependency exemptions to appellee.

Affirmed in part; remanded in part.

MAYFIELD and ROBBINS, JJ., agree.

Sheldon Paul MANGIAPANE *v.* STATE of Arkansas

CA CR 92-1079 858 S.W.2d 128

Court of Appeals of Arkansas
En Banc
Opinion delivered July 7, 1993
[Rehearing denied August 25, 1993.*]

*Mayfield, J., would grant rehearing.

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

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

JOHN MAUZY PITTMAN, Judge. Sheldon Paul Mangiapane attempts to bring this appeal from his conviction of theft by receiving. We do not address the argument raised by appellant because we conclude that he failed to perfect his appeal under Ark. R. App. P. 4.

Appellant was charged with theft by receiving and was found guilty after a jury trial on June 18, 1992. Appellant filed his notice of appeal on June 22, 1992, at 8:37 a.m. However, the judgment of conviction was not entered until 8:45 a.m. on June 22.

Rule 4(a) of the Arkansas Rules of Appellate Procedure provides that "a notice of appeal shall be filed within thirty (30) days *from* the *entry* of the judgment, decree, or order appealed from." (Emphasis added.) A judgment is entered within the meaning of Rule 4 when it is filed with the clerk of the court in which the claim was tried. Ark. R. App. P. 4(e). A notice of appeal filed prior to entry of a final judgment is premature and ineffective. *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992). These rules apply equally to criminal cases. *In re Belated Criminal Appeals*, 313 Ark. 729, 856 S.W.2d 9 (1993); *see Watson* v. *State*, 313 Ark. 409, 856 S.W.2d 1; *Tucker* v. *State*, 311 Ark. 446, 844 S.W.2d 335 (1993); *see also Giacona* v. *State*, 311 Ark. 664, 846 S.W.2d 185 (1993). They also apply to render ineffective even a notice of appeal filed earlier on the same day as the judgment being appealed from. *See Kelly* v. *Kelly*, *supra* (the supreme court overruled that part of *State* v. *Joshua*, 307 Ark. 79, 818 S.W.2d 249 (1991), which had held that a notice of appeal filed sixteen minutes before entry of the order appealed from was timely because treated as though filed when the

judgment was entered); *see also Kimble* v. *Gray*, 40 Ark. App. 196, 842 S.W.2d 473 (1992), *aff'd*, 313 Ark. 373, 853 S.W.2d 890 (1993) (a notice of appeal filed on, but before the expiration of, the day on which a new trial motion was deemed denied is premature and ineffective under Rule 4(c)).

The timely filing of a notice of appeal is, and always has been, jurisdictional. Whether the question is raised by the parties or not, it is not only the power, but the duty, of a court to determine whether it has jurisdiction of the subject matter. *Hawkins* v. *State Farm Fire and Casualty Co.*, 302 Ark. 582, 792 S.W.2d 307 (1990); *Giacona* v. *State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992). Because appellant's notice of appeal was filed prior to the entry of the judgment of conviction, we dismiss the appeal. Appellant, of course, may petition the Arkansas Supreme Court for permission to file a belated appeal. *See* Ark. R. Crim. P. 36.9; *Giacona* v. *State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992).

Dismissed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I want to voice my disagreement with the result reached by the majority opinion in this case. I understand that the Arkansas Supreme Court has changed the rule that allowed a notice of appeal, filed after the judgment was rendered, to become effective at the time the judgment is entered.

I also understand that this court is bound by the decision of our supreme court.

But I do not understand that the judges of this court are obligated to search the record to determine whether the notice of appeal was filed before or after the judgment was entered. The abstract and briefs in this case do not reveal that the notice of appeal was filed before the entry of the judgment, and the issue is not raised by the appellee.

Even though the timely filing of a notice of appeal is jurisdictional, and we have the duty to determine whether we have jurisdiction of the appeal, I know of no requirement that we must search the record to see if the notice of appeal was timely

filed. In fact, the Arkansas Supreme Court has said that we have no such duty — for good reason.

> In effect, appellants ask all seven members of this court to examine the entire will which is attached to the single transcript as an exhibit. "[F]or a hundred years we have pointed out, repeatedly, that there being only one transcript it is impractical for all members of the court to examine it, and we will not do so." *Zini*, 289 Ark. at 344, 711 S.W.2d at 478. Further, even though our review of this case is *de novo*, our review is on the record as abstracted, not upon the transcript. *Id.*

Mills v. *Holland*, 307 Ark. 418, 820 S.W.2d 63 (1991).

I dissent.

ARKANSAS STATE HIGHWAY COMMISSION *v.* LEE WILSON AND COMPANY, INC.

CA 92-376 858 S.W.2d 137

Court of Appeals of Arkansas
En Banc
Opinion delivered July 7, 1993

Robert L. Wilson, Chief Counsel; *Philip N. Gowen*, and *Charles Johnson*, for appellant.

Gibson & Rhodes, by: *Mike Gibson* and *Richard Rhodes*, for appellee.

JAMES R. COOPER, Judge. The appellant, the Arkansas State Highway Commission, appeals from a judgment awarding the appellee, Lee Wilson and Company, Inc., $45,000.00 as compensation for a taking of a portion of its lands by eminent domain. On appeal, the appellant argues that the trial court erred in denying a motion to strike the testimony of the appellee's value witness.

The appellant brought this action to condemn 1.16 acres in the southeast quadrant of the appellee's property which is located at the intersection of Interstate 55 and Highway 181 in Mississippi County. The appellant also sought controlled access on 69 feet in the southwest quadrant and on 438 feet in the northeast quadrant which fronted Highway 181. The access control fence built on the northeast quadrant of the property reduced its previous highway frontage from 463 feet to a 25-foot access point. The appellee based its damages on this reduction of access.

At trial, George Lease testified on behalf of the appellee. Mr.

Lease testified that of the 420 acres of land owned by the appellee only the 3.21 acres in the northeast quadrant which fronted Highway 181 had commercial value. He arrived at 3.21 acres by considering the 463 feet of frontage to a depth of 300 feet. Mr. Lease testified that in his opinion, based on comparable sales, the 3.21 acres had a value before the construction of the fence of $104,175.00, or approximately $32,000.00 per acre. He stated that with the fence in place the fair market value of the 3.21 acres would be $10,000.00, resulting in damages to the appellee in the amount of $94,175.00. He testified that he looked at the whole property. He stated that he did not appraise the rest of the property because he did not think those acres would have any commercial development possibilities. He stated the highest and best use of the remainder of the parcel was agricultural and that the fence would not affect the value of that land. The appellee owned approximately 3.16 acres of land in the southeast quadrant, 1.16 acres of which was condemned by the appellant. Mr. Lease testified that the remaining land in this quadrant was subject to flooding and that he did not consider it as commercially viable as the land across the highway.

Counsel for the appellant moved to strike Mr. Lease's value testimony for failure to make a before and after appraisal of the appellee's entire property and for his failure to consider the impact of the construction project on the value of the remaining lands. On denying the appellant's motion, the trial court stated:

> I'm going to deny the motion. It seems to me that to consider 420 acres would be a bit ridiculous in this situation. The only property we are talking about is the approximate four acres that were involved.
>
> I'm going to allow your expert to testify as to the diminution of the 420 acres if that's what you choose to do, and the jury — you can point out to the jury that their witness only testified to a certain portion of it.
>
> It's going to be my ruling that he was competent to testify and that you didn't object to his expertise. That he did testify to the fair market value of the property and stated his reasons. And that's sufficient. And that's something the jury can weigh and assess, and I will allow each of you to argue to the jury and persuade the jury that the testimony

> for whichever point you are taking is either sufficient or insufficient. It would be a question of weight for the jury and not admissibility.

Thereafter, Mr. Bob Colford, a real estate appraiser for the appellant, testified that he considered roughly 425 acres for his appraisal. Of that acreage, he considered five acres to be commercial. He stated that three of the acres were in the northeast quadrant and the remaining two were in the southeast quadrant. He considered the rest of the parcel to be agricultural and valued it at $1,000.00 an acre. He testified that the before value of the commercial land was $25,000.00 an acre, although he agreed that Mr. Lease's before value of $32,000 an acre was pretty accurate. In his opinion, the total value of the property before the taking was 420 acres of agricultural land at $1,000.00 an acre and five acres of commercial property at $25,000.00 an acre for a total value of $545,000.00. He testified that the five acres of commercial property had appreciated in value to $35,000.00 an acre after the construction. Therefore, in his opinion, the value of the property after the highway construction and taking was $594,850.00, which exceeded the before value. He stated that the excess in value represented benefits or enhancements to the property as a result of the construction of the highway project.

The appellant argues that the trial court erred in not striking Mr. Lease's value testimony because he testified to the value of 3.21 acres in the northeast quadrant and made no appraisal of the remaining lands in the other quadrants, particularly the value of the 1.16 acres which was acquired by the appellant in the southeast quadrant. The appellant suggests that, by not appraising the land in the southeast quadrant, the appellee avoided having to consider enhancement to the property.

When the sovereign exercises its right to take a portion of a tract of land in eminent domain cases, the proper way to measure just compensation is by the difference in the fair market value of the entire tract immediately before the taking and the fair market value immediately after the taking. *Property Owners Improvement Dist.* v. *Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992). We find Mr. Lease's testimony consistent with this rule. In fact, the testimony of both expert witnesses was

actually very similar. Mr. Lease testified that he considered 3.21 acres in the northeast quadrant of the parcel to be of commercial value. Mr. Colford also found the three acres in this quadrant to be of commercial value. They disagreed as to two acres in the southeast quadrant. In his opinion, Mr. Lease found this area did not have commercial value because it was subject to flooding. Mr. Colford disagreed and considered five acres in total to be commercially viable. However, both agreed that the remaining acreage was agricultural and that its value was unaffected by the highway project. The difference is that Mr. Colford calculated this agricultural land in his estimate thereby adding $420,000.00 (420 acres at $1,000.00) to his before and after value. Even if Mr. Lease had done the same, it would not have had an effect on his estimate of the appellee's damages. We do not require testimony be given in exact mechanical fashion. *Arkansas Louisiana Gas Co.* v. *James*, 15 Ark. App. 184, 692 S.W.2d 761 (1985). A motion to strike is a matter largely within the sound discretion of the trial judge and we cannot hold that the trial court erred in refusing to strike Mr. Lease's testimony. *Property Owners Improvement Dist., supra.*

The appellant also advances two other arguments. First, he argues that the jury instructions were confusing and misleading to the jury because, while the trial court refused to strike the testimony of the appellee's expert, it instructed the jury to consider the fair market value of the entire 420 acres before and after the taking, considering the highway facility completed and permanently in place in accordance with the construction plans, to arrive at the amount of just compensation. We note that this argument has not been preserved for appeal because this issue was not presented or decided at the trial level and we do not consider issues raised for the first time on appeal. *Webb* v. *Thomas*, 310 Ark. 553, 837 S.W.2d 875 (1992). Furthermore, we find that the appellant suffered no prejudice since the trial court instructed the jury to determine the amount of just compensation by the method argued by the appellant. We will not reverse absent a showing of prejudice. *Webb, supra.*

He also argues that Mr. Lease's value testimony was contrary to Ark. Code Ann. § 27-67-316(f) (1987), which directs the court or jury to consider any benefits to the remaining land arising from the location of the highway. The appellant

asserts that this statute imposes an obligation on appraisers to do likewise. However, appellant is also raising this argument for the first time on appeal, and therefore, it will not be considered by the appellate court. *Cox* v. *Bishop*, 28 Ark. App. 210, 772 S.W.2d 358 (1989).

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I must respectfully dissent from the opinion of the majority in this case. The rule in determining just compensation where there is a partial taking by the sovereign in the exercise of its right of eminent domain is the difference in the fair market value of the entire tract immediately before the taking and the fair market value of the remaining land immediately after the taking. The reason for that rule was recently explained by this court in *Property Owners Improvement District* v. *Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992), where we said:

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

40 Ark. App. at 178, 843 S.W.2d at 866.

This rule has been well established in condemnation cases filed by the Arkansas State Highway Commission to acquire land for highway purposes. *See Arkansas State Highway Commission* v. *Fox*, 230 Ark. 287, 322 S.W.2d 81 (1959); *Barnes* v. *Arkansas State Highway Commission*, 10 Ark. App. 375, 664 S.W.2d 884 (1984).

In the instant case, it is admitted that the appellee owns 420 acres of land on which are located all four quadrants of the

intersection of Highway 181 and Interstate Highway 55 in Mississippi County, Arkansas. The State Highway Commission filed this suit to take 1.16 acres of appellee's land lying in the southeast quadrant of the intersection; to impose controlled access on 69 feet lying in the southwest quadrant; and to impose controlled access on 438 feet in the northeast quadrant.

The appellee's only value witness testified to the before and after value of only 3.21 acres of the land taken. That tract is in the northeast quadrant of the intersection. The witness gave no testimony as to the before and after value of the appellee's land lying in the other three quadrants — not even as to the 1.16 acres taken from the land in the southeast quadrant. Also, he did not testify as to the before and after value of the appellee's 420 acres. The appellant moved to strike the testimony of this witness because he testified to the before and after value of only 3.21 acres of the land taken and not to the before and after value of the whole 420 acres. The trial court denied the motion.

It is the appellee's argument, accepted by the majority of this court, that the trial court's ruling was correct. I do not agree. The rule of law applicable to this situation is very clear, and the reason for the rule is very clear. Appellee's witness chose the 3.21 acres because that area, bounded by the 463 feet of controlled access, plus a depth of 300 feet, was all of the property affected that the witness thought had commercial value.

The problem with the testimony of this witness is that it avoided the rule that allows the state credit for any enhancement in value resulting from the taking. This credit is even provided by statute. *See* Ark. Code Ann. § 27-67-316(f)(1987).

In the *Fox* case, *supra*, the expert witness for the landowners testified that the "total" amount of damage sustained by the taking of a portion of their land was $20,800.00, but refused to give the before and after figures. The Arkansas Supreme Court found there was "no substantial evidence" to support a judgment for more than $10,250.00, which was the highest before and after difference testified to by the witnesses for the State Highway Commission. And in *Lindsey* v. *Forrest City*, 259 Ark. 743, 536 S.W.2d 305 (1976), the court held that the appraisal of the only value witness offered by the city should have been stricken because he "did not use a permissible method of fixing just

compensation." The court said the witness admitted he determined just compensation by valuing the 121 acres taken for a oxidation pond at $350 per acre and had not determined the value of the whole 690-acre farm.

In the instant case, the court should have stricken the testimony of the appellee's value witness because he did not testify as to the before and after value of the appellee's entire tract of 420 acres. The jury was entitled to this information to ensure that the State would get credit for any enhancement of the entire tract. Obviously, the witness did not have to attribute any enhancement to the remaining land but he should not have been permitted to side step the issue in contravention of the long-established case law of this state.

I would reverse and remand for a new trial.

Warren MORRIS and June D. Morris, Husband and Wife *v.* M. James MEDIN, et al. and Howard Lloyd Muirhead and Marilyn J. Muirhead, *Intervenor Appellees*

CA 92-911 858 S.W.2d 142

Court of Appeals of Arkansas
En Banc
Opinion delivered July 7, 1993
[Rehearing denied August 18, 1993.*]

*Robbins, J., would grant rehearing.

Burrow & Sawyer, by: *Stephen P. Sawyer*, for appellants.

Williams, Schrantz, Croxton, Boyer, Rhoades, Shafer & Cochran, P.A., by: *R. Douglas Schrantz*, for appellees.

Matthews, Campbell & Rhoads, P.A., by: *David R. Matthews*, for intervenors.

JAMES R. COOPER, Judge. This appeal concerns the process to be used in the election of the Board of Directors of the Bella Vista Property Owners Association (POA). The chancellor ruled that all members of the Bella Vista Property Owners Association are entitled to only one vote for each lot owned in the election for the Board of Directors. For reversal, the appellants assert that the chancellor erred in interpreting the Declaration and Protective Covenants, Articles of Incorporation, and Bylaws of the POA, and contend that each member of the POA should have one vote in the election for the Board of Directors.

The appellants are owners of a lot in Bella Vista Village in Benton County. As lot owners, they are members of the POA. The appellees are the former President and General Manager, and Board of Directors of the POA. The intervenor appellees are husband and wife who own separate lots in their individual capacities.

Bella Vista Village, originally incorporated as the Bella Vista Country Club, is a nonprofit corporation organized under the laws of the State of Arkansas. It is a recreational retirement community developed by Cooper Communities, Inc., formerly known as Cherokee Village Development Company, Inc., consisting of approximately 37,000 lots or living units, approximately 4,000 of which are improved. The POA owns and operates recreational facilities consisting of golf courses, swimming pools, tennis courts, clubs and restaurants, among other facilities and common properties. The POA also provides water and sewer facilities, fire protection, emergency services, and police protection through the Benton County Sheriff's Office.

Each lot or living unit in Bella Vista is assessed $168.00 per year or $14.00 per month, irrespective of the number of owners listed on the deed. The POA derives its revenue from these property owner assessments as well as user fees for the use of the facilities.

Membership in the POA requires ownership of a lot or living unit. Evidence of ownership must be registered with the POA to acquire membership privileges. Only two persons are permitted full membership privileges per lot; however, membership cards are issued in the name of the first person on the deed of ownership. If they meet certain criteria, dependents of persons with full membership privileges may obtain a dependent membership.

The record reveals that historically the POA sent a ballot to the first name appearing on the deed for each lot or living unit. The elections were conducted on a one lot, one vote basis, even if members owned multiple lots. Since 1982, however, multiple lot owners were sent only one ballot regardless of the number of lots owned.

Bella Vista Village is subject to the Declaration and Protective Covenants originally filed in 1965 and governed by its Articles of Incorporation. Membership in the POA and voting rights of the members are provided for in the Declaration, Articles of Incorporation, and Bylaws of the POA. The provisions are virtually identical. Article III of the Declaration provides:

> *Section 1. Membership.* The Developer, its successors and assigns, shall be a member of the Club so long as it shall be the record owner of a fee, or an undivided fee, interest in any Lot or Living Unit which is subject by covenants of record to assessment by the Club, and the Developer shall also be a member until it is paid in full for every such Lot or Living Unit which it shall sell. Also, every person or entity who is a record owner of a fee, or undivided fee, interest in any Lot or Living Unit which is subject to covenants of record to assessment by the Club and who shall have paid the Developer in full for the purchase price of the Lot or Living Unit, shall be a member of the Club, provided that any such person or entity (except the Developer) who holds such interest merely as security for the performance of an obligation shall not be a member.
>
> *Section 2. Voting Rights.* Every member of the Club shall be entitled to one vote in the election of directors of the Club, but for all other purposes there shall be two classes of voting memberships:

> Class A. Class A members shall be all those persons or entities as defined in Section 1 with the exception of the Developer, who have paid the Developer in full for the purchase price of the Lot or Living Unit. Class A members shall be entitled to one vote for each Lot or Living Unit in which they hold the interests required for membership by Section 1. When more than one person holds such interest or interests in any Lot or Living Unit all such persons shall be members, and the vote for such Lot or Living Unit shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any such Lot or Living Unit.
>
> Class B. Class B member shall be the Developer. The Class B member shall be entitled to ten votes for each Lot or Living Unit of which it is the record owner and which is subject by covenants of record to assessment by the Club until it shall have conveyed the Lot or Living Unit by deed to a purchaser and shall have been paid in full for such Lot or Living Unit. The Developer shall continue to the right to cast votes as aforesaid (ten votes for each Lot or Living Unit) even though it may have contracted to sell the Lot or Living Unit or may have same under a mortgage or deed of trust.
>
> For purposes of determining the votes allowed under this Section, when Living Units are counted, the Lot or Lots upon which such Living Units are situated shall not be counted.

The appellants argue that this issue was previously litigated in *Buck* v. *Medin*, No. E-88-441-2 (Benton County Chancery, May 25, 1988) and that, pursuant to that decision, each member of the POA should have a vote in the election of the Board of Directors. The chancellor in *Buck* found that Ark. Code Ann. § 4-28-212 (1987), the Declaration, and Articles of Incorporation adopted the principle of "one man, one vote" and that every member of the POA was entitled to one vote in the election of the directors.

However, the chancellor in the case at bar found that Act 672 of 1989, which amended § 4-28-212(a) by adding the second sentence, modified the decision in *Buck* so that only one ballot should be distributed for each lot. Section 4-28-212(a) (1991) provides:

> (a) Each member shall be entitled to one (1) vote in the election of the board of directors. *Where more than one (1) membership is held by a single entity, the member shall be entitled to one (1) vote for each such membership.* (Emphasis added.)

The chancellor held that the statute read in conjunction with the Declaration and Articles of Incorporation mandated that no more than one vote per lot could be exercised in the election of the Board of Directors.

We agree with the chancellor. The decision in *Buck* is consistent with a fair reading of § 4-28-212(a) prior to the 1989 amendment. However, the "one man, one vote" rule enunciated therein was modified by the amendment, which clearly allows multiple votes to be cast where more than one "membership" is held. Insomuch as the Declaration defines membership in terms of interest in any "Lot or Living Unit," we think it clear that the effect of the 1989 amendment was to permit voting to be conducted on the basis of one vote per lot, as had been done historically.[2] We find no error, and we affirm.

Affirmed.

JENNINGS, C.J., concurs.

ROBBINS, J., dissents.

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[2] The dissenting opinion concerns itself largely with a fact situation not presented in the case at bar, i.e., one in which three hypothetical brothers take title to a lot as tenants in common after paying a *pro rata* share for it. Although it is a fundamental principle of appellate review to refrain from deciding issues not before the Court, I feel constrained to point out that the dissent's solution which would allow each of the hypothetical brothers full voting rights would permit any organized group to cheaply and effectively dominant the Property Owners Association by the simple expedient of arranging for the purchase of one lot by hundreds (or thousands) of members taken in common. It is to avoid such absurdities that we adhere to deciding issues on a case-by-case basis. *See generally*, 5 Am. Jur. 2d *Appeal and Error* § 725 (1962).

JOHN B. ROBBINS, Judge, dissenting. This court upholds the trial court's determination that in an election of the board of directors of Bella Vista Property Owners Association, only one vote may be cast for each lot in Bella Vista, even though a lot may have multiple owners. With all due respect to the learned chancellor and my fellow appellate judges, I must dissent.

The fallacy of this decision can be illustrated with a hypothetical factual situation. Assume that a lot in Bella Vista is purchased by three brothers, John, Bill, and Jim Smith, and they take title as tenants in common, with each brother owning a one-third undivided interest. Assume further, that these brothers are not purchasing the lot as partners. The trial court's holding, which is not found clearly erroneous by the majority of this court, limits the Smith brothers' voting rights in an election for board of directors of the POA to one vote, collectively, for the three of them.[1]

The trial court and the majority of this court relied, primarily, on three sources of authority in reaching a decision, i.e., the Articles of Incorporation and Declaration of Covenants and Restrictions; an earlier case decided by this same chancery court in *Buck* v. *Medin*, No. E-88-441-2 (Benton County Chancery, May 25, 1988); and Ark. Code Ann. § 4-28-212(a) (1991).

Sections 1 and 2, Article III, of the Declaration of Covenants and Restrictions, in pertinent part, are identical to Articles IV and V of the Articles of Incorporation, and provide that "every person or entity who is a record owner of a fee, or undivided fee, interest in any Lot . . . shall be a member. . . ." These

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[1] The majority opinion suggests that this hypothetical situation is not presented in the case at bar, however, I believe the evidence suggests that it may be. Mr. Larry Frost, management analyst for the Bella Vista Property Owners Association, testified at the trial as follows:

> A. It [one ballot] goes to the person listed first on the deed.
>
> Q. That's true of any multiple holding, whether they are tenant by the entirety, a husband and wife situation or a joint tenant or tenants in common, the first person on the deed gets one ballot?
>
> A. That's correct.

Furthermore, the trial court's holding that "in the election for the Board of Directors, no more than one vote may be cast for each Lot" does not make exception for tenancies in common such as is presented by this hypothetical.

documents further provide that in all elections *other than for directors*:

> [w]hen more than one person holds such interest or interests in any Lot or Living Unit all such persons shall be members, . . . but in no event shall more than one vote be cast with respect to any such Lot or Living Unit.

This limitation of one vote per lot is conspicuously and significantly absent in the portion of this section which addresses voting rights in elections for directors and in contrast provides that "every member . . . shall be entitled to one vote in the election of directors. . . ."

Consequently, by the plain meaning of this language, if a lot is owned by multiple members, such as the Smith brothers, each of these members is entitled to a vote in an election for the board of directors. However, a member may cast only one vote even though he owns or has an interest in more than one lot.

The trial court construed the Articles of Incorporation and Declaration of Covenants and Restrictions to evidence an intent that only one vote per lot may be cast in an election of the board of directors. It specifically relied on the definition of a "member" and the requirement that a member be a person or entity owning a fee or undivided fee interest in a Lot or Living Unit, "who shall have paid the Developer in full for the purchase price of the Lot or Living Unit." I fail to see, however, how this language could not, and does not, apply equally to the three Smith brothers who has each paid his pro rata share of the purchase price in full, as well as to an individual who purchases a lot in his sole name and pays the full purchase price. The obvious intent of this requirement is that a person does not become a member until the purchase price due the original developer is paid in full.

The language of the Articles and Declaration is consistent with the first sentence of Ark. Code Ann. § 4-28-212(a) which provides; "each member shall be entitled to one (1) vote in the election of the board of the directors." This analysis is the same as was apparently made by the Benton County Chancellor in a 1988 case involving the POA. *Buck* v. *Medin*, No. E-88-44-2. In that case, which was not appealed, the trial court held:

> 4. The said statute, covenants and articles adopt the

> principle of "one man, one vote" in the election of the directors of the Bella Vista property owners association; that is, that every member of the Association is entitled to one vote and no more in the election of directors. The "one lot, one vote" rule as well as other rules apply to other elections conducted for other purposes."

Not long after this decision, our legislature enacted Act 672 of 1989, the title of which suggested that it dealt with proxy voting. However, it also added a second sentence to Ark. Code Ann. § 4-28-212(a) and provided that in the election of a board of directors of a non-profit corporation, "where more than one (1) membership is held by a single entity, the member shall be entitled to one (1) vote for each such membership." The majority of this court now holds that this one-sentence amendment accomplished not one, but two, very significant changes in elections of directors. Firstly, an owner of multiple lots now has a vote for each lot owned. This is consistent with the plain meaning of the language of this amendment. The second change, which the majority of this court agrees was accomplished by this amendment, is that multiple members/ owners of a single lot no longer have one vote each, as was provided by the Articles of Incorporation and Declaration of Covenants and Restrictions and clearly stated in the first sentence of Ark. Code Ann. § 4-28-212(a), but now may only participate with the other undivided interest members/owners of the lot in arriving at one collective vote for that lot. This, I submit, is judicial legislation. I believe Judge Cooper's dissenting opinion in *Palmer* v. *State*, 31 Ark. App. 97, 103, 788 S.W.2d 248, 251-252 (1990) is relevant and a fitting commentary on the court's majority opinion in this case:

> [O]ur role is not to legislate, but instead to apply the statutes of which the legislature has seen fit to enact according to their plain and unambiguous meaning.
>
> I believe that the majority has departed from that role by construing the statutes involved in such a way as to affirm the trial court's action. This was wrong for several reasons. First, the statutes are unambiguous and require no construction or interpretation. Second, even if statutory construction has been required, we lack jurisdiction to perform that function under Rule 29 [now Rule 1-2] of the

> Rules of the Supreme Court and the Court of Appeals. Finally, even if these statutes actually required construction and we were authorized to do so, the construction adopted by the majority would be erroneous.

The subject statute, the Articles of Incorporation and Declaration of Covenants and Restrictions, and the earlier decision in *Buck* v. *Medin* are clear and unambiguous, and we err by failing to apply their plain meaning. I would reverse the trial court's decision because I believe all three sources of authority clearly recognize that each member/owner of a multiple-owner lot has one vote each in the election of the board of directors.[2]

Thomas GARRETT *v.* SEARS, ROEBUCK & COMPANY

CA 92-974 858 S.W.2d 146

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[2] The majority makes an *ad terrorem* argument that an absurd situation could develop should each member who owned an undivided interest in a lot be entitled to a vote in an election for board of directors. If such result should occur, the POA could amend its articles and declaration, and seek legislative relief. Neither of such actions would be subject to the obstacle of "one member, one vote" which only applies to elections of the board of directors.

[redacted]

[redacted]

McKinnon Law Firm, by: *Nancy L. Hamm*, for appellant.

Walter A. Murray, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant's claim for additional benefits for a 1987 injury is barred by the statute of limitations; that the issue of temporary partial benefits was not raised below; and that appellant failed to prove he is permanently partially disabled. On appeal, appellant contends that the statute of limitations was tolled for his 1987 compensable injury; that the issue of temporary partial benefits was a matter in evidence; and that he is entitled to a 5% permanent partial disability rating related to his compensable injuries.

The record reflects that appellant injured his back on September 2, 1987, in the course and scope of his employment with appellee while moving a television set. Appellant received temporary total and medical benefits. Appellant returned to light duty work on September 28, 1987, and continued to receive his regular salary. Around September 3, 1990, appellant was informed that he would be receiving a reduction in pay in the amount of ninety cents an hour. That same day, appellant sustained an injury to his shoulder area when he was moving a scrubber. Two days later, while at home, appellant bent over to pick up his paper and his lower back "popped". He was taken to the emergency room. Appellant received temporary total and medical benefits and returned to work after a couple of weeks at which time he was trained as a sales clerk. This job change resulted in a decrease in his previous salary by an amount of $1.13. Appellant filed this claim with the administrative law judge, and the ALJ found that the statute of limitations did not bar claims stemming from his 1987 injury, that appellant was entitled to temporary partial benefits from September 2, 1987, through January 1991, "for the periods of time that appellant was receiving less than his previous salary", and that appellant did not prove he was permanently disabled. The Commission reversed the ALJ on the first two points and affirmed on the last.

When reviewing a decision of the Workers' Compensation Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is

supported by substantial evidence. *Welch's Laundry and 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. *Quality Service Railcar* v. *Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991).

First, appellant contends that the statute of limitations for additional medical benefits had not expired with regard to his 1987 injury. Under Ark. Code Ann. § 11-9-702(b) (1987), the time for filing a claim for additional compensation "shall be barred unless filed with the Commission within (1) one year from the date of the last payment of compensation, or (2) two years from the date of the injury, whichever is greater." The record indicates that appellant's last medical service for his 1987 injury was on January 23, 1989. Therefore, by the time appellant presented this claim for additional benefits in April of 1991, the statute of limitations had run on the 1987 injury.

Appellant argues, however, that his attorney's letter of June 13, 1989, amounted to a claim for additional benefits, thereby tolling the statute of limitations on his 1987 compensable injury. Appellant cites *Cook* v. *Southwestern Bell Telephone Co.*, 21 Ark. App. 29, 727 S.W.2d 862 (1987), in support of his argument. The Commission found no merit in appellant's argument. The Commission specifically stated in its opinion that the letter dated June 13, 1989, did not serve as the filing of a claim and that, unlike the letter in *Cook*, it was not sufficient to toll the statute of limitations. The Commission found that "at no point did [appellant's] attorney indicate that any benefits were not being received. To the contrary, she specifically indicates that she is not requesting a hearing because [appellant's] medical bills were being paid." The Commission thus concluded that appellant's counsel was simply giving notice that she wanted to be recognized as the attorney of record and that no claim was being presented at that time since there was no present conflict over the receipt of benefits.

In *Cook*, we held that the appellant's counsel's letter represented a claim for additional medical benefits so as to toll the statute of limitations for additional medical benefits. The letter

notified the Commission within the two year statute of limitations that he had been employed to assist the appellant in connection with *unpaid* benefits, and it listed the appellant's name, the employer's name, and the Workers' Compensation Commission's file number. However, we find *Cook* distinguishable.

In this case, appellant's counsel's letter stated:

> Please be advised my law firm has been retained by the above referenced injured worker in regards to a back injury sustained on the above date. Please note my name is the attorney of record in regards to this matter. Please also be advised that I am not requesting a hearing at this time since it appears that Mr. Garrett's medical is being is paid.

We agree with the Commission's assessment and comparison of these facts in relation to the case of *Cook*. Consequently, we cannot say there is no substantial evidence to support the Commission's finding that appellant was barred by the statute of limitations from receiving further benefits connected with his 1987 back injury.

As his second point, appellant contests the Commission's finding that he is not entitled to temporary partial disability benefits. The Commission found that this issue was not before the ALJ, that the ALJ had raised the issue on his own and that he had resorted to matters outside the record in reaching that decision. We disagree with the Commission's conclusion.

The ALJ found that appellant was "entitled to temporary partial disability at all times during his healing period from September 2, 1987 through January 24, 1991 when his wages were less than he was receiving at the time of his September 2, 1987 injury." The record shows that this finding was based on facts stipulated to by the parties concerning the wages that appellant was earning both before and after his injuries, appellant's uncontradicted testimony at the hearing, to which appellee did not object, and the appellee's own exhibits, which included the appellant's personnel file concerning wage information. The ALJ also relied on medical reports which were placed into evidence. Given the evidence introduced by both parties, to which there was no objection, we cannot say that the ALJ resorted to matters outside the record or that this finding was not within the realm of

the evidence presented. Therefore, we reverse and remand for proceedings consistent with this opinion for the Commission to determine the appropriate amount of temporary partial disability benefits, if any.

Last, appellant argues that he is entitled to a 5% permanent partial disability rating as assessed by Dr. Vincent B. Runnels, appellant's physician. The record indicates that Dr. Runnels noted that he would have assessed the 5% disability rating to appellant despite appellant's 1990 injury. Furthermore, Dr. Runnels refused to attribute the 5% rating to any specific problem. He testified that the 5% rating was simply a number he picked "out of the sky." The Commission found that appellant did not suffer a permanent disability as a result of either compensable injury. We cannot say there is no substantial evidence to support the Commission's decision.

Affirmed in part; reversed and remanded in part.

MAYFIELD and COOPER, JJ., dissent.

MELVIN MAYFIELD, Judge, concurring and dissenting. I must dissent from the majority opinion on the first issue in this case. That issue is whether the statute of limitations barred appellant's claim for *additional* compensation. The statute involved is Ark. Code Ann. § 11-9-702(b) (1987), which provides in pertinent part:

> In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two years from the date of injury, whichever is greater.

The appellant sustained a compensable injury on September 2, 1987. The last payment of benefits was made on May 16, 1989, for medical services rendered January 23, 1989. Appellant contends that a letter written by his attorney to the Commission, dated June 13, 1989, met the statutory requirement for filing a claim. On June 21, 1989, the Assistant Executive Director of the Commission acknowledged receipt of the letter from appellant's attorney. Therefore, we know that by June 21, 1989, at the latest,

the letter from appellant's attorney had been received by the Commission. That was clearly within two years of appellant's injury and within one year from the date of the last medical treatment paid for by appellee. However, the Commission held, and the majority opinion agrees, that the letter from appellant's attorney did not constitute the filing of a claim. The letter stated:

> RE: Tom Garrett v. Sears
> WCC File No: Unknown
> D/A: 9-2-87
> SSN: 430-90-5045
>
> Dear Ms. Gray:
>
> Please be advised my law firm has been retained by the above-referenced injured worker in regards to a back injury sustained on the above date. Please note my name is [sic] the attorney of record in regards to this matter. Please also be advised that I am not requesting a hearing at this time since it appears that Mr. Garrett's medical is being is [sic] paid.
>
> By copy of this correspondence I am informing the respondent of this representation and asking that they contact my office as soon as possible.
>
> Sincerely,
>
> Laura J. McKinnon
> LJM/cmp
>
> cc: Allstate Insurance Co.
> P. O. Box 105584
> Atlanta, GA 30348

The majority opinion cites our case of *Cook* v. *Southwestern Bell Telephone Co.*, 21 Ark. App. 29, 727 S.W.2d 862 (1987), where we reversed the Commission's decision holding that the claim for additional benefits was barred by limitations. The majority opinion says the *Cook* case is distinguishable because the letter from the attorney to the Commission in that case stated the attorney had been "employed to assist Katherine R. Cook in connection with unpaid benefits in the above matter." With all due respect, I think there is no meaningful distinction between the

two letters. Moreover, I think the majority opinion sweeps away the precedent which has been established for many years on this point. In *Cook* we said:

> On appeal to this court, the appellant cites *Long-Bell Lumber Co.* v. *Mitchell*, 206 Ark. 854, 177 S.W.2d 920 (1944), in support of her contention that the letter of April 9, 1985, constituted a claim. In that case, the Arkansas Supreme Court said that the Commission was correct in treating certain correspondence between the claimant and the Commission as tantamount to the filing of a claim. In so holding, the court stated:
>
> > In our Workmen's Compensation Law, formalities are frowned on. A reading of §§ 18, 19 and 27 thereof is convincing of this statement. The spirit of the law, *inter alia*, is to afford a speedy and simple form of relief to, or settlement of the claims of, those injured. (71 C.J. 247). The act is to be liberally construed to effectuate its purposes; and the correspondence was notice of claim.
>
> 206 Ark. at 857.
>
> Appellant also cites Larson's treatise on worker's compensation law, which both parties agree states:
>
> > At the minimum, the informal substitute for a claim should identify the claimant, indicate that a compensable injury has occurred, and convey the idea that compensation is expected.
>
> *See* 3 Larson, *Workmen's Compensation Law* § 77A.41 (1983).

21 Ark. App. at 30-31, 727 S.W.2d at 864.

In *Woodard* v. *ITT Higbie Manufacturing Co.*, 271 Ark. 498, 500, 609 S.W.2d 115, 117 (Ark. App. 1980), the court said that "the purpose of the statute of limitations in workers' compensation cases is to permit prompt investigation and treatment of injuries." In the instant case the Commission's opinion states that appellant had already been paid temporary total disability and medical benefits and that the last medical treat-

ment received was on January 23, 1989. In fact, appellee's exhibit #2 shows that the last payment for medical treatment was on May 16, 1989. Thus, appellee knew of appellant's injury and, less than a month before the letter of June 13, 1989, had paid for the medical treatment rendered to appellant on January 23, 1989. Appellee would have to be more than naive not to know that the letter was a claim for additional benefits. In *Sisney* v. *Leisure Lodges, Inc.*, 17 Ark. App. 96, 704 S.W.2d 173 (1986), we held that a claimant's timely filing for rehabilitation and additional permanent disability payments also tolled the statute for her later requested medical benefits. To hold otherwise, we said would "invoke a measure of precision uncalled for by the broad language of the statute and unsupported by the case law of this state." 17 Ark. App. at 99, 704 S.W.2d at 175. I think this statement applies to the instant case. Therefore, I dissent on the first issue.

The second point argued by the appellant is that the Commission erred in reversing the administrative law judge's decision which had found appellant entitled to temporary *partial* disability benefits. The majority opinion agrees with this point, and so do I. However, I want to add to the discussion of the majority opinion on this point. The Commission reversed the law judge "because the issue was raised not by either party in this case but rather by the ALJ who resorted to matters outside the record and speculation to make the finding." The specific finding reversed was that appellant was "entitled to temporary partial disability benefits during the period of September 2, 1987 through January 24, 1991." This finding was based upon the evidence discussed by the law judge which included the parties' stipulation of the amount of wages made by appellant during his healing period and the fact that he was paid less during that period than the average wage he was receiving immediately prior to his injury on September 2, 1987.

In the first place, I want to note that I am in complete agreement with the opinion on this point of the dissenting Commissioner who stated:

> It was not improper for the ALJ to determine whether claimant was entitled to benefits for temporary partial disability. At the hearing, claimant contended that he was

> entitled to total disability benefits. Claimant did not have to specifically raise the issue of entitlement to temporary partial disability benefits. The possibility that the evidence will support an award for temporary partial disability is necessarily included within a claim for temporary total disability.

In the second place, I do not think the Commission's statement that the law judge "resorted to matters outside the record and to speculation" to find appellant entitled to temporary partial disability is supported by the record. It is important to note that the Commission did not itself make any factual determination on the merits of the question of whether the evidence in the record established that appellant was entitled to temporary partial disability benefits. It is, of course, the duty of the Commission to make a finding according to a preponderance of the evidence and not whether there is any substantial evidence to support the finding of the law judge. *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 81, 371 S.W.2d 528 (1963); *Jones* v. *Scheduled Skywards, Inc.*, 1 Ark. App. 44, 46, 612 S.W.2d 333, 335 (1981); *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 52, 759 S.W.2d 578, 579 (1988). However, I think the evidence before the law judge relates to whether the issue of entitlement to temporary partial disability was properly before the law judge.

As appellant's brief states, the law judge relied upon the stipulated evidence concerning the difference in wages that appellant was paid prior to his injury and during his healing period, the appellant's uncontradicted testimony during the hearing, to which the appellee did not object, and the appellee's own exhibits, which included the appellant's personnel file concerning wage information. In addition, the law judge's opinion makes very detailed findings of fact and conclusions of law, and the opinion has a discussion that tracks the judge's reasoning and the evidence, including the medical reports. Ark. Code Ann. § 11-9-705(a)(1) (1987) provided the guide for the law judge to follow in the hearing on this claim:

> In making an investigation or inquiry or conducting a hearing, the commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but

> may make such investigations or inquiry, or conduct the hearing in a manner as will best ascertain the rights of the parties.

Under this guide it is clear to me that the issue of temporary partial disability was properly before the law judge, both parties introduced evidence on the issue, neither objected that the issue was not before the law judge and it was tried by implied consent and in a manner that would best ascertain the rights of the parties.

The third point raised by appellant contends that the Commission erred in refusing to allow him a 5% permanent partial disability entitlement as assessed by Dr. Runnels. I agree with the majority opinion's conclusion that we cannot say there is no substantial evidence to support the Commission's decision on this point.

In summary, I concur with the majority opinion on the permanent partial disability issue and agree to affirm the Commission on that point. I also concur with the majority opinion in reversing and remanding on the issue regarding the law judge's finding as to temporary total disability. I disagree, however, with the Commission on the statute of limitations issue; therefore, I dissent on that point.

COOPER, J., joins in this dissent.

Gary D. HANCOCK, Sandy Hancock and Insurance Company of North America *v.* TRI-STATE INSURANCE COMPANY

CA 92-989 858 S.W.2d 152

Court of Appeals of Arkansas
En Banc
Opinion delivered July 7, 1993

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

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Brian Allen Brown* and *Jacob Sharp, Jr.*, for appellee.

BRUCE BULLION, Special Judge. This appeal involves the question of insurance coverage provided to a permitted driver in an automobile liability policy. The driver-employee of Allison Farms and Trucking, Inc., Mr. Videll, has been sued in tort by his co-employee, Mr. Hancock, for injuries received in an accident while they were delivering a load of rice for their employer. Mr. Videll made demand upon the employer's automobile liability insurance carrier, Tri-State Insurance Co., to furnish him a defense to the Hancock suit and pay whatever judgment was rendered against him. Tri-State filed this action seeking a declaratory judgment that it owed no duty to Mr. Videll in that suit under the undisputed facts. All parties moved for summary judgment, and after a hearing the trial court entered judgment that the Tri-State policy, in the circumstances of this case, excluded the coverage that Mr. Videll sought. This appeal ensued. We affirm.

In November, 1988, Riceland Foods engaged Allison Farms and Trucking, Inc. to transport a truck load of rice from its Jonesboro, Arkansas, plant to a consignee in Battle Creek, Michigan. The trucking company assigned two of its drivers, Messrs. Hancock and Videll, to drive the load of rice from origin to destination. Their driving format was that one would drive for a specified period while the other slept, or rested, in the sleeper compartment of the truck. They would then switch places, and this enabled the truck to remain in constant motion, except for short stops for coffee, and the like. While in Michigan, when Mr. Videll was driving, the truck was involved in an accident resulting in injuries to both men.

The Insurance Company of North America (INA), the workers' compensation insurance carrier for the trucking company, has paid both of these employees the benefits provided under that law. Mr. Hancock then filed a tort suit against his co-driver, Mr. Videll, to recover damages for his injuries. Mr. Videll called upon Tri-State to furnish him a defense, and it filed this suit for a declaratory judgment that it owed no duty to Mr. Videll under the circumstances of this case. INA is present in the suit to protect its subrogation rights in the event Mr. Hancock recovers judgment in that case.

Under our system of law, parties are free to make contracts based on whatever terms and conditions they agree upon, provided it is not illegal or tainted with some infirmity such as fraud, overreaching, or the like. The contracting parties to the document we have before us, Tri-State and the trucking company, agreed to the following conditions as a part of the contract:

> SECTION II. LIABILITY COVERAGE.
>
> A. COVERAGE. We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' . . . to which this insurance applies. . . . [W]e have no duty to defend 'suits' for 'bodily injury' . . . not covered by this Coverage Form.
>
> 1. WHO IS AN INSURED. The following are 'insureds':
>
> a. You for any covered 'auto'.
> b. Anyone else while using with your permission a covered 'auto'[.]
>
> . . . .
>
> B. EXCLUSIONS. This insurance does not apply to any of the following:
>
> . . . .
>
> 3. WORKERS COMPENSATION. Any obligation for which the 'insured' or the 'insured's' insurer may be held liable under any workers' compensation [law.]

> 4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY. 'Bodily injury' to: (a) An employee of the 'insured' arising out of and in the course of employment by the 'insured'. . . . This exclusion applies: (1) Whether the 'insured' may be liable as an employer or in any other capacity[.]
>
> 5. FELLOW EMPLOYEE. 'Bodily injury' to any fellow employee of the 'insured' arising out of and in the course of the fellow employee's employment.

SECTION V. DEFINITIONS

. . . .

> D. 'Insured' means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or 'suit' is brought.

The appellants do not contend that any of these quoted provisions are illegal or infirm; instead they urge that exclusions 3, 4, and 5 are void in the circumstances of this suit because of the definition of the word 'insured' in Section V.D., above. The argument is twofold: (a) the word 'insured' applies only to the person requesting the coverage and does not include the "named insured"; and (b) the wording of Section V.D. that provides "the coverage applies separately to each 'insured' " nullifies the three exclusions. This last argument is based upon a Wyoming case, *Barnette* v. *The Hartford Ins. Group*, 653 P.2d 1375 (Wyo. 1982), which will be mentioned later.

■ It is the duty of courts to enforce contracts as they are written and in accordance with the ordinary meaning of the language used and the overall intent and purpose of the parties. If some ambiguity creeps in, the interpreting court must first seek resolution within the wording of the instrument before resort to extraneous information is used.

■ It is very apparent to us that the intent of these contracting parties in inserting the three exclusionary clauses,

above, was an attempt to abide by the Arkansas law and workers' compensation law and public policy expressed thereby. There is nothing vague or indecisive in the language of the three exclusions, and the three of them relate to the same problem: work-related injury to employees. This was a risk excluded from the coverage, and if for no other reason (actually they do not need a reason so long as it is not illegal or tainted with infirmity), it is recognition that work-related injuries to employees are to be compensated under the provisions of the workers' compensation law, and none other insofar as these parties and their contract are concerned.

The recognition of this intent brings into focus more clearly the true meaning of the word "insured" as used in Section V.D. The "named" insured is always a part of its meaning; otherwise the clauses become almost meaningless. There are not many employees who themselves have employees, or carry workers' compensation insurance, and to limit its meaning to the permitted driver, as here, makes them almost idle words. It is our opinion that the word clearly relates to and includes the named insured, one of the contracting parties. In this way, a reasonable and meaningful interpretation is given to the word, and allows the other clauses to remain as a part of the contract as written. And we do not consider this a far-fetched or strained interpretation — quite the opposite.

Be that as it may, however, even by the acceptance of the narrow meaning urged by the appellants, exclusion #5 excludes this coverage to Mr. Videll. For emphasis we again quote #5 in collated form as applied only to it:

> [W]e have no duty to defend 'suits' for 'bodily injury' . . . not covered by this Coverage Form. . . . This insurance does not apply to . . . 'bodily injury' to any fellow employee of the 'insured' arising out of and in the course of the fellow employee's employment.

Messrs. Hancock and Videll, at the time of the accident in Michigan, were fellow employees; Mr. Videll is the permitted driver insured seeking the coverage. The contracting parties agreed that under these circumstances there was no insurance coverage, and we must give force to this plain language.

The "separate coverage" language of Section V.D. in no way conflicts with the language of any of the three exclusions, and to determine that it nullifies them reaches for a conclusion without support. And while we are not called upon in this case to define the meaning of this phrase, only that it in no way conflicts with the exclusions, it would not be a difficult task to define it in complete harmony with all of the policy provisions; a way that agrees with, not detracts from, the intent of the parties. As an example, suppose the permitted driver is sued by someone other than a fellow employee, and the employer is not joined as a named defendant.

The *Barnette* case, *supra*, contains facts widely apart from the facts of this case, and the discussion of the policy provisions, and their quotation, leaves some doubt as to similarity to the language before us now. Nonetheless, even assuming they dealt with identical clauses under identical facts, we are more persuaded by the reasoning of the minority opinion in that case in that it reaches the better result under contract law. The fact of the matter is, we find no infirmity with the exclusionary clauses in the contract before us. They plainly provide that its coverage is denied to Mr. Videll in these circumstances. Tri-State owes him "no duty", contractual or otherwise, according to the evidence before us. *See Liberty Mutual Ins. Co.* v. *Jones*, 427 So.2d 1117 (Fla. Dist. Ct. App. 1983); *Julian Martin, Inc.* v. *Indiana Refrigeration Lines, Inc.*, 262 Ark. 671, 560 S.W.2d 228 (1978); *Bryan* v. *Aetna Casualty and Sur. Co.*, 381 F.2d 872 (8th Cir. 1967); 12 Ronald A. Anderson, *Couch Cyclopedia of Insurance Law* § 45:545 (Mark S. Rhodes, ed., Rev. 2d ed. 1981). Job A. Sandoval, Annotation, *Construction and Application of Provision of Automobile Liability Policy Expressly Excluding From Coverage Liability Arising From Actions Between Fellow Employees*, 45 A.L.R. 3d 288 (1972).

The other three arguments of the appellants can be disposed of in short order. They are: (1) the policy exclusions violate State and Federal public policy; (2) the policy is ambiguous regarding the named insured; and (3) a question of fact exists as to whether Messrs. Hancock and Videll were employed by the named insured. The public policy of both our State and Nation is contrary to the argument of appellants. *See TransAmerican Freight Lines, Inc.* v. *Brada Miller Freight Sys.*, 423 U.S. 28

(1975); *Cook* v. *Wausau Underwriters Ins. Co.*, 299 Ark. 520, 772 S.W.2d 614 (1989); Ark. Code Ann. § 27-19-713(e) (1991 Supp.). Also, the evidence clearly establishes that the named insured in this policy is the trucking company, and that both Messrs. Hancock and Videll were its employees. There is a provision in the policy that provides that only vehicles that are listed on a schedule attached to the policy are insured. That list reflects there are four truck tractors and seven trailers belonging to the trucking company, and none other.

Given the plain meaning of the exclusionary clauses and the undisputed facts of this case, the granting of summary judgment was proper.

COOPER and MAYFIELD, JJ., dissent.

ROGERS, J., not participating.

JAMES R. COOPER, Judge, dissenting. I dissent because the insurance policy at issue contains conflicting clauses which render the question of coverage ambiguous, requiring us to resolve the issue against the drafter.

As noted by the majority, the policy excludes coverage for injury to "any fellow employee of the insured." The effect of this cross-employee exclusionary clause, by its terms, depends upon the definition of "insured." However, the definition of "insured" contained in the policy incorporates a severability of interest clause which provides that the "coverage applies separately to each insured who is seeking coverage or against whom a claim or 'suit' is brought.

The relationship between the cross-employee exclusionary clause and the severability of interest clause was the subject of an exhaustive analysis by the Wyoming Supreme Court in *Barnette* v. *Hartford Insurance Group*, 653 P.2d 1375 (Wyo. 1982). The *Barnette* Court held that the effect of combining these clauses was to permit coverage where the injured person is not the employee of the specific insured who seeks protection under the policy. There is extensive authority for the proposition that the employee exclusion clause is not effective unless the employee in question is an employee of the particular person against whom he is asserting his claim. *See*, *e.g.*, 12 *Couch on Insurance 2d* § 45:581 (rev. ed. 1981).

As the Arkansas Supreme Court has noted, an insurance policy is to be construed strictly against the insurer. *Employers Mutual Liability Insurance Co.* v. *Farm Bureau Mutual Insurance Co.*, 261 Ark. 362, 549 S.W.2d 267 (1977). The *Employers Mutual* Court further noted that conflicting judicial interpretations place insurance companies on notice that terms subject to such contradictory interpretations are ambiguous. *Id.* at 365. In light of the many cases holding that the employee exclusion is effective only when the employee in question is asserting a claim against his own employer, *see* 12 *Couch on Insurance* 2d § 45:581 (rev. ed. 1981), I submit that an ambiguity arises in the case at bar which should have been resolved against the insurer.

I respectfully dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority opinion in this case. I agree with Judge Cooper's dissent which states that the insurance policy involved is ambiguous. However, we must construe the policy against the insurer who wrote it and in favor of the insured. *Countryside Casualty Co.* v. *Grant*, 269 Ark. 526, 530, 601 S.W.2d 875, 878 (1980). When that is done I believe the matters submitted by the parties on the motion for summary judgment mandate an interpretation in favor of the appellants in this case.

The policy involved here has a severability of interest clause in Section "V" of the policy. Subsection "D" thereunder is almost exactly like the one involved in *Barnette* v. *The Hartford Ins. Group*, 653 P.2d 1375 (Wyo. 1982). That case makes it very clear that the policy in the present case covered Mr. Videll. As that case explains, the reason for this clause is to insure an employee for liability when he would not otherwise be insured under the policy. The majority's reasoning in this case is backwards. Because the driver in this case was covered by workers' compensation is the very reason the policy in this case contained the severability clause. Moreover, the citation in the majority opinion to 12 *Couch on Insurance 2d* § 45:545 does not deal with this type clause. Section 45:549, at pages 949-50, does deal with this type clause. *See Barnette*, 653 P.2d at 1383. Also, *Barnette* and two other cases holding the same way are referred to in the 1992 Supplement to *Couch on Insurance* at § 45:549. Furthermore, the Arkansas case of *Julian Martin, Inc.* v. *Indiana Refrigeration*

Lines, Inc., 262 Ark. 671, 560 S.W.2d 228 (1978), does not deal with this type clause. In fact, no case cited by the majority opinion which deals with this type clause supports the majority opinion.

The *Barnette* case is not easy to read, but it contains a good analysis, it collects the authorities, and the result it reaches, in my opinion, is right.

I dissent from the majority opinion.

Francis BAKER *v.* Rebecca BAKER

CA 92-1014 858 S.W.2d 157

Court of Appeals of Arkansas
Opinion delivered July 7, 1993

Ralph J. Blagg, for appellant.

No brief filed for appellee.

PER CURIAM. This is the second motion to dismiss this appeal filed by the appellee in this case. In her first motion to dismiss, the appellee urged us to dismiss the appeal on the grounds that the

appellant designated the entire record as the record on appeal, but failed to order the entire record as designated. In our per curiam of January 6, 1993, we denied that motion to dismiss but granted the appellee ten days to designate additional portions of the record. In her present motion, the appellee asserts that, although she designated additional testimony pursuant to our per curiam and to Ark. R. App. P. 6(b), the appellant did not order the additional testimony from the court reporter. The appellant concedes that he did not order the additional testimony, but argues that his failure to do so is excused because he raised only one issue on appeal, and the additional material designated by the appellee could not be relevant to that issue.

The rule applicable to this case was enunciated by the Arkansas Supreme Court in *Arkansas Farmers Association* v. *Townes*, 232 Ark. 997, 342 S.W.2d 83 (1961):

> In short, we hold that, in the absence of a court order to the contrary, the appellant must file in this Court the record designated by both parties or suffer the appeal to be dismissed for failure to file a designated record and appellant cannot, on his own determination, cast on appellee the burden of paying for the additional record designated.

Rule 6 of the Arkansas Rules of Appellate Procedure mandates that the appellant shall direct the court reporter to include in the transcript all testimony designated by the appellee. This rule was promulgated by the Supreme Court and, even should we wish to change it, we would lack the authority to do so. Therefore, because the appellant admits that he failed to order the additional record as designated by the appellee, and in the absence of any application for an adjustment of costs or other protective order by the appellant, we are constrained to dismiss his appeal.

Appeal dismissed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I do not agree to dismiss this appeal at this time. The Per Curiam opinion granting dismissal relies upon a 32-year-old case that construed Sections 8 and 9 of Act 555 of 1953 (Ark. Stat. Ann. §§ 27-2127.2 and 2127.3). The 1979 replacement volume of Ark. Stat. Ann. shows

these sections were superseded by Arkansas Rules of Appellate Procedure 3 and 6. Even if the case relied upon by our Per Curiam is still the law, I do not think it should apply to the present case.

The transcript in this case was filed in this court on September 8, 1992. On December 21, 1992, the appellee filed a motion to dismiss the appeal. From the motions, exhibits, and briefs filed since December 21, 1992, we can plainly see what has occurred to bring us to today's action by this court.

Appellant's notice of appeal designated the "entire record including all the pleadings, testimony, and exhibits" and also stated that appellant was appealing from the trial court's "award of temporary and permanent alimony, attorney fees, and an unequal division of the property."

However, counsel for appellant changed his mind about the points he wanted to raise on appeal and notified the court reporter to prepare only a partial transcript of the testimony. The trouble with this is that appellant's counsel did not notify appellee's counsel of the instructions to the reporter and what the new points would be on appeal. Rule of Appellate Procedure 3(g) provides that if the appellant does not designate the complete record, he must serve the appellee with a concise statement of the points on which he intends to rely. The rule contemplates that this will be done when the notice of appeal is filed. Surely, however, the appellant can change his mind about what he wants to argue on appeal. So, if the appellant did wrong here, it was his failure to notify the appellee as to the new points he would argue on appeal and that he was not now going to include all the trial testimony in the record on appeal.

The penalty for that failure, under Appellate Rule 3(a), "shall not affect the validity of the appeal, but shall be ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal." I do not think dismissal of the appeal is appropriate in this case. This conclusion takes into consideration the following circumstances.

After the appellee filed her motion to dismiss appellant's appeal, the appellant filed a response in which he alleged that he had included in the record on appeal all the testimony that pertained to the trial court's ruling on appellant's motion to stay

which was the only point appellant was now appealing.

This court denied appellee's motion to dismiss, but granted appellee ten days to designate additional record. Appellee then filed a designation for all the testimony taken at trial and, at the same time, filed a new motion to dismiss the appeal. We then issued a Per Curiam asking appellee to brief the relevancy of the additional testimony she had designated. At the time we requested this brief, the appellant's brief on the merits of his appeal had been filed in this court for about six months. In fact, that brief had been filed more than three months before appellee's new motion to dismiss was filed.

In her brief as requested by this court, the appellee shows that she clearly understood that the appellant's only point on appeal was that the trial court erred in denying appellant's motion for a stay of proceedings in the trial court; that the motion was based on the Soldier's and Sailor's Civil Relief Act; and that the trial record, up to the point that the court denied the motion, would not support the denial. However, appellant wants the record to include the testimony that was taken after the court denied the motion. This is because, the appellee says, this later testimony will show that the allegations in appellant's motion for stay were untrue, and this later testimony would support the trial court's ruling.

I submit that we should not dismiss the appellant's appeal at this time. We could do three things, either of which would be better than dismissing the appeal:

> (1) We could tell the appellant he has to file the additional testimony and give him a certain period in which to do this, and tell him that if he does not comply we will dismiss his appeal.
>
> (2) Under the authority of Appellate Rule 6(b) and (c) we could tell the appellee that she has to file the additional testimony and if we decide it was relevant and needed, we would assess the cost of furnishing the additional testimony against the appellant.
>
> (3) Also, we could pass the motion to dismiss until all the briefs are filed and tell the parties that they can argue

the motion in their briefs.

Our failure to follow the third course has caused us to have to deal with this case on three separate occasions. We have had to read a stack of papers. The arguments made in the briefs supporting the motions could have waited until the briefs on the merits were filed, and we would have saved time and expense for the parties, the attorneys, and this court.

I dissent from dismissing this appeal at this point.

Deborah Ann ROLAND (Archer) *v.* Jeffery Neil ROLAND

CA 93-122 859 S.W.2d 654

Court of Appeals of Arkansas
Division II
Opinion delivered August 25, 1993

Meredith Wineland, for appellant.

JOHN MAUZY PITTMAN, Judge. Appellant, Deborah Ann Roland, and appellee, Jeffery Neil Roland, were divorced by a decree of the Lonoke County Chancery Court in May 1981. In the divorce decree, appellant was awarded custody of the parties' twenty-one-month-old child and appellee was ordered to pay appellant $100.00 per month in child support. In March 1992, appellant filed a motion to increase appellee's child support obligation, and appellee responded with a motion to change custody. Following a hearing, the chancellor denied both motions. On appeal, appellant argues that the chancellor erred in failing to find a change in circumstances and in not following the family support chart.

At the hearing, evidence was introduced that appellee's weekly take-home pay is $249.50; in 1981, he made $125.00 in take-home pay per week. Appellee testified that he has remarried and has two children from his second marriage. His wife does not work. He also testified that he pays approximately $700.00 per month for his Ford truck, his furniture, and his mobile home. On cross-examination in regard to his request for a change of custody, however, appellee testified that he could adequately support the child on his present income.

Appellant testified that she has also remarried and does not work. Her husband is employed and provides medical insurance for the child. She testified that she has not had an increase in child support since 1981, when the child was twenty-one months old. Appellant stated that the costs associated with rearing the child (who was thirteen at the time of the hearing) have increased. She stated that his clothes cost more; it costs more to feed him; and his activities, such as baseball, are more expensive. She also testified that, every winter, the child is ill with allergies and respiratory problems.

At the conclusion of the hearing, the chancellor denied appellee's request for a change of custody. With regard to the issue of support, he stated:

> We're working with very, very limited resources here. Seems to me like — of course, I can understand there's probably some bitterness here. You attorneys probably weren't able to even talk with each other about this, I don't know, but there has to be significant changes in income and other things.
>
> Mr. Roland does have two other children that he's also supporting now, and this has been over a period of twelve years, limited income. Mrs. Archer stated that she — there's no reason why she's not able to work. And I know that you can't raise a child on a Hundred Dollars a month, but I don't know what I can do. I can't make something out of nothing.

In the order, the chancellor stated that he was denying appellant's motion for an increase in child support because "it would be an undue burden upon the [appellee] to pay an additional amount of child support, based upon the Affidavit of Financial Means entered herein." The chancellor ordered appellee to be responsible for one-half of the child's medical expenses not covered by insurance. Appellee has not cross-appealed from that part of the order denying his request for a change of custody.

Appellant argues on appeal that the chancellor erred in refusing to find a material change in circumstances; in failing to refer to the family support chart; and in not making a specific written finding as to why he deviated from the family support chart.

A change in circumstances must be shown before a court can modify an order regarding child support, and the party seeking modification has the burden of showing a change in circumstances. *Reynolds* v. *Reynolds*, 299 Ark. 200, 771 S.W.2d 764 (1989); *Ross* v. *Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989). The assumption is that the chancellor correctly fixed the proper amount in the original divorce decree. *Id.*

> In determining whether there has been a change in circumstances warranting adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody,

> debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child support chart. *Thurston* v. *Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987).

Reynolds v. *Reynolds*, 299 Ark. at 202, 771 S.W.2d at 765. There is no hard and fast rule concerning the specific nature of the changed circumstances. *Arkansas Dep't of Human Servs.* v. *Brown*, 35 Ark. App. 11, 811 S.W.2d 326 (1991).

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

We agree with appellant that the chancellor erred in refusing to find a change in circumstances since the entry of the 1981 divorce decree. Although it does not compel a determination of changed circumstances, we note that a change of ten percent in the payor's income can be sufficient to support such a finding. Ark. Code Ann. § 9-14-107(a) (Supp. 1991). At the hearing, appellee admitted that his take-home pay of $125.00 per week has doubled since the parties' divorce. His affidavit of financial means showed his weekly take-home pay to be $249.50. Additionally, appellant testified that the costs of rearing the child have increased during the eleven years between the date of the divorce decree and the hearing on the petition to increase support. She testified that the child has additional expenses resulting from his participation in school activities. She further testified that the child has medical problems; only a percentage of these expenses are covered by the health insurance provided for the child by appellant's husband.

In her brief, appellant also argues that, because a change in circumstances was proven, the chancellor erred in failing to modify the child support in accordance with the family support chart (which is $54.00 weekly, based on appellee's take-home pay). Appellant also argues that the chancellor was required to give a fuller explanation for his deviation from the chart.

The controlling law on what is required to determine the amount of child support is set forth in Ark. Code Ann. § 9-12-

312(a)(2) (Supp. 1991):

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the support chart, shall the presumption be rebutted.

"Reference to the chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by written findings stating why the chart amount is unjust or inappropriate." *Black* v. *Black*, 306 Ark. 209, 214, 812 S.W.2d 480, 482 (1991). The chancellor, in his discretion, is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case. *Waldon* v. *Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991). The presumption may be overcome if the chancellor determines, upon consideration of all the relevant factors, that the chart amount is unjust or inappropriate. *Id.*

■ In its per curiam *In Re: Guidelines for Child Support Enforcement*, 305 Ark. 613, 804 S.W.2d XXIV (1991), the supreme court set out the factors the court should consider in determining whether an amount specified by the chart is unjust or inappropriate:

> In adopting this per curiam, the Court creates a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for divorce, separation, paternity, or child support.
>
> It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a written finding or specific finding

on the record that the amount so calculated, after consideration of all relevant factors, is unjust or inappropriate. The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.

. . . .

Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:

1. Food;
2. Shelter and utilities;
3. Clothing;
4. Medical expenses;
5. Educational expenses;
6. Dental expenses;
7. Child care;
8. Accustomed standard of living;
9. Recreation;
10. Insurance;
11. Transportation expenses; and
12. Other income or assets available to support the child from whatever source.

Additional factors may warrant adjustments to the child support obligations and shall include:

1. The procurement and/or maintenance of life insurance, health insurance, dental insurance for the children's benefit;
2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g. orthopedic shoes, glasses, braces, etc.);
3. The creation or maintenance of a trust fund for the children;
4. The provision or payment of special education needs or expenses of the child;
5. The provision or payment of day care for a child; and

6. The extraordinary time spent with the non-custodial parent, or shared or joint custody arrangements.

Id. at 616-17, 804 S.W.2d at XXVI-XXVII.

In this per curiam, the supreme court stated: "In determining requested modifications of child support orders entered prior to the effective date hereof, the trial court should consider the totality of the present circumstances of the parties and avoid modifications that would work undue hardship on the parties or any persons presently dependent thereon." 305 Ark. at 618, 804 S.W.2d at XXVIII. In this case, the chancellor stated that, based upon appellee's affidavit of financial means, it would be an "undue burden" to order him to pay more child support. In that affidavit, appellee listed his monthly bills and his children born of his second marriage. According to the per curiam quoted above, it was certainly permissible for the chancellor to consider the effect of an increase in appellee's child support obligation on his ability to pay his bills and to support his other children.

Nevertheless, from the chancellor's remarks at trial and the order denying appellant's petition for increased support, there is no indication that the chancellor referred to the family support chart. Given the presumption that the chart amount is reasonable, it is incumbent on the chancellor to give a fuller explanation of his reasons for rejecting the chart. *See Cochran* v. *Cochran*, 309 Ark. 604, 832 S.W.2d 252 (1992), where the chancellor had observed at the conclusion of the hearing that, if he followed the family support chart, the amount of child support would double, a result which he considered to be unreasonable. The supreme court reversed on appeal, stating that the chancellor's observation that the chart amount of child support was unreasonable is not an adequate explanation for his deviation from the family support chart. It stated: "If appellate review is to have much significance, a greater account of why the chart amount is inappropriate under the circumstances of the case is essential." *Id.* at 607, 832 S.W.2d at 254.

On appeal, this court has the power to decide chancery cases *de novo* on the record before us, but in appropriate cases, we also have the authority to remand such cases for further action. *See Black* v. *Black*, 306 Ark. 209, 812 S.W.2d 480 (1991). We

therefore remand this case to the chancellor for a determination of child support in accordance with Ark. Code Ann. § 9-12-312 and the guidelines for child support enforcement. Because this case requires a remand, we leave it to the discretion of the chancellor to decide whether a more detailed and explanatory opinion will suffice to meet the requirements of the supreme court's per curiam order and Ark. Code Ann. § 9-12-312(a)(2) or whether further proof from the parties is necessary on the applicable factors and other relevant matters. We affirm that part of the order denying appellee's petition for a change of custody and ordering appellee to be responsible for one-half of the child's medical needs not covered by insurance.

Affirmed in part; reversed and remanded in part.

ROBBINS, J., agrees.

MAYFIELD, J., concurs.

Anthony A. NELSON *v.* STATE of Arkansas

CA CR 92-1198 859 S.W.2d 658

Court of Appeals of Arkansas
Division II
Opinion delivered August 25, 1993

William R. Simpson, by: *Phillip Hendry*, for appellant.

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

JOHN B. ROBBINS, Judge. On April 15, 1992, appellant was convicted by a jury of robbery and misdemeanor theft of property. He was sentenced as a habitual offender to twelve years in the Arkansas Department of Correction. Appellant contends on appeal that the trial court erred in denying his motion to proceed pro se and represent himself without the assistance of counsel. We find no error and affirm.

At a pretrial hearing held on January 14, 1992, appellant

requested that the court relieve his defense counsel from representing him, citing ineffective assistance of counsel, and requested that a different and specific public defender be appointed. When questioned by the court about his claims of ineffective assistance of counsel, the appellant could not cite any specific problem that his attorney was not handling properly. The court found no reason to justify granting appellant's request.

Prior to the commencement of the trial on April 15, 1992, appellant made an oral motion to represent himself, again contending ineffective assistance of counsel. Here, appellant was complaining that his defense counsel failed to subpoena three reverends as character witnesses as part of his defense. Appellant's counsel responded to the comments by stating:

> Character witnesses I did not subpoena. We had character witnesses here last time. I spoke with those character witnesses. Mr. Simpson was also present when I spoke to those character witnesses last time. In my opinion, from speaking with those three gentlemen at the last trial, they would do more damage than they would help. They also told me they did not want to testify unless they were actually forced to. I felt that it would do more damage than it would any help. They had been here last time. I think you remember when we were back in chambers the three reverends I had with me. You remember the last trial?
>
> THE COURT:
>
> Uh huh.
>
> MR. BROWN:
>
> Those would be the same character witnesses. And that is the strategy on my part and I do not want them here, your Honor.
>
> * * * *
>
> THE DEFENDANT:
>
> But I'm trying to show you his ineffective assistance of counsel here this morning.
>
> THE COURT:

He's pretty effective. He won everything.

Appellant then went on to make his motion, and the following transpired:

THE DEFENDANT:

Well, Mr. Lofton, then I'm going to ask this Court if they would honor me and I would represent myself under pro se matter and ask that this jury trial be put off until another time until I prepare myself and bring me back in about a month, please, sir.

THE COURT:

Are you ready for trial, Bill?

MR. BROWN:

I'm ready for trial.

* * * *

THE COURT:

The Court views this as a pure and simple motion for a continuance. There's absolutely no merit to it. He's got a good lawyer, good counsel, successful lawyer in the past. An allegation of ineffective assistance of counsel, there's no merit to it. I haven't heard anything. If I do hear it - And I won't, Bill. You're competent. If I do hear it, we'll stop and talk about it during trial. But it won't happen.

The Court does remember that the three minister [sic] that were here last time specifically did not want to testify about his character and indicated to the Court that they would not be helpful to his character. And they were released and he won. He won that case for him. And I respect your judgment that they wouldn't be helpful to him this time.

So, motion for a continuance is denied, which is what it amounts to . . . .

If he wanted to go to trial today and represent himself, fine. But, if he doesn't know enough about it to go to trial today, then he obviously doesn't know whether there's been

ineffective assistance of counsel or anything else.

So, we'll go to trial today.

When asked for a final time whether he wished to proceed pro se, the following transpired:

THE COURT:

Do you want to represent yourself this morning?

THE DEFENDANT:

I'm not ready this morning because, your Honor, the reason I'm not ready this morning is because I don't have the people that I would like to subpoena here present here this morning, your Honor.

* * * *

THE COURT:

You're just looking for a continuance any way, shape, form or fashion.

THE DEFENDANT:

I would rather go to trial, your Honor.

Article 2, § 10, of the Arkansas Constitution gives a defendant in a criminal prosecution the right to represent himself. As indicated in *Faretta* v. *California*, 422 U.S. 806 (1975), which is the prevailing case on the right of a defendant to represent himself, twenty-six other states have constitutional provisions granting an accused the right to be heard or to defend himself. 422 U.S. at 813. In *Faretta*, the United States Supreme Court declared that a defendant has the right to conduct his own defense in a criminal case under the Sixth Amendment to the United States Constitution and it is applicable to the states by the Fourteenth Amendment. The State cannot force a defendant to accept counsel against his will or deny his request to conduct his own defense. *Barnes* v. *State*, 15 Ark. App. 153, 691 S.W.2d 178 (1985).

Here, on the morning of the trial, the appellant asked the court if he could represent himself, but coupled that request with a motion for a continuance in order to prepare his case and

subpoena witnesses not present for trial. The court denied his request for a continuance and stated "[i]f he wanted to go to trial today and represent himself, fine." The court then asked the appellant "Do you want to represent yourself this morning?" The appellant replied "I'm not ready this morning . . . ." Consequently, we find that appellant waived his right to conduct his own defense, unless the court erred in denying his request for a continuance.

In a similar case, *Burns* v. *State*, 300 Ark. 469, 780 S.W.2d 23 (1989), the defendant asked the court to appoint him another attorney, and the trial court refused finding his counsel competent and that no good cause existed for the defendant not to proceed with his appointed counsel. The defendant in that case then asked the court for a continuance to prepare his own case and represent himself. The supreme court in *Burns* held that where the record reveals appellant's appointed counsel was acting diligently and competently in defending the appellant, the trial court did not err in denying appellant a continuance so that he could prepare to represent himself.

Here, as in *Burns*, appellant's counsel was found competent by the trial court and had prevailed for appellant in a previous case without calling appellant's character witnesses. Also, as in *Burns*, appellant asked for a continuance to prepare his own defense when the trial court refused to find his counsel ineffective. The trial court did not err in denying appellant a continuance so that he could prepare to represent himself. *See Burns* v. *State*, *id.*

In a denial of continuance, it is the appellant's burden to show that there was an abuse of discretion by the trial court. *Lukack* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992). The factors which the trial court considers in exercising its discretion over continuance motions are set out in *Butler* v. *State*, 303 Ark. 380, 797 S.W.2d 435 (1990):

> (1) the diligence of the movant, (2) the probable effect of the testimony at trial, (3) the likelihood of procuring the attendance of the witness in the event of a postponement, and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true.

303 Ark. at 384-385, 797 S.W.2d at 438.

State law requires that an affidavit be provided to justify any continuance caused by a missing witness. Ark. Code Ann. § 16-63-402(a) (1987); *Brooks* v. *State*, 308 Ark. 380, 797 S.W.2d 435 (1990). Appellant did not file any affidavit as such, and as pointed out by the trial judge and defense counsel, appellant won another case when counsel refused to call the witnesses appellant now complains were essential to his defense. We find no prejudice or abuse of discretion by the trial court in denying appellant's motion for a continuance.

Affirmed.

PITTMAN and MAYFIELD, JJ., agree.

PARKS LEASING, INC. *v.* BRAY CORPORATION, Frank E. Cochran and Mary B. Cochran

CA 92-1363 861 S.W.2d 116

Court of Appeals of Arkansas
Division I
Opinion delivered September 1, 1993

Williams, Schrantz, Croxton, Boyer, Rhoads, Schafer & Cochran, P.A., by: *R. Douglas Schrantz*, for appellant.

Matthews, Campbell & Rhoads, P.A., by: *Edwin N. McClure*, for appellees.

JAMES R. COOPER, Judge. The appellant leasing company brought an action against the appellees alleging breach of lease agreements. After a trial at which the appellees failed to appear, judgment was entered against them on March 19, 1992. Subsequently, the appellees moved for a new trial and for relief from the judgment pursuant to Rule 60. The trial court denied the request for a new trial but granted limited relief from the judgment pursuant to Rule 60. The appellant brings this appeal from the order granting relief from the judgment; the appellees cross-appeal, challenging the denial of their motion for a new trial. We reverse on direct appeal and dismiss the cross-appeal as untimely.

Parks Leasing, Inc., is in the business of leasing trailers for tractor-trailer trucks. In February 1989, Scheduled Truckways, Inc., leased 110 over-the-road trailers from the appellant for a term of sixty months. Frank Cochran, president of Scheduled Truckways, signed the lease, and the lease payments were guaranteed by Frank Cochran, Mary B. Cochran, and Bray Corporation (which is owned by the Cochrans).

Scheduled Truckways defaulted on the lease agreement, and on September 12, 1991, the appellant filed a complaint and petition for recovery of property against Scheduled Truckways, Bray Corporation, and the Cochrans. A preliminary hearing was

held October 4, 1991, at which time all the appellees were represented by attorney Howard Slinkard. At that hearing, the court allowed Scheduled Truckways to retain possession of the trailers on the condition that lease payments be made into the court registry during November and December 1991. However, these payments were not made, and an order of possession was entered on January 7, 1992. At that time, the court also set the case for trial on March 19, 1992.

On January 6, 1992, Mr. Slinkard asked the court's permission to withdraw as counsel for the appellees. However, on January 21, 1992, Mr. Slinkard continued his representation of the appellees at Mr. Cochran's deposition. On January 24, 1992, the court allowed Mr. Slinkard to withdraw pursuant to his earlier request and required the appellees to provide the court with the name of their new counsel within ten days. The appellees never contacted the court, and the matter proceeded to trial as scheduled on March 19, 1992. The appellees failed to appear, and judgment was entered against them for over $1.6 million, plus costs and attorney's fees, on March 19, 1992.

On March 26, 1992, the appellees Bray Corporation, Frank Cochran, and Mary Cochran filed a motion for new trial pursuant to Ark. R. Civ. P. 59, alleging they had been given no notice of the March 19 trial date and that the confusion concerning their legal representation amounted to irregularity in the proceedings. Although a hearing was held on the motion for new trial on April 16, 1992, the circuit court took no action at that time. On May 7, 1992, the appellees filed an amended motion for new trial, alleging error in the assessment of damages and asserting that they had been denied a jury trial. On that date, the appellees also filed a motion for relief from judgment under Ark. R. Civ. P. 60.

On June 26, 1992, the appellees filed an amended motion for relief from judgment and a second amended motion for new trial, alleging that a new trial should be granted in order to correct an error or mistake and to prevent the miscarriage of justice because the appellant had violated the Equal Credit Opportunity Act. On August 24, 1992, the circuit judge found no irregularity in the proceedings and denied the appellees' request for a new trial under Rule 59. The circuit judge did, however, grant the

appellees some relief from judgment under Rule 60 in order to prevent a miscarriage of justice. He set aside the judgment for the limited purpose of allowing the appellees to present their legal arguments concerning the proper computation of principal, interest, and late charges.

The appellant argues on appeal that the circuit judge erred in granting the appellees any relief from the judgment. The appellees have cross-appealed, arguing that the circuit judge erred in denying their motion for new trial.

When the appellees' motion for new trial was not acted upon within thirty days of its filing, it was deemed denied. *Bush* v. *Bush*, 306 Ark. 513, 514, 816 S.W.2d 590, 591 (1991); Ark. R. App. P. 4(c). In fact, after the expiration of thirty days from the date a motion for new trial is filed, the trial court loses its ability to do so. *See Wal-Mart Stores, Inc.* v. *Isely*, 308 Ark. 342, 343, 823 S.W.2d 902, 903 (1992). The appellees' motion for a new trial was filed on March 26, 1992, and was deemed denied on Monday, April 27, 1992. Although a notice of cross-appeal ordinarily is timely if filed within ten days of a notice of appeal, Ark. R. App. P. 4(a), no timely notice of appeal was filed from the denial of the appellees' new trial motion. While we could otherwise treat the appellees' "notice of cross-appeal" as a notice of appeal in its own right, we cannot in this case because the appellees' notice was not filed until September 17, approximately five months after their new trial motion was deemed denied pursuant to Rule 4(c). *See Phillips Constr. Co.* v. *Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991). The appellees' failure to file a timely notice of appeal must result in the dismissal of their cross-appeal. *See Upton* v. *Estate of Upton*, 308 Ark. 677, 678-79, 828 S.W.2d 827, 828 (1992); Ark. R. App. P. 4(a).

The appellees' motion for relief from judgment pursuant to Ark. R. Civ. P. 60 was filed on May 7, 1992. The circuit judge did not act on that motion until August 24, 1992, more than five months after the judgment was entered. At that point, the trial court had lost jurisdiction to grant relief from judgment under Rule 60(b). *See City of Little Rock* v. *Ragan*, 297 Ark. 525, 526, 763 S.W.2d 87, 88 (1989). Further, the appellant correctly points out that Rule 60(d) provides that no judgment shall be set aside unless the defendant, in his motion, asserts a valid defense to the

action. There was no reference to any defense in the appellees' May 7, 1992, motion for relief from judgment. It was not until the appellees filed their amended motion for relief on June 26, 1992, over ninety days after the entry of the judgment, that the appellees asserted a defense.

The only authority the circuit judge has to set aside a judgment after the expiration of ninety days is found in Rule 60(c), which states:

> (c) Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days. The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> (1) By granting a new trial where the grounds therefor were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59(c). . . .
>
> (2) By a new trial granted in proceedings against defendants constructively summoned. . . .
>
> (3) For misprisions of the clerk.
>
> (4) For fraud practiced by the successful party in obtaining the judgment.
>
> (5) For erroneous proceedings against an infant or person of unsound mind. . . .
>
> (6) For the death of one of the parties before the judgment in the action.
>
> (7) For errors in a judgment shown by an infant within twelve (12) months after reaching the age of eighteen (18) years. . . .

The appellees, however, have completely failed to show that they were entitled to relief under any of the grounds listed in Rule

60(c).

We find that, by the time the circuit judge took action on the appellees' motion for relief from judgment, he was without jurisdiction to do so under Rule 60(b). Since the appellees presented no evidence that they were entitled to relief under Rule 60(c), we reverse and remand with directions to the circuit court to reinstate the judgment.

Reversed on direct appeal; cross-appeal dismissed.

ROBBINS and MAYFIELD, JJ., agree.

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

CA 92-1215 861 S.W.2d 114

Court of Appeals of Arkansas
En Banc
Opinion delivered September 1, 1993

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

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

PER CURIAM. The appellee in this workers' compensation case has moved for attorney's fees pursuant to Ark. Code Ann. § 11-9-715(b) (1987), based on our opinion of June 23, 1993, in which we affirmed the award of workers' compensation benefits in

favor of the appellee. We grant the motion and award attorney's fees in the sum of $500.00 to the appellee.

This case began as a claim for benefits, based on a work-related hernia, which was granted by the Commission. The employer appealed that decision to this Court and, in *Cagle I*, we affirmed the Commission's award of benefits to the appellee. *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 36 Ark. App. 49, 819 S.W.2d 14 (1991). The appellee, having prevailed in *Cagle I*, moved for an award of attorney's fees which we granted by a per curiam issued February 12, 1992. *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 37 Ark. App. 85, 827 S.W.2d 660 (1992). No appeal was taken from our decision granting the appellee's motion for attorney's fees. Subsequently, the Arkansas Supreme Court granted review of our decision in *Cagle I*, concluded that we had erred in finding that the Commission made a satisfactory finding of fact with respect to the fifth requirement of the hernia statute, and reversed and remanded to the Commission for a new decision based upon a specific finding regarding compliance with the fifth statutory requirement. *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992). On remand, the Commission found that the appellee had satisfied that requirement and again awarded benefits to the appellee. The employer appealed to this Court, which again affirmed the Commission's award of benefits to the appellee in *Cagle II*. *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993). In the course of that appeal, the employer presented arguments concerning our prior award of attorney's fees to the appellee for prevailing in *Cagle I*. We did not address these arguments because the appellant conceded that the appellee would be entitled to the award of attorney's fees should the appellee prevail on appeal.

The present motion presents a separate issue, i.e., whether the appellee is entitled to an additional fee for prevailing in *Cagle II*. Arkansas Code Annotated § 11-9-715(b)(1) provides for additional attorney's fees if the claimant prevails on appeal. The statute neither expressly provides for nor expressly prohibits an additional award of attorney's fees in cases such as the case at bar, where the claimant has been required to defend his award of workers' compensation benefits through two separate appeals brought by the employer to this Court. Construing

the attorney's fee provision liberally and in accordance with the remedial purposes of the Act, *see* Ark. Code Ann. § 11-9-704(c)(3) (Supp. 1991), we hold that an additional award of attorney's fees is authorized by the statute under the circumstances of this case. Therefore, we grant the appellee's motion and award attorney's fees in the amount of $500.00.

Michael HAWKINS *v.* CITY OF PRAIRIE GROVE

CA CR 92-1070 861 S.W.2d 118

Court of Appeals of Arkansas
Division I
Opinion delivered September 8, 1993
[Rehearing denied October 6, 1993.]

John William Murphy, for appellant.

Boyce R. Davis Associates, by: *Boyce R. Davis*, for appellee.

JOHN E. JENNINGS, Chief Judge. Michael Hawkins was convicted of driving while intoxicated in Prairie Grove Municipal Court on January 18, 1991. Appellant filed a timely notice of appeal with the clerk of the Washington County Circuit Court and filed an affidavit of appeal with the clerk of the Prairie Grove Municipal Court on February 6, 1991.

The municipal court clerk never lodged the record on appeal in circuit court and on June 18, 1992, the court dismissed the appeal. The sole argument here is that the judge erred in his interpretation of Arkansas Code Annotated section 16-17-213 (Supp. 1991). We find no error and affirm.

The cited statute provides:

> If a party appeals from a justice of the peace judgment or a municipal court judgment, the clerk of the court or the justice of the peace of the court from which the appeal is taken must file the transcript of the judgment in the office of the circuit court within thirty (30) days after the rendition of the judgment.

Appellant notes that the earlier version of this act provided, "the clerk of the municipal court shall . . . lodge the transcript with the circuit clerk . . ." and argues that the change in the wording from "shall" to "must" shows that the general assembly intended that the appellant have no responsibility for lodging the record on appeal. We see no reason to agree. Under both versions of the statute the municipal court clerk clearly is charged with the responsibility for filing the record of the proceedings with the circuit court. Compliance with this section has been said to be mandatory and jurisdictional. *Wheeler* v. *City of Arkadelphia*, 254 Ark. 533, 495 S.W.2d 862 (1973). But when it is clear that the court [or the clerk] will not file the transcript, "the party appealing must assume the burden of taking prudent and diligent measures to protect his right of appeal, eliminating burdens of a character completely beyond his control." *Wheeler*, *supra*; *Brown* v. *Curtis*, 254 Ark. 162, 492 S.W.2d 235 (1973).

Appellant contends that he was left without a remedy, but the court in *Brown* noted that a party in such circumstances may file a motion for a rule on the clerk or a petition for a writ of mandamus. We also see no reason why appellant could not have

filed a partial record in the circuit court and petitioned for a writ of certiorari directing the municipal court clerk to lodge the record on appeal. *See e.g.*, *Forrest City Machine Works* v. *Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993).

Our conclusion is that the circuit court was correct in determining that it lacked jurisdiction to hear the appeal.

Affirmed.

COOPER and ROGERS, JJ., agree.

Denise HOLLABAUGH, M.D. *v.* ARKANSAS STATE MEDICAL BOARD

CA 93-34 861 S.W.2d 317

Court of Appeals of Arkansas
Division I
Opinion delivered September 8, 1993

Peel & Dunham, by: *James Dunham*, for appellant.

William H. Trice, III, for appellee.

JOHN B. ROBBINS, Judge. Denise Hollabaugh, M.D., is a family practice physician in Dover, Arkansas. Following a hearing on March 12, 1992, the Arkansas State Medical Board found that Dr. Hollabaugh had violated Ark. Code Ann. § 17-93-409(7) (Repl. 1992) and the medical board's Regulation 2(4) by committing "gross negligence or ignorant malpractice" in prescribing excessive amounts of controlled substances and writing an excessive number of prescriptions for addictive or potentially harmful drugs for seven patients. The board placed Dr. Hollabaugh's medical license on probation for one year and directed that she obtain fifty hours of continuing medical education regarding pain management. The board also ordered Dr. Hollabaugh to refrain from writing Schedule II and III narcotics prescriptions for her patients and to submit to periodic monitoring by the medical board and the Arkansas State Pharmacy Board. Dr. Hollabaugh appealed the decision of the board to the Pope County Circuit Court, which affirmed the medical board's decision. Dr. Hollabaugh has appealed from the decision of the circuit court and argues that the medical board's decision is not supported by the evidence. We agree and reverse.

The rules governing judicial review of decisions of administrative agencies are settled and are the same for both the circuit and appellate courts. On review of an agency decision, the circuit court is limited to a review of the evidence to determine whether there was substantial evidence to support the decision made and whether it was arbitrary, capricious, or characterized by an abuse of discretion. *Deweese* v. *Polk County Children and Family Servs.*, 40 Ark. App. 139, 141-42, 842 S.W.2d 466, 467 (1992). On appeal, our review of the evidence is similarly limited. *Beverly Enters.-Ark., Inc.* v. *Ark. Health Servs. Comm'n*, 308 Ark. 221, 226, 824 S.W.2d 363, 365 (1992). When reviewing the evidence, we give it its strongest probative force in favor of the agency. *Id.* In order to establish an absence of substantial evidence, the appellant must show the proof before the board was so nearly undisputed that fair-minded persons could not reach its conclusion; the question is not whether the evidence supports a

contrary finding but whether it supports the finding that was made. *Id.*

Substantial evidence has been defined as valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion and force the mind to pass beyond conjecture. *Eckels* v. *Ark. Real Estate Comm'n*, 30 Ark. App. 69, 75, 783 S.W.2d 864, 867 (1990); *Arkansas Real Estate Comm'n* v. *Hale*, 12 Ark. App. 229, 233, 674 S.W.2d 507, 509 (1984). The reviewing court may not displace the board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it *de novo*. *Fouch* v. *Alcoholic Beverage Control Div.*, 10 Ark. App. 139, 141-42, 662 S.W.2d 181, 183 (1983). Whenever the record contains affirmative proof supporting the view of each side, we must defer to the board's expertise and experience. *Green* v. *Carder*, 282 Ark. 239, 245, 667 S.W.2d 660, 663 (1984). It is well settled that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues; this may be especially true where such issues may be brought up in a contest between opposing forces in a highly-charged atmosphere. *Arkansas Alcoholic Beverage Control Bd.* v. *King*, 275 Ark. 308, 311, 629 S.W.2d 288, 290 (1982).

Dr. Hollabaugh argues that the decision of the medical board is not supported by substantial evidence because the only expert testimony offered on behalf of the medical board was that of Jim Moss, a pharmacist employed by the Arkansas Department of Health who works as an investigator for the medical board. She points out that Mr. Moss did not testify about the appropriate standard of care for the patients involved in this matter or whether she had violated the standard of care. Dr. Hollabaugh argues that, because there was no expert testimony on the appropriate standard of care or whether it had been violated, the board's decision should be reversed under *Hake* v. *Arkansas State Medical Board*, 237 Ark. 506, 374 S.W.2d 173 (1964). In *Hake*, the appellant argued that the medical board's decision to revoke his license to practice medicine was supported by no expert testimony regarding the appropriate standard of care; therefore, there was no standard by which to determine whether the acts charged amounted to malpractice.

In *Hake* v. *Arkansas State Medical Board*, the supreme court reversed and remanded the decision of the medical board because the record furnished no factual standard for the board's conclusions and no standards by which to determine whether the physician had committed malpractice:

> There is a virtual absence of evidence in the record to sustain the board's findings, as well as no expert testimony to provide a standard for the board's medical opinions. The valuable property rights here involved cannot be taken from appellant upon such questionable compliance with due process.

237 Ark. at 510, 374 S.W.2d at 176.

In reversing the medical board's decision, the supreme court in *Hake* relied on *McKay* v. *State Board of Medical Examiners*, 103 Colo. 305, 86 P.2d 232 (1938). In that case, the Colorado State Medical Board had revoked the license of John McKay to practice medicine on the ground that he was guilty of "grossly negligent or ignorant malpractice" and of "immoral, unprofessional or dishonorable conduct." *Id.* at 307, 86 P.2d at 235. There, the court stated:

> There is no evidence that the drugs prescribed by McKay were not prescribed in good faith. No doubt the amount prescribed and the frequency of prescription might be such that in and of itself it would indicate to one skilled in their proper use that one could not possess ordinary skill as a physician and in good faith so frequently prescribe such quantities. But, as heretofore pointed out, the law under which the board acted, contemplates a review of the board's action by a court presumably not expert in medical matters, with authority in the court to determine whether the board regularly pursued its authority or abused its discretion. Without testimony by an expert the court cannot determine the limits of proper treatment in good faith of one possessing ordinary skill, nor can it assume that the board members out of their own individual knowledge and skill correctly fixed the limits within which one might prescribe in these particular cases and be within the bounds of ordinary care and skill so that good faith might be presumed, and beyond which good

> faith and ordinary skill could not both be successfully asserted. Such matters being only within the knowledge of experts must be shown by testimony of experts appearing in the record.
>
> . . . . It does not appear in the evidence that such treatment for a patient in her condition was not proper, judged by sound and recognized medical standards. The board says that in its opinion it was not, but until there was competent evidence to support it the board was not authorized to form such an opinion and exceeded its authority in so doing. The board further found, without regard to any matters of diagnosis or treatment, that writing prescriptions to be delivered in McKay's absence from the state and in prescribing morphine in powdered form, the dose to be approximated by the patient, constituted malpractice. We find no evidence that in cases and under circumstances such as those in which this was done that it was not within the limits of reasonable discretion nor that it was a departure from what might be done by one possessed of reasonable skill in the exercise of ordinary care.

103 Colo. at 314-15, 86 P.2d at 237.

In *Livingston* v. *Arkansas State Medical Board*, 288 Ark. 1, 701 S.W.2d 361 (1986), the supreme court affirmed the medical board's finding that the appellant, Dr. Pat Livingston, had committed "grossly negligent or ignorant malpractice" warranting the suspension of her license to practice medicine for thirty days. The court noted that "malpractice" is defined by Regulation 2 of the medical board to include "any professional misconduct, unreasonable lack of skill or fidelity in professional duties, evil practice, or illegal or immoral conduct in the practice of medicine and surgery." 288 Ark. at 5, 701 S.W.2d at 363. The court noted that, although it had not previously defined "ignorant malpractice," it looked to its consideration of the question of "gross negligence" in other contexts:

> We have stated our commitment "to the majority rule that willful and wanton misconduct is, as a matter of law, higher in degree than gross negligence", *St. Louis S.W. Ry. Co.* v. *Clemons, etc.*, 242 Ark. 707, 415 S.W.2d 332

(1967). The U.S. District Court, Western District, Fort Smith Division, has stated that "[g]ross negligence is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." *Robinson Ins. & Real Estate Inc.* v. *Southwestern Bell Tel. Co.*, 366 F. Supp. 307 (1973). The district court further explained that the element of willfulness is absent in gross negligence. *Id.*

California has a similar medical licensing statute which includes "gross negligence" as a form of unprofessional conduct. Cal. Bus. & Prof. Code § 2234(b) (Deering 1985). Interpreting this statute, (formerly § 2361) the California Court of Appeal in *Gore* v. *Board of Medical Quality Assur.*, 110 Cal. App.3d 184, 167 Cal. Rptr. 881 (1980), also defined gross negligence as "a want of even slight care, but not necessarily involving wanton or willful misconduct; *in other words*, an extreme departure from the ordinary standard of care." In finding the doctor in that case committed gross negligence, the court held:

> Substantial evidence shows that he failed to exercise the standard of care in diagnosis, monitoring and treatment that is basically and routinely taught to students in medical school. Thus, management of his patient was an extreme departure from the standard of medical care, which we hold to be the equivalent of "want of even scant care" under the circumstances of this case.

Although the board did not differentiate in its finding between "ignorant malpractice" or "gross negligence" there was substantial evidence of an extreme departure from the ordinary standard of care, which constitutes gross negligence.

288 Ark. at 5-6, 701 S.W.2d at 363. In *Livingston*, however, there was expert testimony that Dr. Livingston's actions had breached the ordinary standard of care in the community.

■ In this case, Mr. Moss, a pharmacist, and Dr. Hollabaugh testified. The other evidence in the record included the medical records of the patients involved in this matter along with

the observations of the medical board's investigator. Also included in the record are the affidavits of two of Dr. Hollabaugh's patients. It is true that Mr. Moss testified about the types, amounts, and frequency of the prescriptions of certain drugs prescribed by Dr. Hollabaugh for these patients. Nevertheless, Mr. Moss did not, and could not, testify as to whether her treatment of these patients was appropriate or whether it violated the ordinary standard of care in the community. Additionally, Dr. Hollabaugh discussed her reasons for prescribing the drugs for these patients and gave much detail about their medical conditions which she felt justified her actions. She also discussed her belief that pain resulting from most medical conditions is not adequately treated by the medical profession. The board correctly states that, traditionally, we accord a great deal of deference to the findings of administrative agencies and points out that the expert credentials of the finders of fact (the medical board members) cannot be discounted. Nevertheless, the record must contain expert testimony establishing the standard of care to which Dr. Hollabaugh is to be held and whether she violated that standard of care. Without evidence in the record that the drugs prescribed for these patients were not therapeutic in nature or that the quantities prescribed were excessive, given the patients' conditions, we cannot affirm the decision of the medical board.

The record does not show that the board conducted any hearing pursuant to Ark. Code Ann. § 25-15-212(c) (Repl. 1992) to stay, pending appeal, enforcement of its disciplinary order of March 12, 1992, which placed Dr. Hollabaugh on probation for one year. Consequently, the matter should now be moot and we will not remand the proceeding through the circuit court back to the board for further proceedings. We reverse and dismiss.

COOPER and MAYFIELD, JJ., agree.

Pamela Arlene RAMSEY *v.* Donald Edward RAMSEY

CA 93-135 861 S.W.2d 313

Court of Appeals of Arkansas
Division I
Opinion delivered September 8, 1993

Mills & Patterson, P.A., by: *William P. Mills*, for appellant.

Hughes & Hughes, P.A., by: *Teresa L. Hughes*, for appellee.

MELVIN MAYFIELD, Judge. Pamela Ramsey (Tubbs) appeals from an order of the Chancery Court of White County. She contends that the court erred in failing to order appellee, Don Ramsey, to pay past-due child support. We find no error and affirm.

The parties to this action were divorced in December 1985 but continued to live together with their two daughters until January 1992. In the divorce decree, appellee was ordered to pay $300.00 a month in child support until June 1986, when the

monthly amount would increase to $400.00. In February 1992, appellant filed a contempt motion and sought to recover $25,800.00 in past-due support plus attorney's fees. In response, appellee pleaded the affirmative defense of estoppel, asserting that he had been the children's primary supporter subsequent to the divorce and until the parties separated in 1992. Appellee also sought a modification in child support due to the termination of his disability benefits.

The court held appellant was estopped from claiming the child support arrearage that accrued between December 1985 and January 1992. However, the court found appellee in contempt for failure to pay child support from January 1992 to the time of trial and ordered him to pay the amount which had accrued during that period. The court also modified the child support order to require appellee to pay $25.00 each week for the support of the one child who was still a minor, but the court stated that support might be adjusted by the court if appellee became employed or was awarded social security benefits. The court also ordered appellee to pay an attorney's fee of $1,000.00. Appellant appeals only from that part of the order denying past due child support for the period of December 1985 through January 1992.

Although we review chancery cases *de novo*, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). Because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the chancellor's superior opportunity to assess credibility. *Roark* v. *Roark*, 34 Ark. App. 250, 252, 809 S.W.2d 822, 823 (1991); *Callaway* v. *Callaway*, 8 Ark. App. 129, 131, 648 S.W.2d 520, 522 (1983).

At trial, both parties testified that they lived together subsequent to the divorce and paid bills from a joint checking account. Appellee stated that he, appellant, and their two children continued to operate as a family unit. He said that the substantial sums of money he received during that period from disability income and lump-sum disability settlements were used to enlarge the home received by appellant in the divorce settlement, to buy furniture, to pay a debt owed to appellant's father, and to pay family expenses such as taxes, insurance, medical

treatment, food, and clothing.

Appellant, however, disputed that the parties and their children lived as a family unit because appellee was absent from the home for long periods of time and she and appellee did not live together as husband and wife. She also said she did not consent to appellee living in the home but was unable to force him to leave. She stated that appellee had contributed his labor to the enlargement of the house but had not paid the debts he claimed to have paid. And she denied that he contributed to the family expenses.

Jody Ramsey, one of the parties' daughters, testified that her parents had been living together "off and on" since 1985, but that appellee had been there for the most part. She agreed that appellee had helped support the family and that the family had to "pull together" to meet their needs.

Rosie Bradley, the parties' neighbor for fifteen years, testified that appellee was in the home the majority of time after the divorce. She said that appellee was receiving disability payments part of that time and appellant stated that "she had to keep tabs on the money or [appellee] would blow it." Ms. Bradley said that it was her understanding that after the appellee received one of the disability settlements, he paid off a debt to appellant's father, paid off the furniture bill, and paid to finish the shop building. Ms. Bradley also said that appellant stated she "couldn't make it with these girls without him."

At the conclusion of the hearing, the chancellor stated:

> The Court has listened very closely to the testimony concerning whether or not these parties resided together after the divorce. I listened very closely to what the parties had to say and as to who and what was contributed. Not only did I listen to the parties, but I also listened to Jody testify as to what she had to say and how the parties, how these people functioned as a family unit after the divorce, and also the testimony of Rosie Bradley, a long time next-door neighbor, who testified in very strong terms that the parties, in fact, were living together, and it appears from the testimony of Jody Ramsey, she was a child, but indicated to the Court as well that the parties were living together as a family unit and there was a contribution

being made.

> I think credibility lies with the defendant on that issue. I think that for the Court to do anything other than to apply the doctrine of equitable estoppel would be improper and would not be a good result.

The appellant first argues that the chancellor erred in finding that the parties and their children had lived as a family unit and that appellee provided support for the family from the divorce in 1985 until the parties' separation in January 1992. Based on the record before us, and in view of the chancellor's superior opportunity to assess the credibility of the witnesses, we cannot say the chancellor's findings in this regard are clearly against a preponderance of the evidence.

Appellant also argues that the chancellor erred in applying the doctrine of equitable estoppel and refusing to enforce payment of the child support arrearages accrued from the time of the divorce in 1985 to the parties' separation in January 1992. She contends that statutes enacted by the Arkansas Legislature prohibited the chancellor from remitting the unpaid and accrued support payments.

This court discussed the vesting of child support payments in *Roark* v. *Roark*, 34 Ark. App. at 252-53, 809 S.W.2d at 824, as follows:

> Once a child support payment falls due, it becomes vested and a debt due the payee. *Holley* v. *Holley*, 264 Ark. 35, 568 S.W.2d 487 (1987). Arkansas has enacted statutes in order to comply with federal regulations and to insure that the State will be eligible for federal funding. *Sullivan* v. *Eden*, 304 Ark. 133, 801 S.W.2d 32 (1990); *see* Ark. Code Ann. §§ 9-12-314 and 9-14-234 (Repl. 1991). These statutes provide that any decree, judgment, or order which contains a provision for payment of child support shall be a final judgment as to any installment or payment of money which has accrued. Ark. Code Ann. § 9-14-234(a) (Repl. 1991); Ark. Code Ann. § 9-12-314(b) (Repl. 1991); *see Sullivan v. Eden*, *supra*. Furthermore the court may not set aside, alter, or modify any decree, judgment or order which has accrued unpaid support prior to the filing of the

motion. Ark. Code Ann. § 9-14-234(b) (Repl. 1991); Ark. Code Ann. § 9-12-314(c) (Repl. 1991); *see Sullivan, supra*. While it appears that there is no exception to the prohibition against the remittance of unpaid child support, the commentary to the federal regulations which mandated our resulting State statutes, makes it clear that there are circumstances under which a court might decline to permit the enforcement of the child support judgment. The commentary states:

> [e]nforcement of child support judgments should be treated the same as enforcement of other judgments in the State, and a child support judgment would also be subject to the equitable defenses that apply to all other judgments. Thus, if the obligor presents to the court or administrative authority a basis for laches or an equitable estoppel defense, there may be circumstances under which the court or administrative authority will decline to permit enforcement of the child support judgment.

54 Fed. Reg. 15,761 (April 19, 1989).

In *Arkansas Department of Human Services* v. *Cameron*, 36 Ark. App. 105, 109, 818 S.W.2d 591, 593 (1991), we went on to explain: "That commentary refers to the defense of equitable estoppel as an example of a circumstance under which enforcement of a child support judgment may not be permitted. . . ."

The Arkansas Supreme Court has held that 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. *See Bethell* v. *Bethell*, 268 Ark. 409, 424, 597 S.W.2d 576, 583 (1980). And in *Arkansas Department of Human Services* v. *Cameron*, cited above, the Arkansas Court of Appeals affirmed the chancellor's finding that the appellant was estopped from collecting child support arrearages because of her actions leading the appellant into thinking there was going to be

an adoption. 36 Ark. App. at 109, 818 S.W.2d at 593.

A party claiming estoppel must prove he has relied in good faith on wrongful conduct and has changed his position to his detriment. *Christmas* v. *Raley*, 260 Ark. 150, 158, 539 S.W.2d 405, 410 (1976). Here, the appellee testified that he did not pay child support into the court registry because he was providing, and appellant was accepting, financial support for appellant and the children while he was living in the home. We also note that appellant did not file the contempt motion until February 1992, after the parties had separated. In addition, the chancellor weighed the contributions the parties were making to the support of the family. The chancellor held that the circumstances were sufficient to establish the elements of estoppel, and we cannot say that the chancellor's finding is clearly against a preponderance of the evidence.

Appellant also contends that under this court's holding in *Buckner* v. *Buckner*, 15 Ark. App. 88, 689 S.W.2d 584 (1985), the chancellor was precluded from remitting the arrearages. In that case, the chancellor found that the parties did not live together and that what monies appellant did give appellee were voluntary expenditures and not child support. Here, the chancellor found that the parties functioned as a family with appellee providing support for appellant and the children, and we are not persuaded appellee's expenditures can be classified as "voluntary expenditures."

Finally, we note two cases not cited by either party. *State v. Robinson*, 311 Ark. 133, 842 S.W.2d 42 (1992), involved a suit filed in California by the Family Support Division of a District Attorney's Office seeking to obtain child support for the benefit of an unwed mother and her child. Under the provisions of the Revised Uniform Reciprocal Enforcement of Support Act, Ark. Code Ann. §§ 9-14-301 through 9-14-344 (Repl. 1991), the initiating court in California certified the complaint to a court in Arkansas where the father of the child lived. The court here made a finding of paternity, ordered the father to pay child support, and placed the custody of the child in the mother subject to the father's right of visitation. Subsequently, the father filed a petition alleging he had been denied visitation and asking that support payments be suspended until he was allowed to visit the

child. This petition was granted and the mother appealed. The Arkansas Supreme Court held that the Act under which the suit was filed did not give the Arkansas chancery court jurisdiction to address the visitation issue, and the court could not make child support dependent upon visitation. The court stated that the cases of *Roark* v. *Roark* and *Arkansas Department of Human Services* v. *Cameron*, cited above, could be read to conflict with its decision in *State* v. *Robinson*, and concluded: "To prevent any possible confusion, we note that the federal regulation quoted in those cases, 54 Fed. Reg. 15,761 (April 19, 1989), is not related to visitation or custody defenses, and to the limited extent that there may be some conflict, they are overruled." 311 Ark. at 136, 842 S.W.2d at 48.

In *Burnett* v. *Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993), a case decided after the briefs in the instant case were filed, the trial court had granted a retroactive reduction in child support because of "material changes" in circumstances and because the father had made a "good faith" effort to pay according to the Arkansas Child Support Chart. Our supreme court reversed "[b]ecause the actions of Mrs. Burnett do not justify the application of estoppel to prevent the collection of past due child support payments." 313 Ark. at 605, 855 S.W.2d at 955.

The instant case does not involve a visitation or custody defense, and neither *State* v. *Robinson* nor *Burnett* v. *Burnett* holds that a court cannot decline to permit the enforcement of a child support judgment on the basis of equitable estoppel. To the contrary, both cases refer to Fed. Reg. 15,761 (April 19, 1989) and acknowledge that it provides that "a child support judgment would also be subject to the equitable defenses that apply to all other judgments." The decision in the instant case is based on equitable estoppel, and we affirm that decision.

Affirmed.

COOPER and ROBBINS, JJ., agree.

HOME FEDERAL SAVINGS & LOAN ASSOCIATION *v.* CITIZENS BANK of Jonesboro

CA 93-385 861 S.W.2d 321

Court of Appeals of Arkansas
Division I
Opinion delivered September 15, 1993
[Rehearing denied October 13, 1993.]

Barrett & Deacon, by: *Ralph W. Waddell*, and *D.P. Marshall, Jr.*; for appellant.

Lyons & Emerson, by: *Jim Lyons*, for appellee.

JOHN B. ROBBINS, Judge. This case involves the chancellor's refusal to restore three mortgages, which were released by appellant in error, to their priority status above appellee's judgment lien. The chancellor found that appellant's error in releasing its mortgages was the result of its own culpable negligence and refused to reinstate the priority position of the mortgages above appellee's judgment lien. Because we cannot say this finding is clearly against the preponderance of the evidence, we must affirm.

The facts in this appeal are undisputed. In 1990, appellant, Home Federal Savings and Loan Association, held a first, second, and third mortgage on property owned by Stanley and Barbara Broadaway, known as the "packing plant," in Jonesboro, Arkansas. These mortgages secured three separate promissory notes for various amounts with differing maturity dates. By the summer of 1990, all three of these notes had matured and the Broadaways began negotiations with appellant for additional time to attempt

to sell the mortgaged property in order to repay these notes. Appellant agreed to consolidate the three notes into a single note with a future maturity date. The new note, in the amount of $152,448.37, not only included the $140,242.69 amount owing on the three prior notes, but also included an additional indebtedness of $12,205.68 and had a different interest rate from the earlier notes. The additional indebtedness represented $10,414.68 interest, which was owed by the Broadaways to appellant on a residential mortgage loan and secured by a separate mortgage on the Broadaways' home, and $1,791.00 loaned by appellant to the Broadaways to cover the expenses of a new appraisal, title report, and recording fees. The new note and mortgage were executed on August 1, 1990, and the proceeds from this note were used to pay off the three earlier notes. The first, second, and third mortgages securing these earlier notes were released after these notes were paid, and the mortgage on the new note was recorded.

In releasing its mortgages, appellant had failed to discover that appellee, Citizens Bank of Jonesboro, had obtained a judgment against the Broadaways for $307,510.00, which had been entered of record after the three original mortgages but prior to the new August 1990 mortgage. By operation of law, the appellee's judgment constituted a lien on the packing plant; therefore, appellee's judgment lien ascended to priority above appellant's new mortgage when the three old mortgages were released. Appellant failed to discover this judgment lien despite the fact that it was reflected in the title report ordered by appellant.

It was not until a second title report of the packing plant property was ordered, in preparation for instituting foreclosure proceedings against the Broadaways, that appellant discovered appellee's intervening judgment lien and the loss of appellant's priority status. Appellant then contacted appellee in an attempt to regain its priority status. Appellee refused appellant's request although it had been unaware that appellant's three earlier mortgages had been released.

Appellee instituted foreclosure proceedings against the Broadaways and the packing plant property and named appellant as a party defendant. Appellant counterclaimed, asking that its three original mortgages on the property, which it had released in

error, be reinstated to their first priority position. The chancellor denied appellant's petition for reinstatement after a hearing on the merits, finding that the new note was intended to be a new loan rather than a continuation or renewal of the three existing notes and that appellant was guilty of culpable negligence in not discovering appellee's intervening judgment lien. It is from this ruling that appellant appeals.

■ It has long been the rule in Arkansas that, where a senior mortgagee in good faith and without culpable negligence satisfied the lien of his mortgage on the record in ignorance of the existence of an intervening mortgage on the same premises and took a second mortgage as a substitute, equity will restore the lien of the first mortgage, provided it can be done without working hardship or injustice on innocent parties. *Wooster* v. *Cavender*, 54 Ark. 153, 155, 15 S.W. 192 (1891). *See also Stephenson* v. *Grant*, 168 Ark. 927, 931, 271 S.W. 974, 976 (1925). Such relief, however, cannot be obtained to the injury of the intervening rights of an innocent third party who relied upon the release unless the party is chargeable with notice of the mistake or will not be prejudiced by the reinstatement. *Security Trust Co. of Freeport* v. *Martin*, 178 Ark. 518, 520, 12 S.W.2d 870, 871 (1928).

Appellant contends that reinstatement of its prior mortgages is proper because appellee did not rely on the release of its mortgages and has not suffered any prejudice because of appellant's mistake. Although appellant acknowledges that its new note includes approximately $12,000.00 of additional indebtedness which was not included in the original three notes, it argues that it disclaimed any right to these additional funds prior to trial and requested that its reinstated mortgages be limited to the amount of debt secured by the prior three mortgages.

■ As a general rule, where a mortgage has been released or satisfied through mistake or accident, it *may* be restored to its original priority as a lien unless the rights of innocent third persons are affected.

> *Ignorance of existence of other liens or rights.* Generally, where a new mortgage is substituted for an old one in ignorance of and under the mistaken belief that there was no other encumbrance on the premises, and the original mortgage is released of record, it may be restored and given

> its original priority as a lien, where the rights of innocent third persons will not be affected. . . . Thus, when the release is intended to be effectual only by force of, and for the purpose of giving effect to, a new mortgage, as where a new mortgage is substituted for an old one for purposes of convenience, or with the object of extending the time of payment or in pursuance of an agreement to assign the debt, and, in ignorance of an intervening lien, the first mortgage is discharged of record, it may be restored and given its original priority. . . .
>
> The result under the general rule will not be affected by the fact that the overlooked intermediate lien was on record at the time of the controverted release, *provided the mortgagee was not, in so acting, guilty of culpable negligence; but if the mortgagee is chargeable with such negligence relief will be denied, as where the mortgagee had actual knowledge of the intervening lien.*

59 C.J.S. *Mortgages* § 282 (1949) (emphasis added). While a court of equity has the power to grant relief from the consequences of a mistake, the application of this power must be largely controlled by the circumstances of each case. Spencer W. Symons, *Pomeroy's A Treatise On Equity Jurisprudence* § 856b, at 340 (5d ed. 1941).

■ We agree with appellant that appellee has not shown any reliance or that it will suffer any prejudice if appellant's mortgages are reinstated. Nevertheless, Arkansas law also requires a mortgagee to be free of culpable negligence in order to have its mortgage reinstated. *See Wooster* v. *Cavender*, 54 Ark. at 153, 15 S.W. at 192. The chancellor recognized this premise in his letter opinion:

> Let me begin with the statement that the court recognizes the basic premise that a mortgage released by mistake may be reinstated, provided that such reinstatement is not detrimental to intervening rights of innocent third parties. As stated in the case of *Wooster* v. *Cavender*, such reinstatement is conditional, i.e. the mortgager must have acted in good faith and without culpable negligence, and provided the reinstatement does not work a hardship or injustice to innocent parties. That Home Federal was

guilty of culpable negligence is, in my opinion, without question.

Appellant admits that it made a mistake in not discovering appellee's lien but maintains that this mistake was a mere error and not the result of culpable negligence. Whether this mistake was caused by appellant's own culpable negligence was a question of fact for the chancellor. Culpable negligence is the omission of something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under all the circumstances surrounding each particular case. *St. Louis Iron Mountain & Southern Railway Co.*, 66 Ark. 248, 250, 50 S.W. 273, 274 (1899); *Hot Springs Railroad Co.* v. *Newman*, 36 Ark. 607, 611 (1880).

In the case at bar, there was no evidence that appellant inquired of the Broadaways as to whether there were other mortgages on the property or judgments against them when it negotiated the new loan. The title report ordered by appellant clearly showed the judgment of appellee at the bottom of the report.

Connie Stevenson, assistant loan officer with appellant, testified that part of her responsibilities was to review title reports and to prepare the necessary documents to secure appellant's first liens on property. She stated that she began working in the Consumer Lending Department of appellant in January 1990 and her only formal training for this position was working for three weeks with the lady who was leaving that area. She stated that she was a consumer loan processor until January 1992 when she became an assistant loan officer. She testified that she obtained the title work on the property from the abstractor but could not remember examining the report. She stated that she was sure she did review it but did not recall seeing the judgment lien of appellee reflected on that report. She admitted that, at that time, she did not understand the legal significance of a judgment on a title report. She stated that appellant had a first, second, and third mortgage on the property and she ordered the title report to see if someone else had a fourth mortgage on the property.

Dan Trevathan, president of appellant, testified that he is responsible for the overall operations of appellant and that he instructed Connie Stevenson to order a title search on the

property. He testified that he did not review the title report and that he normally does not do so unless the loan secretary brings a problem to his attention. He testified that he was concerned about an additional mortgage on the property of which he might not have been aware but went ahead with the closing of the loan when the title report did not reveal another mortgage. He denied that he had any actual knowledge of appellee's judgment lien but stated he knew that Mr. Broadaway had purchased property after a foreclosure from appellee and he did not check to see if that foreclosure decree had been satisfied before releasing appellant's mortgages. He also stated that he would have handled the transaction differently if he had been aware of appellee's judgment lien. He admitted that anyone closing loans and reviewing title reports ought to know the significance of a judgment lien.

Based on the undisputed evidence before the chancellor, we cannot say his finding that appellant was guilty of culpable negligence in releasing its mortgages is clearly against the preponderance of the evidence. Chancery cases are tried *de novo* on the record on appeal; however, we will not reverse the findings of the chancellor unless clearly erroneous or clearly against the preponderance of the evidence. *RAD-Razorback Ltd. Partnership* v. *B.G. Coney Co.*, 289 Ark. 550, 552, 713 S.W.2d 462, 464 (1986); Ark. R. Civ. P. 52.

Because we are affirming the chancellor's finding of culpable negligence on the part of appellant, we need not address appellant's second point on appeal, that the chancellor erred in finding the consolidation loan was a new transaction. Suffice it to say we have reviewed the evidence and the testimony presented, and we cannot say his decision in this regard is clearly against the preponderance of the evidence.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Rick R. BANNING *v.* STATE of Arkansas

CA CR 93-435 861 S.W.2d 119

Court of Appeals of Arkansas
Opinion delivered September 15, 1993

James C. Haaser, for appellant.

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

PER CURIAM. The State of Arkansas, through the attorney general, has filed a motion to dismiss the appeal in this criminal case. For reasons which follow, the motion must be granted.

After a jury trial, appellant was convicted of DWI in Sebastian County Circuit Court on December 9, 1992. The circuit court entered a judgment of conviction on December 23, 1992. On January 20, 1993, appellant filed a motion for new trial. On January 22, 1993, appellant filed a notice of appeal. On January 25, 1993, the circuit court entered an order denying the motion for new trial.

Rule 4(c) of the Rules of Appellate Procedure provides:

> (c) Disposition of Posttrial Motion. If a timely motion listed in section (b) of this rule is filed in the trial court by any party, the time for appeal for all parties shall run from

> the entry of the order granting or denying a new trial or granting or denying any other such motion. Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. A notice of appeal filed before the disposition of any such motion or, if no order is entered, prior to the expiration of the 30-day period shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period. No additional fees shall be required for such filing.

It is quite clear that Rule 4(c) applies in criminal cases. *Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); *Mangiapane* v. *State*, 43 Ark. App. 19, 858 S.W.2d 128 (1993). It is also clear that a motion for new trial in a criminal case is analogous to a motion made pursuant to Ark. R. Civ. P. 59. *Enos, supra.* In a criminal case a motion for new trial must be filed within thirty days from the entry of the judgment. *Smith* v. *State*, 301 Ark. 374, 784 S.W.2d 595 (1990); *Chisum* v. *State*, 274 Ark. 332, 625 S.W.2d 448 (1981).

In the case at bar the notice of appeal was filed before the disposition of appellant's posttrial motion and under the express language of Rule 4(c) it had "no effect." It follows that we lack jurisdiction to hear the appeal. *See Phillips Construction Co.* v. *Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991).

We have no choice but to dismiss this appeal without prejudice to appellant's right to petition the Arkansas Supreme Court for a belated appeal.

Motion granted.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the dismissal of the appeal in this case and respectfully submit that the majority opinion has failed to follow the law as announced by the Arkansas Supreme Court.

The judgment of conviction in this case was entered on

December 23, 1992. Both Appellate Procedure Rule 4(a) and Criminal Procedure Rule 36.9 make it clear that a notice of appeal must be filed within 30 days from the entry of the judgment. The notice in this case was filed on January 22, 1993, and this was within the 30-day period. *See Hodge* v. *Wal-Mart Stores, Inc.*, 297 Ark. 1, 759 S.W.2d 203 (1988) ("The general rule in calculating a limitations period is to exclude the first day from the computation.").

However, the appellant filed a motion for new trial in this case, and under Appellate Procedure Rule 4(c), it is provided that "*if a timely motion listed in section (b) of this rule is filed in the trial court*" (emphasis added), then the time of appeal begins to run from the entry of an order granting or denying the motion. Furthermore, Rule 4(c) provides that if no such order is entered within 30 days of the filing of the motion, it will be deemed denied as of the 30th day; and in that event, a new notice of appeal will have to be filed within 30 days from the date the motion was deemed denied, and the notice of appeal filed before the motion was deemed denied "shall have no effect."

As the majority opinion states, the Arkansas Supreme Court has held that Appellate Rule 4(c) applies in criminal cases. *Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *In Re Belated Criminal Appeals*, 313 Ark. 561 app., 856 S.W.2d 9 (1993); *Giacona v. State*, 311 Ark. 664, 846 S.W.2d 185 (1993). Because of that holding, the majority opinion has reached the wrong result. The motion for new trial was filed January 20, 1993. Appellate Rule 4(c) clearly provides that it applies only "if a *timely* motion listed in section (b)" of Appellate Rule 4 is filed in the trial court. Section 4(b) lists three motions. The motion applicable here is "motion for new trial under Rule 59(b)." Turning to Civil Procedure Rule 59(b), we see it provides that a "motion for new trial shall be filed not later than 10 days after the entry of judgment." In the present case, the judgment was entered on December 23, 1992. The motion for new trial was not filed until January 20, 1993. Therefore, the motion was not filed within the 10 days provided for by Civil Procedure Rule 59(b). Thus, there was no filing of a "*timely*" motion as listed in section (c) of Appellate Rule 4.

The Arkansas Supreme Court dealt with this precise issue in

Jackson v. *Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992), and the court concluded:

> Because Jackson's motion to vacate was in the nature of a motion for a new trial under Rule 59, it was required to be filed within ten days of judgment. *See* Ark. R. Civ. P. 59(b). This was not done. Since the motion to vacate did not extend the time for filing a notice of appeal under Ark. R. App. P. 4(b), the notice of appeal was required to be filed within thirty days of judgment. This also was not done. AP&L's motion, accordingly, has merit and the appeal is dismissed.

309 Ark. at 574, 832 S.W.2d at 225. In the present case, the motion for new trial was not filed within 10 days of the entry of judgment; therefore, it did not extend the time for filing the notice of appeal. And, since the notice of appeal filed on January 22, 1993, was filed within 30 days of the entry of the judgment on December 23, 1992, it was filed after the judgment was entered and it was filed in time.

The majority opinion relies upon *Smith* v. *State*, 301 Ark. 374, 784 S.W.2d 595 (1990), as authority for dismissing the appeal in the present case. In that case, the Arkansas Supreme Court said that "a motion for a new trial on the basis of newly discovered evidence must be filed within 30 days from the entry of the judgment," and cited as authority Criminal Procedure Rule 36.22. However, *Smith* was not concerned with the question of whether a notice of appeal was filed in time. Moreover, the application of Criminal Procedure Rule 36.22 to the situation in the present case seems to have been clearly negated by the later case of *Giacona*, *supra*, in which our supreme court stated, "We . . . take this opportunity to repeat that Arkansas Rule of Appellate Procedure 4(c) applies to criminal cases." And in *Enos*, *supra*, the supreme court said again, "We have made it clear that Rule 4(c) applies in criminal cases . . . ." The court in *Enos* also stated that it was "concerned about the confusion caused by this court's application of the Arkansas Rules of Appellate Procedure to criminal cases" and refused to hold that a "motion to set aside the judgment" was analogous to any of the motions listed in Appellate Procedure Rule 4(b). That opinion sets the tone that I would follow here. I would make a perfectly

reasonable application that would allow — rather than dismiss — this appeal.

I recognize the Arkansas Supreme Court has said that in cases where a judgment was entered prior to July 1, 1993, the supreme court will consider a petition for belated appeal even though the notice of appeal was filed *before* the judgment was entered. *See In Re Belated Criminal Appeals*, 313 Ark. 561 app., 856 S.W.2d 9 (1993). Therefore, since the judgment in the present case was entered before July 1, 1993, the appellant can petition the supreme court for a belated appeal, and the appellant may prefer to do that without asking (even alternatively) that the supreme court review and reverse our decision. Even so, I think we have incorrectly applied the law as announced by our supreme court.

I dissent.

Ronald PORTER *v.* STATE of Arkansas

CA CR 92-975 861 S.W.2d 122

Court of Appeals of Arkansas
Division II
Opinion delivered September 22, 1993

Cross, Kearney & McKissic, by: *Jesse L. Kearney*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Ronald Porter appeals from his conviction at a jury trial of first-degree criminal mischief and burglary, for which he was sentenced to three years in the Arkansas Department of Correction and fined $5,000, respectively. Appellant argues four points for reversal in this appeal. We find no error and affirm.

Appellant was sixteen years old in October 1991 when he allegedly burglarized Westside School and caused in excess of $35,000.00 damage to school property. Appellant was charged as an adult in Bradley County Circuit Court with the felonies of burglary and first-degree criminal mischief.

At the time of these crimes, appellant was on probation after having been adjudicated a delinquent by the Bradley County Juvenile Court as a result of a May 1991 theft of property valued at more than $200.00. A petition to revoke appellant's prior probation, alleging as grounds for revocation appellant's activities at Westside School, was filed in juvenile court. After a hearing on January 24, 1992, the juvenile court revoked appellant's probation and ordered him placed into the custody of the Division of Children and Family Services.

On January 27, 1992, appellant filed a motion in the circuit court for an order dismissing the criminal prosecution on double jeopardy grounds or, in the alternative, transferring the case to juvenile court and enjoining further prosecution in the criminal proceeding. On January 28, appellant filed a petition for a writ of prohibition in the supreme court, also seeking to halt the prosecution on double jeopardy grounds. On January 29, the supreme court denied appellant's petition for a writ of prohibition without prejudice to his raising the issue of double jeopardy on appeal. Also on January 29, after a hearing, the circuit court denied appellant's motion to dismiss or transfer. The case proceeded to trial, and appellant was found guilty of both

charges.

Appellant first contends that the evidence was insufficient to sustain his convictions. We do not address the issue because it was not preserved for appeal. Where there has been a trial by jury, a defendant's failure to move for a directed verdict at the conclusion of the State's evidence and again at the close of the case constitutes a waiver of any question pertaining to the sufficiency of the evidence. Ark. R. Crim. P. 36.21(b). Here, appellant did not move for a directed verdict at either time, and we cannot consider his argument. *Middleton* v. *State*, 311 Ark. 307, 842 S.W.2d 434 (1992); *DeWitt* v. *State*, 306 Ark. 559, 815 S.W.2d 942 (1991).

Appellant next contends that the trial court erred in denying his motion to dismiss under both the Fifth Amendment to the United States Constitution and Art. 2, § 8 of the Arkansas Constitution. He argues that it violated the prohibition against being "twice put in jeopardy" for the same offense to be prosecuted on charges of burglary and criminal mischief when proof of that same criminal conduct had served as the basis for the revocation of his probation. We find no error.

We agree with appellant that a juvenile "who has been subjected to an *adjudication* proceeding pursuant to a petition alleging him to be a *delinquent*" cannot then be tried on "criminal charges based upon facts alleged in the petition to find him delinquent." Ark. Code Ann. § 9-27-319(a) (Repl. 1991) (emphasis added); *see Breed* v. *Jones*, 421 U.S. 519 (1975). However, that is not what happened in this case. Rather, the criminal conduct for which this appellant was tried and convicted in circuit court had merely been used as a basis for *revoking his probation*, which had been ordered as a result of the *prior*, *unrelated* adjudication of delinquency for the May 1991 theft of property. The detention imposed upon revocation of that probation was imposed for the prior, unrelated theft of property. As we recently held in *Lawrence* v. *State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992), the prohibition against double jeopardy does not bar a criminal prosecution simply because the same criminal conduct has previously served as the basis for the revocation of the defendant's probation.

Appellant's third argument for reversal is that the court

erred in denying his alternative motion to transfer the matter to juvenile court. We cannot agree.

Since appellant was sixteen years old at the time of the acts in question, and since those acts would constitute felonies if committed by an adult, the prosecuting attorney had the discretion either to file a delinquency petition in juvenile court or to file criminal charges in circuit court and prosecute appellant as an adult. Ark. Code Ann. § 9-27-318(c) (Supp. 1991). Because appellant moved to transfer the case to juvenile court, the circuit judge held a hearing to determine whether to retain jurisdiction or to grant the motion to transfer. Ark. Code Ann. § 9-27-318(d). At the conclusion of the hearing, the court found by clear and convincing evidence that appellant should be tried as an adult and retained jurisdiction. Ark. Code Ann. § 9-27-318(f).

In making a determination whether to retain jurisdiction or to transfer the case, the court is to consider the following factors:

> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
>
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

Ark. Code Ann. § 9-27-318(e). The court is not required to give equal weight to the statutory factors, nor is the prosecutor required to introduce proof against the juvenile with regard to each factor. *Hogan* v. *State*, 311 Ark. 265, 843 S.W.2d 825 (1992); *Pennington* v. *State*, 305 Ark. 312, 807 S.W.2d 660 (1991). On appeal, the trial court's findings will not be reversed unless clearly erroneous. *Hogan* v. *State*, *supra*; *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502, *reh'g denied*, 304 Ark. 402-A, 805 S.W.2d 80 (1991).

Here, the trial court considered the evidence in light of all of the statutory factors and found by clear and convincing evidence that appellant should be tried as an adult. Although appellant did not employ violence against another person, the court specifically found that the charged offenses were very serious and that appellant was beyond rehabilitation under existing rehabilitation programs. The court noted the extent of the damage done to school property and appellant's prior juvenile court history. From our review of the record, including proof that over $35,000.00 damage was intentionally done, that appellant had twice before been adjudicated delinquent, and that he had failed to complete the prior probation successfully, we cannot conclude that the trial court's decision was clearly erroneous.

Appellant finally argues that the trial court erred in denying his motion, made after the denial of his motion to transfer, to enjoin any further proceedings by the prosecutor. Again, appellant argues in his brief that the State was barred from prosecuting appellant on the criminal charges because it had elected to seek revocation of his probation in juvenile court. We first note that the circuit court did not hold any proceedings until after the supreme court had denied appellant's petition for a writ of prohibition. In any event, since appellant's contention is essentially based upon the same double jeopardy argument made above, we conclude that our decision of that former argument adversely to appellant disposes of this contention as well.

Affirmed.

JENNINGS, C.J., and ROGERS, J., agree.

Staci COCHRAN, Lon Cochran, and A.N.C. *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES,
Division of Children and Family Services, Allison Hickey,
and SCAN, Inc.

CA 92-1404 860 S.W.2d 748

Court of Appeals of Arkansas
Division I
Opinion delivered September 22, 1993

Autrey & Autrey, by: *L. Wren Autrey*, for appellant.

Steve C. Jennings, for appellee.

JAMES R. COOPER, Judge. The appellee, Arkansas Department of Human Services, brought an action on June 22, 1992, to remove the custody of A.N.C., a minor child, from Lon Cochran, her father, and declare the child to be dependent-neglected. After

hearings on September 3, 1992, and September 18, 1992, custody of the minor child was removed from the father; she was declared dependent-neglected and placed with a relative. From that decision, comes this appeal.

For reversal, the appellants contend that the trial court erred in admitting into evidence certain out-of-court statements made by the child to a Department of Human Services employee. We agree, and we reverse.

The Department of Human Services employee, Allison Hickey, testified that, in the course of her duties as the Director of SCAN, she investigated a complaint that A.N.C. had been sexually abused by her father. After testifying on direct examination that she had interviewed A.N.C., Ms. Hickey was asked what A.N.C. had told her during the course of the interview. The defense counsel objected to such testimony on the grounds that it would be inadmissible hearsay. The defense further argued that, even if the testimony was considered to be an admission by a party opponent under Rule 801(d)(2), such testimony could not be used against the father because he was a co-defendant. The trial court overruled the objection and permitted the testimony as an admission by a party opponent. We hold that the trial judge erred in so ruling.

Rule 801(d) of the Arkansas Rules of Evidence provides that a statement is not hearsay if it is an admission by a party opponent, defined as a statement offered against a party which is:

> (i) his own statement, in either his individual or a representative capacity, (ii) a statement of which he has manifested his adoption or belief in its truth, (iii) a statement by a person authorized by him to make a statement concerning the subject, (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The crux of the appellant's argument is that the statement made by the child is not the statement of the co-defendant father; therefore, they argue, subsection (i) does not apply and the statement does not constitute an admission by a party opponent

under the Rule. We agree.

It is generally held that the admissions of one co-plaintiff or co-defendant are not receivable against another, merely by virtue of his position as a co-party in the litigation. 4 *Wigmore on Evidence* § 1076 (Chadbourn rev. 1972).

The best exposition of the rule is found in C.J.S., where it is stated that:

> As a general rule, admissions of one of two or more coparties are competent against declarant . . . and they are not to be excluded merely because in terms they also affect a coparty, or because they may have an ulterior or collateral effect detrimental to a coparty.
>
> Where, however, the interests of coparties are all dependent on the existence of a particular fact, the admission of one of them with respect to such fact cannot be received, because it could have no effect as to himself without affecting the others.

31A C.J.S. *Evidence* § 318(a).

The rule of exclusion applies especially where the coparties, although nominally on the same side in the litigation, actually have adverse interests. *See generally* 4 *Wigmore on Evidence* § 1076. This general principle was employed in the Arkansas case of *Bryant* v. *Lewis*, 201 Ark. 288, 144 S.W.2d 37 (1940). There the issue was whether the contents of an affidavit by a co-defendant were admissible against the other co-defendant. The Supreme Court held that they were not, and explained its reasoning as follows:

> It must be remembered in this case that the interests of William Lewis and Mittie Lewis are hostile. The fact that William Lewis' answer was verified does not make its contents evidence against Mittie Lewis. At most it is but an affidavit, or statement made under oath, by William Lewis in the absence of appellee, Mittie Lewis, who was deprived of the privilege of cross-examination and is in no sense binding upon her, or evidence against her.

Bryant v. *Lewis*, 201 Ark. at 291. A similar situation was presented in *Higgins* v. *General Motors Corp.*, 250 Ark. 551, 465

S.W.2d 898 (1971). There the trial judge permitted GM's admission of a product defect into evidence against the dealership, which was GM's co-defendant. The Supreme Court stated that:

> Although the letters were certainly relevant to the issue of a pre-existing defect in the brake hoses, they were not competent against Terry in view of the restrictive objection. The letters emanated from a source other than the party against whom they were sought to be introduced. As such, absent a showing that they were adopted by or otherwise binding upon it, the contents of the letter of recall constituted mere hearsay and *res inter alios acta* as to Terry.

Higgins, 250 Ark. at 556.

In the case at bar, the father and child, although nominally coparties, have interests that are in reality adverse; moreover, the child's statements went to the heart of the dispute and the appellant never acquiesced in or adopted them. Under the rules cited above, the trial court erred in allowing the child's statements into evidence against the appellant.

We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

ROBBINS and MAYFIELD, JJ., agree.

Robert WAGNER *v.* DIRECTOR, Employment Security Department

E 93-145 869 S.W.2d 22

Court of Appeals of Arkansas
En Banc
Opinion delivered September 22, 1993

W. Hunter Williams, Jr., for appellant.

Ronald A. Calkins, for appellee.

PER CURIAM. Appellant Robert Wagner has appealed a decision of the Arkansas Board of Review dated May 20, 1993, which denied his claim for unemployment compensation. Wagner represented himself pro se before the Appeal Tribunal and Board of Review. Following an adverse decision by the Board of Review he retained an attorney and appealed to this court.

On June 28, 1993, Wagner filed a Motion for Remand so that he can introduce additional evidence. The crux of Wagner's motion is that the matter should be remanded for the taking of additional evidence because he was not represented by an attorney when he presented his proof before the Appeal Tribunal. However, a remand is not warranted unless the Board of Review failed to make a finding on a crucial issue, *Hayes* v. *Batesville Mfg. Co.*, 251 Ark. 659, 473 S.W.2d 929 (1971), or unless the hearing was not conducted in a manner conducive to a determination of the substantial rights of the parties. *Helena-West Helena School Dist.* v. *Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985). Wagner does not allege the presence of either of these

bases. Our administrative appeal process would suffer if a pro se claimant for unemployment benefits could obtain a remand solely because he chose to proceed without an attorney the first time through, and then, upon receiving an adverse decision, retravel the appeal procedure with an attorney.

Appellant's motion to remand is denied.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. This is an appeal from the denial by the Arkansas Board of Review of the appellant's claim for unemployment compensation. Prior to the filing of the record on appeal by the Director of the Employment Security Department, the appellant filed a motion asking that we remand this matter to the Board of Review with directions that the Board remand to the Appeals Tribunal to allow appellant to submit additional evidence.

The majority of this court has today rejected appellant's request. I do not agree and issue this dissent to explain the reasons for my disagreement.

In the first place, the appellant's Notice of Appeal states that appellant had filed a motion with the Board of Review asking that this matter be remanded to the Appeals Tribunal to allow appellant to present additional evidence before the Tribunal. The reason for such request was that appellant was not represented by counsel at the hearing before the Appeals Tribunal and having now obtained an attorney the matter should be remanded to enable the attorney to present additional evidence for consideration.

My dissent does not argue the merits of that request, although this court has held that appellants in unemployment compensation cases are not required to follow all the rules with regard to appeals when they are not represented by counsel. *See Hunter* v. *Daniels, Director*, 2 Ark. App. 94, 616 S.W.2d 763 (1981). However, it is my position that this court should not have denied the appellant's motion to remand at this point. The remand issue was raised before the Board of Review, and since the Board's failure to remand will obviously be an issue argued when appellant files his brief after the record on appeal is filed by the appellee, I think we should simply pass the motion asking this

court to remand until the appellant's brief is filed and the appeal is presented on its merits. As matters now stand, we will have to decide essentially the same issue twice.

I also note that the motion to remand filed with the Board of Review was actually filed after the Board had decided the case on its merits. This does not, however, change the situation before us. The question on appeal before us will still be whether the Board should have remanded. So, whether we should remand to the Board will again be presented — and with more light than we have today — because as said in *Helena-W.Helena School Dist.* v. *Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985):

> [A]ppeal tribunals and the Board of Review are mandated by law to conduct hearings and appeals in a manner that will determine the substantial rights of the parties. If they fail to do so, we have a correlative duty to remand these cases to require it to be done.

15 Ark. App. at 31, 688 S.W.2d at 327.

The statutory rules applicable to the hearing and appeal of unemployment compensation cases are now found in Ark. Code Ann. §§ 11-10-524 through 11-10-530. Some cases dealing with the discussion in this dissent are *Arkansas Game & Fish Commission* v. *Director*, 36 Ark. App. 243, 821 S.W.2d 69 (1992); *Edward* v. *Stiles, Director*, 23 Ark. App. 96, 743 S.W.2d 12 (1988); *Fry* v. *Director*, 16 Ark. App. 204, 698 S.W.2d 816 (1985); *Roberts* v. *Everett, Director*, 8 Ark. App. 49, 648 S.W.2d 504 (1983).

I dissent from the failure of the majority to pass the appellant's motion to remand until the appeal is presented on its merits.

COOPER, J., joins in this dissent.

James H. COLE and Patricia Cole Pearson *v.* Barbara Riggins RIVERS, Bonnie Riggins Peace, and Quinton O. Riggins Jr.

CA 93-295 861 S.W.2d 551

Court of Appeals of Arkansas
Division II
Opinion delivered September 29, 1993
[Rehearing denied November 3, 1993.]

Richard Hatfield, P.A., by: *Richard Hatfield* and *Thomas J. Swearingen*, for appellants.

The Trammell Law Firm, by: *LaDonna D. Bornhoft*, for appellees.

JOHN E. JENNINGS, Chief Judge. James Cole and Patricia Cole Pearson appeal from an order of the Columbia County Chancery Court granting summary judgment to the appellees, Barbara Riggins Rivers, Bonnie Riggins Peace, and Quinton O.

Riggins Jr.

Juanita Cole Riggins and Quinton O. Riggins Sr. were married in 1974. Juanita had two children, the appellants, by a prior marriage. Quinton O. Riggins Sr. had three children, the appellees, by a prior marriage. In October 1981, Juanita and Quinton executed mutual wills in which each left his property to the survivor. Each will provided that, at the survivor's death, all property would pass in five equal shares to the appellants and the appellees.

Juanita died in May 1985, and Quinton received all of her estate pursuant to her 1981 will. In 1986, Quinton executed a will which revoked his prior wills and provided that his residence would pass to appellees, leaving the residue of his estate to be divided equally among appellants and appellees. In July 1988, Quinton married Merry Owens Hutchinson. In September 1988, Quinton executed another will which revoked all prior wills and left his residence to Merry for her life, provided she occupied it as her principal residence. The will gave the residue of his estate to appellees and made no provision for appellants. In 1989, Quinton and Merry were divorced. In November 1991, Quinton executed another will which revoked all prior wills and left his estate to appellees. This will also failed to provide for appellants.

Quinton O. Riggins Sr. died on December 27, 1991, and his last will was admitted to probate. Appellants then brought suit in chancery seeking the imposition of a constructive trust against 40% of the estate of Quinton O. Riggins Sr. The suit was based on allegations that Riggins Sr. and his wife, Juanita, had agreed that the survivor of them would leave their property to all five children in equal shares.

The appellees then filed a motion for summary judgment and attached the affidavit of Ronny Bell, the lawyer who prepared the 1981 mutual wills. Mr. Bell's affidavit states that neither Juanita nor Quinton mentioned any agreement not to revoke their 1981 wills. Mr. Bell also stated in the affidavit that he explained to both that their wills could be revoked at any time. In response, the appellants filed the affidavit of James H. Cole which recited that he and his sister were assured by Quinton O. Riggins Sr., shortly after Juanita's death in 1985, that Quinton would leave the property to all five children in equal shares. Mr. Cole said that he

and his sister signed waivers in connection with the probate of his mother's estate in reliance upon this assurance. The chancellor granted the appellees' motion for summary judgment based on Ark. Code Ann. § 28-24-101 (1987). That code section provides:

> (a) A valid agreement made by a testator to convey property devised in a will previously made shall not revoke the previous devise, but the property shall pass by the will subject to the same remedies on the agreement against the devisee as might have been enforced against the decedent if he had survived.
>
> (b)(1) However, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after June 17, 1981, can be established only by:
>
> > (A) Provisions of a will stating material provisions of the contract; or
> >
> > (B) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
> >
> > (C) A writing signed by the decedent evidencing the contract.
>
> (2) The execution of a reciprocal or mutual will does not create a presumption of a contract not to revoke the will.

There is no contention by the appellants that the alleged agreement between Quinton O. Riggins Sr. and Juanita Riggins, that the survivor would leave his or her property in equal shares to all five children, could be established by any of the means set out in the statute. Appellants argue, nevertheless, that equity may impose a constructive trust in these circumstances.

The appellants' complaint is clearly based on an allegation that Quinton and Juanita had a contract to make a will or not revoke a will, and the affidavit filed by James Cole contains an additional allegation of a promise on behalf of Quinton O. Riggins Sr. to make a will.

A constructive trust is simply an equitable remedy. It is true, as appellants contend, that constructive trusts are fre-

quently imposed to remedy the breach of a fiduciary duty, to remedy fraud or overreaching and to prevent "unjust enrichment." *J.W. Reynolds Lumber Co.* v. *Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992); *Mitchell* v. *Mitchell*, 28 Ark. App. 295, 773 S.W.2d 853 (1989). But here the appellants' claim is based on an alleged promise on the part of Quinton Riggins Sr. to make, or not to revoke, a will. We see no reason why the legislature cannot establish rules governing the manner of proving such a contract. The maxim that "equity follows the law" is strictly applicable whenever the rights of the party are clearly defined and established by law. *Beebe Sch. Dist.* v. *Nat'l Supply Co.*, 280 Ark. 340, 658 S.W.2d 372 (1983); 30A C.J.S. *Equity* § 118 (1992). Even prior to the enactment of Ark. Code Ann. § 28-24-101, the law imposed a relatively high burden of proof on one seeking to establish a binding contract to make a will. *See Mabry* v. *McAfee*, 301 Ark. 268, 783 S.W.2d 356 (1990).

Appellants argue that since "the law of constructive trusts overrides the statute of frauds," it should also override Ark. Code Ann. § 28-24-101, citing *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984). The primary reason, however, that a constructive trust may be imposed despite the statute of frauds is that implied trusts, such as constructive trusts or resulting trusts, are specifically exempted from its application by the statute. Ark. Code Ann. § 4-59-103 (Repl. 1991). *See also* Ark. Stat. Ann. § 38-107 (Repl. 1962); *Grissom* v. *Bunch*, 227 Ark. 696, 301 S.W.2d 462 (1957); *Walker* v. *Biddle*, 225 Ark. 654, 284 S.W.2d 840 (1955); *Phillips* v. *Tramble*, 224 Ark. 359, 273 S.W.2d 400 (1954); *Edlin* v. *Moser*, 176 Ark. 1107, 5 S.W.2d 923 (1928). Section 28-24-101 of our code contains no similar exception.

Our conclusion is that the chancellor did not err in granting summary judgment.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

Robert L. HARRIS *v.* Avanell LOONEY and Rita Alexander

CA 92-1473 862 S.W.2d 282

Court of Appeals of Arkansas
Division II
Opinion delivered September 29, 1993

Thomas L. Mays, for appellant.

Honey & Honey, P.A., for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal is from an order of the Dallas County Circuit Court which awarded appellant

judgment against defendant Joe Alexander but not against appellees, Avanell Looney and Rita Alexander. Appellant contends that, under the terms of Ark. Code Ann. § 4-27-204 (Repl. 1991), appellees were strictly liable for J&R Construction, Inc.'s debt to him. We initially certified this case to the Arkansas Supreme Court pursuant to Rule 1-2(a)(3) of the Rules of the Arkansas Supreme Court [formerly Ark. Sup. Ct. Rule 29(1)(c)] as one involving construction of a statute. However, the supreme court declined to accept jurisdiction and remanded the case to this court for decision. We affirm.

On February 1, 1988, appellant, Robert L. Harris, sold his business and its assets to J&R Construction. The articles of incorporation for J&R Construction were signed by the incorporators on February 1, 1988, but were not filed with the Secretary of State's office until February 3, 1988. In 1991, J&R Construction defaulted on its contract and promissory note, and appellant sued the incorporators of J&R Construction, Joe Alexander and appellees, Avanell Looney and Rita Alexander, for judgment jointly and severally on the corporation's debt of $49,696.21. In his amended complaint, appellant alleged that the incorporators were jointly and severally liable for the debt of J&R Construction because its articles of incorporation had not been filed with the Secretary of State's Office at the time Joe Alexander, on behalf of the corporation, entered into the contract with appellant. After a bench trial, the circuit court held that Joe Alexander was personally liable for the debts of J&R Construction because he was the contracting party who dealt on behalf of the corporation. The court refused, however, to hold appellees, Avanell Looney and Rita Alexander, liable, because neither of them had acted for or on behalf of the corporation pursuant to Ark. Code Ann. § 4-27-204 (Repl. 1991).

On appeal, appellant contends that the trial court erred in not holding appellees jointly and severally liable, along with Joe Alexander. It was undisputed that the contract and promissory note were signed by Joe Alexander on behalf of J&R Construction and that J&R Construction had not yet been incorporated when the contract was executed.[1] Appellant concludes that,

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[1] Arkansas Code Annotated § 4-27-203 (Repl. 1991), which provides that,

because Arkansas law imposes joint and several liability on those purporting to act as or on behalf of a corporation knowing there is no incorporation, the trial court erred in not also awarding him judgment against appellees.

In support of his argument, appellant cites *Thompson* v. *Robinson Tube Fabricating Co.*, 238 Ark. 996, 386 S.W.2d 926 (1965), where the supreme court held that:

> "[W]here an incorporator signs a contract or agreement in the name of the corporation before the corporation is actually formed and the other party to the agreement believes at the time of the signing that the corporation is already formed, then the incorporators are responsible as a partnership for the obligations contained in the contract or agreement, including damages resulting from any breach of the contract on their part. . . ."

238 Ark. at 998, 386 S.W.2d at 928. *See also Burks* v. *Cook*, 225 Ark. 756, 284 S.W.2d 855 (1955); *Whitaker* v. *Mitchell Mfg. Co.*, 219 Ark. 779, 244 S.W.2d 965 (1952); *Gazette Publishing Co.* v. *Brady*, 204 Ark. 396, 162 S.W.2d 494 (1942); *but see Rainwater* v. *Childress*, 121 Ark. 541, 182 S.W. 280 (1915) (holding that signers to a subscription contract are not liable as stockholders in a *de facto* corporation). These cases, however, were decided before the Arkansas General Assembly had specifically addressed the issue of liability of individuals for preincorporation debt.

In 1987, the Arkansas General Assembly passed Act 958 which adopted the Arkansas Business Corporation Act. Section 204 of this Act, Ark. Code Ann. § 4-27-204, concerns liability for pre-incorporation transactions and is identical to Section 2.04 of the Revised Model Business Corporation Act. It states: "All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this Act, are jointly and severally liable for all liabilities created while so acting." The official comment to § 2.04 of the Revised Model Business Corporation Act explains:

"[u]nless a delayed effective date is specified, the corporation's existence begins when the articles of incorporation are filed."

Earlier versions of the Model Act, and the statutes of many states, have long provided that corporate existence begins only with the acceptance of articles of incorporation by the secretary of state. Many states also have statutes that provide expressly that those who prematurely act as or on behalf of a corporation are personally liable on all transactions entered into or liabilities incurred before incorporation. A review of recent case law indicates, however, that even in states with such statutes courts have continued to rely on common law concepts of de facto corporations, de jure corporations, and corporations by estoppel that provide uncertain protection against liability for preincorporation transactions. These cases caused a review of the underlying policies represented in earlier versions of the Model Act and the adoption of a slightly more flexible or relaxed standard.

Incorporation under modern statutes is so simple and inexpensive that a strong argument may be made that nothing short of filing articles of incorporation should create the privilege of limited liability. A number of situations have arisen, however, in which the protection of limited liability arguably should be recognized even though the simple incorporation process established by modern statutes has not been completed.

. . . .

. . . [I]t seemed appropriate to impose liability only on persons who act as or on behalf of corporations "knowing" that no corporation exists. Analogous protection has long been accorded under the uniform limited partnership acts to limited partners who contribute capital to a partnership in the erroneous belief that a limited partnership certificate has been filed. UNIFORM LIMITED PARTNERSHIP ACT § 12 (1916); REVISED UNIFORM LIMITED PARTNERSHIP ACT § 3.04 (1976). Persons protected under § 3.04 of the latter are persons who "erroneously but in good faith" believe that a limited partnership certificate has been filed. The language of section 2.04 has essentially the same meaning.

While no special provision is made in section 2.04, the

> section does not foreclose the possibility that persons who urge defendants to execute contracts in the corporate name knowing that no steps to incorporate have been taken may be estopped to impose personal liability on individual defendants. This estoppel may be based on the inequity perceived when persons, unwilling or reluctant to enter into a commitment under their own name, are persuaded to use the name of a nonexistent corporation, and then are sought to be held personally liable under section 2.04 by the party advocating that form of execution. By contrast, persons who knowingly participate in a business under a corporate name are jointly and severally liable on "corporate" obligations under section 2.04 and may not argue that plaintiffs are "estopped" from holding them personally liable because all transactions were conducted on a corporate basis.

Model Business Corporation Act Ann. § 2.04 official cmt. at 130.2-33 (3d ed. 1992).

In passing this Act, the Arkansas General Assembly adopted a heightened standard for imposing personal liability for transactions entered into before incorporation. The Act requires that, in order to find liability under § 4-27-204, there must be a finding that the persons sought to be charged acted as or on behalf of the corporation and knew there was no incorporation under the Act.

The evidence showed that the contract to purchase appellant's business and the promissory note were signed only by Joe Alexander on behalf of the corporation. The only evidence introduced to support appellant's allegation that appellees were acting on behalf of the corporation was Joe Alexander's and Avanell Looney's statements that they were present when the contract with appellant was signed; however, these statements were disputed by appellant and his wife. Appellant testified that he, his wife, Kathryn Harris, and Joe Alexander were present when the documents were signed to purchase his business and he did not remember appellee Avanell Looney being present. Kathryn Harris testified that appellees were not present when the contract was signed.

The trial court denied appellant judgment against

appellees because he found that appellees had not acted for or on behalf of J&R Construction as required by § 4-27-204. The findings of fact of a trial judge sitting as the factfinder will not be disturbed on appeal unless the findings are clearly erroneous or clearly against the preponderance of the evidence, giving due regard to the opportunity of the trial court to assess the credibility of the witnesses. *Arkansas Poultry Fed'n Ins. Trust* v. *Lawrence*, 34 Ark. App. 45, 805 S.W.2d 653 (1991). From our review of the record, we cannot say that the trial court's finding in this case is clearly against the preponderance of the evidence, and we find no error in the court's refusal to award appellant judgment against appellees.

Affirmed.

JENNINGS, C.J., and ROGERS, J., agree.

Quay BEESON *v.* LANDCOAST and Cigna

CA 92-1259 862 S.W.2d 846

Court of Appeals of Arkansas
En Banc
Opinion delivered September 29, 1993

Dowd, Harrelson, Moore & Giles, by: *Marshall H. Moore*, for appellant.

Friday, Eldredge & Clark, by: *James C. Baker, Jr.*, and *T. Wesley Holmes*, for appellee.

JOHN B. ROBBINS, Judge. The appellant, Quay Beeson, suffered an acute myocardial infarction while working at his job for appellee, Landcoast. The Administrative Law Judge found that his heart attack was compensable. Landcoast appealed to the full Commission, which reversed the Administrative Law Judge. It held that Beeson failed to prove that his heart attack was causally related to his employment. Beeson appeals, contending that the Commission's decision is not supported by substantial evidence. We disagree and affirm.

At the time of his heart attack, Beeson was 65 years old and had a family history of heart disease. He had worked for Landcoast for approximately seven years as an insulator. On the

morning of his heart attack, Beeson began his work day at 7:00 a.m. For the first couple of hours that morning, he carried boxes of insulation from a warehouse to the job site, a distance of about a quarter of a mile. An electric hoist lifted the boxes to the third floor of the building where Beeson unloaded them. After unloading for about thirty minutes, Beeson began to experience symptoms of a heart attack and was taken to a hospital. He was diagnosed with coronary artery disease caused by arteriosclerosis, which resulted in the myocardial infarction.

The issue presented on this appeal is whether there is any substantial evidence to support the Commission's holding that Beeson's heart attack was not causally related to his employment with Landcoast.

In reaching its decision, the Commission considered the opinions of four physicians, Dr. Abdul Waheed, Dr. James Hurley, Dr. Thomas Pullig and Dr. James Doherty. Three of these doctors opined that Beeson's heart attack was precipitated by his work, while the fourth doctor was of the opinion that it was not.

Dr. Waheed, a cardiologist, premised his opinion that Beeson's employment precipitated his heart attack, at least in part, on his misunderstanding that the heart attack occurred while Beeson was climbing stairs at work. Dr. Hurley, a cardiologist, admitted that he did not know where Beeson was when his pain began, but was of the opinion that if his pain began when he was at work then his job caused it.

Dr. Pullig did not state the activities which he understood Beeson was performing on his job at the time of the heart attack, but opined that his employment precipitated the attack. He based this conclusion on his general statement that "it is established that physical exertion can precipitate a heart attack."

Dr. Doherty, a professor of medicine and pharmacology at the University of Arkansas for Medical Science and Director of Cardiovascular Research at the V. A. Medical Center, reviewed Beeson's medical records and a transcript of his deposition. His report notes that Beeson's arteriosclerosis took many years to develop and that Beeson had a family history of heart disease. It was his opinion that there was no relationship between Beeson's

heart disease and his work, except in a temporal sense, in that he was on his job when he experienced his first symptoms.

A heart attack is compensable only if there is a causal connection between the heart attack and one's employment; and when it is established that the employee was putting forth unusual exertion at the time of the heart attack it is ordinarily held that the requirement of causal connection has been met. *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987). Absent "unusual exertion" the applicable test is whether the required exertion producing the injury is too great for the employee undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or contributing cause of the injury. *Fowler*, *supra.*

When reviewing a decision of the Workers' Compensation Commission on appeal, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991). In making our review we recognize that the Commission has the duty of weighing medical evidence as it does any other evidence, and if the evidence is conflicting, the resolution of the conflict is a question of fact for the Commission. *Mack* v. *Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989). On appeal to this court, 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 Co.* v. *Boyd*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

We may well have decided this case differently if our standard of review was to weigh the evidence and determine where the preponderance of the evidence lay. However, this is not our function. Although three medical experts were of the opinion that Beeson's employment precipitated his heart attack, it is obvious that the Commission found Dr. Doherty's opinion to be more credible. We hold that Dr. Doherty's report constitutes substantial evidence in support of the Commission's decision. Consequently, we must affirm the Commission's holding that Beeson's myocardial infarction was not casually related to his

employment.

Affirmed.

MAYFIELD and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I do not believe that the decision of the Workers' Compensation Commission in this case is supported by substantial evidence; therefore, I cannot agree to affirm it. The majority opinion of this court states that "we may have well decided this case differently if our standard of review was to weigh the evidence and determine where the preponderance of the evidence lay." That, of course, is not our standard of review but — as the majority also recognizes — our standard requires that we reverse a decision of the Commission if we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *International Paper Co.* v. *Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990); *Lockeby* v. *Massey Pulpwood, Inc.*, 35 Ark. App. 108, 812 S.W.2d 700 (1991). And in *Pickens-Band Construction Co.* v. *Case*, 266 Ark. 323, 584 S.W.2d 21 (1979), the Arkansas Supreme Court said that "any" evidence is not substantial evidence. 266 Ark. at 330, 584 S.W.2d 25.

The law, at the time involved in this case, regarding the compensability of heart attacks which occurred on the job is also recognized in the majority opinion by the quotation from *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987), that states the applicable test "is whether the required exertion producing the injury is too great for the employee undertaking the work." To put that quote in proper perspective, in *Reynolds Metal Company* v. *Robbins*, 231 Ark. 158, 328 S.W.2d 489 (1959), relied upon in *Fowler*, the Arkansas Supreme Court explained:

> The question therefore before this Court, is whether there was substantial evidence to show that Robbins' condition was aggravated by the work performed, as heretofore set out; or stated differently, whether his death occurred sooner than would have otherwise occurred if the work had not been performed.

231 Ark. at 162, 328 S.W.2d at 491. In the instant case the administrative law judge found:

> I conclude from the testimony, that although the claimant was not climbing stairs at the time he first experienced chest pains, he was engaged in the heavy manual labor of unloading the boxes of insulation material from the hoist. I therefore find that the claimant has established by a preponderance of the evidence that the physical exertion of his employment was a precipitating factor in the myocardial infarction and is therefore a compensable injury.

The full Commission did not agree with the law judge and in an opinion, with one member dissenting, held as follows:

> In support of his contention that a causal relationship exists between his employment and his myocardial infarction, the claimant relies upon the opinions of three physicians. The first is Dr. Abdul Waheed, a cardiologist who testified that the claimant's employment precipitated his heart attack because the heart attack occurred while claimant was climbing stairs at work. According to claimant's testimony, this is not a correct history. Claimant was not climbing stairs at the time of his myocardial infarction. Therefore, Dr. Waheed's opinion is based upon an incorrect history.
>
> Claimant also relies upon the opinion of Dr. James Hurley, who opined that a causal connection exists even though he admitted that he had no idea where the claimant was when this pain started. However, Dr. Hurley opined that if the claimant's pain started when he was at work then it was obvious that his job caused the heart attack. The fact that an individual is at work when a heart attack occurs is not sufficient, in and of itself, to prove a causal connection.
>
> Finally, claimant relies upon the opinion of Dr. Thomas Pullig who opined that it is established that physical exertion can precipitate a heart attack; therefore, he opined that claimant's employment precipitated his heart attack. Significantly, Dr. Pullig does not state what activities he believes the claimant was performing on the date in question to support his opinion that claimant's employment precipitated his heart attack.

> It appears that the opinions of these physicians are based upon the fact that the claimant was at work at the time that his heart attack occurred as evidence that causal connection exists. We find that the opinion of Dr. James Dogherty, [sic] a cardiologist at the University of Arkansas for Medical Sciences, is entitled to greater weight. Dr. Dogherty [sic] noted that the claimant suffered from arteriosclerosis which took many years to develop. Although the claimant was engaged in some activity at the time of the myocardial infarction, Dr. Daugherty [sic] opined that the relationship was merely coincidental and that the claimant's employment did not precipitate or contribute to the heart attack.

At this point, I want to point out the medical evidence as it exists in the record.

A medical record from Magnolia Hospital dated October 12, 1989, shows that appellant was admitted at 11:46 a.m. with an acute myocardial infarction, anterior, and was discharged to transfer to St. Michael Hospital in Texarkana by helicopter at 5:53 p.m.

The first St. Michael Hospital record shows that appellant was admitted on October 12, 1989, with chest pain which first occurred about 11:00 a.m. while he was "climbing the stairs." The family history on this admission report shows appellant as a non-smoker (even though 20 years ago he did smoke for a short period of time), non-drinker, with heart disease in the family. A cardiac catheterization performed on October 16 showed appellant had 99% proximal right coronary lesion but it was felt he could be adequately maintained with medication. However, after appellant had three separate episodes of pain requiring Morphine Sulfate for relief during the weekend, a coronary (balloon) angioplasty was performed on October 24, 1989. Appellant was discharged on October 26, 1989.

On November 4, 1989, appellant again presented himself to the Magnolia Hospital emergency room with chest pain which felt like his previous attack but not as severe and a history of indigestion all day. Appellant was transferred to St. Michael by ambulance, placed on Coumadin, and discharged.

A letter dated January 3, 1990, from Dr. Abdul Waheed, a Texarkana cardiologist who treated appellant at St. Michael, states:

> As to the cause of his heart attack, it is clear the heart attacks are caused by atherosclerosis of the arteries, and since this occurred while climbing up the stairs at work, certainly the physical exertion of this precipitated the heart attack.

Dr. James M. Hurley, who performed the angioplasty on appellant, wrote on December 18, 1990, that the only information he had about appellant's heart attack came from Dr. Waheed's report which said appellant's chest pain began while he was climbing stairs at work. He stated:

> If the man's pain started at his workplace, then the job caused it. Obviously, the job itself did not cause atherosclerotic disease but the stress of the job did precipitate the myocardial infarction.

Dr. Thomas A. Pullig, appellant's general physician in Magnolia, wrote on December 18, 1990:

> It is well established that the cause of heart attack is coronary artery disease caused by arteriosclerosis. It is also well established that physical exertion beyond a certain point can precipitate heart attack which is caused by coronary artery disease. It is therefore my opinion that the physical exertion that Mr. Beeson was performing on the day of his heart attack was a definite precipitating factor for his acute myocardial infarction.

Counsel for appellees apparently sent a copy of appellant's medical records to James E. Doherty, M.D., at the University of Arkansas for Medical Sciences Cardiovascular Division. On June 20, 1990, Dr. Doherty wrote a letter expressing his doubt that appellant's heart attack was related to his occupation. However, from reading that letter it appears that Dr. Doherty reviewed only those records pertaining to appellant's *second* hospitalization, November 4 through 9, 1989. He does not mention the October 12, 1989, episode. However, on April 10, 1991, Dr. Doherty wrote another letter in which it is apparent that he had reviewed appellant's entire heart attack record and

appellant's deposition. He stated:

> As to my opinion regarding the patient[']s job and its relation to his heart attack:
>
> > Mr. Beeson was at work 10-12-89 when he first experienced symptoms of his myocardial infarction. His disease, coronary atherosclerosis, is many years in developing and has no relationship to his work, except in a temporal fashion — he was on the job when he experienced his first symptoms.
>
> His family history of heart disease is probably more important in this regard.

Based on the above medical evidence, the Commission found against the appellant's claim. In his challenge to the sufficiency of the evidence to support the Commission's finding, appellant points out that the Commission's opinion notes that Dr. Waheed was not factually correct in stating that appellant's heart attack occurred while climbing stairs. However, the appellant points out that the record shows that he had climbed seven flights of stairs to the top of the tower when he went to work on the morning of his attack; that after he had looked at this area where the insulation was to be installed, the appellant spent the next two hours making numerous trips between the tower and the warehouse, walking a quarter mile each way, while carrying on his shoulder boxes of insulation weighing from 75 to 150 pounds; and that he had been unloading the heavy boxes of insulation from the hoist on the third floor for about thirty minutes at the time his heart attack began. The appellant argues that the Commission's opinion minimizes his exertion and maximizes a verbal discrepancy that the law judge readily recognized as unrelated to credibility and to the question of causal relationship between appellant's work and his heart attack.

In support of his argument, appellant relies on *Cox* v. *Nashville Livestock Commission*, 28 Ark. App. 139, 771 S.W.2d 786 (1989), where we held that debilitating angina pain constituted a compensable injury. After reviewing numerous cases, we quoted from *Dougan* v. *Booker*, 241 Ark. 224, 407 S.W.2d 369 (1966), which quoted from *Triebsch* v. *Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951), as follows:

> Therefore, to summarize: we have in the case at bar undisputed facts which are similar in essential respects to those which existed in the six cases hereinafter discussed, in each of which compensation was awarded. These facts are: *a pre-existing ailment, an increased and overtaxing effort to accomplish the workload under the conditions existing, and a collapsed worker resulting therefrom.* These make a case of accidental injury within the purview of the workers' compensation law. (Emphasis added in *Dougan.*)

28 Ark. App. at 143, 771 S.W.2d at 788-89. Appellant argues that each of these three requirements is also present in this case. He had preexisting atherosclerosis, he had worked strenuously, lifting and carrying, and moving heavy boxes of insulation, for over three hours on a warm day, and he collapsed with a heart attack. Appellant quotes *C.J. Horner Company* v. *Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985), in which the deceased had a desk job and we affirmed the Commission's holding that the stress of the job brought on the deceased's heart attack. We said:

> It is well settled that an award of benefits will be sustained by the Court where a myocardial infarction is shown to have been aggravated or precipitated by the employment. *Kempner's* v. *Hall*, 7 Ark. App. 181, 646 S.W.2d 31 (1983). There is no requirement in Arkansas that in order for a heart attack to be compensable, it must be caused or brought on by some unusual exertion rather than by the employee's regular work. *Hoerner Waldorf Corp.* v. *Alford*, 255 Ark. 431, 500 S.W.2d 758 (1973).

14 Ark. App. at 142, 685 S.W.2d at 535.

Because I agree with the appellant's argument and because I do not believe fair-minded persons, with the same evidence before them, could reach the decision reached by the Commission in this case, I would reverse and remand for the Commission to award compensation benefits.

ROGERS, J., joins in this dissent.

Mary (Henson) REYES, as Administratrix of the Estate of Billy Henson, Deceased *v.* Lucy JACKSON

CA 91-514 861 S.W.2d 554

Court of Appeals of Arkansas
Division II
Opinion delivered September 29, 1993

Wilson & Castleman, by: *Richard L. Castleman*, for

appellant.

Riffel, King & Smith, by: *Kirby Riffel*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from a judgment setting forth appellee's entitlement to the proceeds of an insurance policy. As the only issue on appeal, appellant contends that the trial court erred in denying its motion to dismiss. We sustain appellant's argument and reverse.

Appellee, Lucy Jackson, brought this lawsuit in the Craighead County Circuit Court against the John Hancock Life Insurance Company. In her complaint of February 4, 1991, appellee alleged that she was entitled to the proceeds of an insurance policy the company had issued on the life of Billy G. Henson because she was the named beneficiary at the time of Henson's death. The appellant, Mary Reyes, in her capacity as the Administratrix of the Estate of Billy G. Henson, filed a motion to intervene in this lawsuit. In the motion, the estate alleged that it had an interest in the proceeds by virtue of a default judgment which was granted the estate against appellee on November 19, 1990, by the Chancery Court of Randolph County. The trial court allowed the intervention. The life insurance company thereafter interpled the proceeds of the policy and appellee's claim against it was dismissed with prejudice.

The subject of this appeal is the denial of appellant's motion to dismiss. In this motion, appellant contended that principles of *res judicata* and collateral estoppel barred appellee from relitigating her claim to the proceeds because of the default judgment rendered against her in the Randolph County Chancery Court. In the chancery court action, the estate had sued appellee over the proceeds of the policy. In the default judgment, which was attached as an exhibit to the motion, it was specifically found by the chancery court that appellee had procured the change of beneficiary of the life insurance policy by fraud, and the court declared the proceeds to be property of the estate[1]. The trial

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[1] During the pendency of the instant litigation, appellee was pursuing an appeal from the default judgment. We affirmed the chancery court's denial of her motion to set aside the default judgment in an unpublished opinion, *Jackson* v. *Reyes, as Adminstratrix of the Estate of Henson*, CA 91-139 (February 26, 1992).

court, however, denied appellant's motion to dismiss reasoning that the actual dispute over the proceeds was among appellee, the insurance company and Mary Reyes, who was the beneficiary of the policy just prior to the change to appellee. The trial court then concluded that, since neither Ms. Reyes nor the insurance company were parties to the former lawsuit, neither *res judicata* nor collateral estoppel barred appellee's present suit. The court further stated that the estate had no interest in the matter since insurance proceeds typically vest outside of an estate. On appeal, appellant contends that the trial court's ruling was in error. We agree.

Collateral estoppel, or issue preclusion, bars the relitigation of issues of law or fact actually litigated by the parties in the former suit. *Cater* v. *Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993). Issue preclusion, or the collateral estoppel aspect of *res judicata*, is limited to those matters previously at issue which were directly and necessarily adjudicated. *Bailey* v. *Harris Brake Fire Protection Dist.*, 287 Ark. 268, 697 S.W.2d 916 (1985). In the former lawsuit between appellant and appellee, it was decided that appellee fraudulently induced the deceased to name her as the beneficiary of the policy. It was also settled that the estate was to receive the proceeds of the life insurance policy. In the present case, appellee asserted that she was entitled to the proceeds as the named beneficiary. Because the issue of ownership was decided in the previous lawsuit, appellee is collaterally estopped from again litigating the matter. It follows that the trial court erred in denying appellant's motion to dismiss.

We also disagree with the trial court's conclusion that the estate had no interest in the matter since life insurance proceeds pass outside an estate. Such reasoning is tantamount to a collateral attack on the default judgment. A judgment by default is just as binding and enforceable as a judgment entered after a trial on the merits. *Murry* v. *Mason*, 42 Ark. App. 48, 852 S.W.2d 830 (1993). 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. *Rowland* v. *Farm Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

In this review we have not overlooked appellee's assertion that collateral estoppel does not apply because Mary Reyes,

as an individual, was not a party to the previous lawsuit. In support of the trial court's decision, appellee contends that the default judgment does not inure to Ms. Reyes' benefit because the default was in favor of Ms. Reyes as the administratrix of the estate. We do not consider the question of whether Ms. Reyes, individually, can assert collateral estoppel for the simple reason that Ms. Reyes does not appear to be a party to this litigation. The party who intervened in this lawsuit was Mary Reyes, but only in her capacity as the administratrix of the estate. Similarly, the motion to dismiss was asserted on behalf of the estate, and the party who has appealed from the judgment is Mary Reyes, as the administratrix of the estate. Although it appears that Ms. Reyes was given leave to intervene, she did not do so as the record reveals no pleadings or appearances entered on her behalf. Moreover, neither the style nor the language of the judgment mentions Ms. Reyes individually. We also note that she was not otherwise joined as a party to this action. In short, the issue of whether Ms. Reyes can assert that the former judgment as a bar to appellee's suit is not properly before us because Ms. Reyes is not a party to this litigation. Any comment on this issue would transgress the settled practice of not discussing questions of theoretical interest only. *Russell* v. *Miller*, 253 Ark. 583, 487 S.W.2d 617 (1972).

Reversed.

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

Kenneth JOHNSON *v.* STATE of Arkansas

CA CR 92-1374 862 S.W.2d 290

Court of Appeals of Arkansas
Division II
Opinion delivered October 6, 1993

Mark S. Cambiano, for appellant.

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

JOHN E. JENNINGS, Chief Judge. At about 3:00 a.m. on January 10, 1992, Kenneth Johnson was driving a 1979 Chevrolet Malibu on Markham Street in Little Rock. He was stopped by Little Rock Police Officer Greg Birkhead, who suspected the car might be stolen. During a pat-down search Officer Birkhead found a knife and a quantity of cocaine in Johnson's pocket. The appellant was subsequently charged with possession of cocaine with intent to deliver.

Johnson filed a motion to suppress, contending that the officer had no reasonable suspicion to stop him. The trial court denied the motion and Johnson entered a conditional plea of guilty under Ark. R. Crim. P. 24.3(b). He was sentenced by the court to five years imprisonment under Act 378 of 1975.

The sole issue presented is whether Officer Birkhead had reasonable suspicion to stop the appellant's car. We hold that the circuit court's decision that there was reasonable suspicion is not clearly against a preponderance of the evidence and affirm.

Officer Birkhead testified that on January 10, 1992, he was patrolling around Markham and Chester Streets in Little Rock. At a stop light he pulled up beside the car Johnson was driving and

noticed that the left vent window was broken out. Birkhead testified that he immediately suspected the vehicle might be stolen and was trying to run a radio check on the license plate. Birkhead testified:

> The light changed to green, and I allowed the vehicle to get up in front of me. I got behind it, and I followed it to Markham and Victory. As it turned the corner, I could get a good angle on the window, and I observed that it was broke out. I suspected the vehicle might be stolen at that point, so I changed my radio channel to a channel eight, which is a secondary traffic channel, and I was going to try and run a check on the license plate.
>
> The vehicle then quickly turned. We turned from Markham onto Victory. We went about a half block, and then he turned right again, which would have been going west bound on Markham again, and picked up the speed. So I couldn't get a good look at the plate again.
>
> I sat my radio down. I tried to catch up to the vehicle. The vehicle made it to the parking lot, which would be down in the train station where Slick Willy's the club is. The vehicle did a U-turn and started to come right back at me, so I had no choice then. I was very suspicious at that time.
>
> It appeared the vehicle was trying to elude me, so I cut across in front of it, put my spot light on it, put my take-down lights on it, and then I activated my blue lights and blocked the vehicle. He then came to a stop. I exited my vehicle and approached the vehicle at that time.

Officer Birkhead testified that in his two and one-half years with the Little Rock Police Department he had been involved in the recovery of hundreds of stolen vehicles and that "80 to 90 percent of them" had broken side windows. He also testified that the appellant committed no traffic offense and the car eventually turned out not to have been stolen.

"Reasonable suspicion," which is something less than probable cause, is required to constitutionally justify an investigative stop. *Alabama* v. *White*, 496 U.S. 325 (1990); *Kaiser* v. *State*, 296 Ark. 125, 752 S.W.2d 271 (1988); *Lambert*

v. *State*, 34 Ark. App. 227, 808 S.W.2d 788 (1991); Ark. R. Crim. P. 3.1. Reasonable suspicion is defined by Ark. R. Crim. P. 2.1 as "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." The existence of reasonable suspicion is to be judged by the "totality of the circumstances." *See Alabama* v. *White*, 496 U.S. 325 (1990).

Two recent cases from other jurisdictions are almost directly on point and reach opposing conclusions. In *People* v. *Elam*, 179 A.D.2d 229, 584 N.Y.S.2d 780 (N.Y. App. Div. 1992), two police officers stopped the defendant's car after having noticed a broken rear vent window which caused them to believe that the car might be stolen. There was also evidence that the vehicle was being driven "rather erratically" and "pretty fast," although there was no indication that the defendant committed any traffic offense. A five judge panel of the appellate division of the New York Supreme Court held in a 4-1 decision that the trial court erred in finding reasonable suspicion to stop.

In *Commonwealth* v. *Epps*, 415 Pa. Super. 231, 608 A.2d 1095 (1992), a three judge panel of the Pennsylvania Superior Court held that the observation of a broken rear vent window was sufficient by itself to provide reasonable suspicion to justify an investigatory stop. In *Epps*, the officer testified that he knew from his experience in investigating automobile thefts that entry for purposes of theft is routinely gained by breaking one of the vent windows, rather than one of the larger, more conspicuous windows of the car.

In *Elam*, where the car turned out not to have been stolen, the Court said the officer simply had a hunch that the defendant had stolen the car. In *Epps*, where the car actually was stolen, the Court said this was not merely a hunch but rather an "articulable, particularized suspicion."

In the case at bar we are not persuaded that the trial judge's finding of reasonable suspicion is clearly against a preponderance of the evidence. That suspicion was based not merely on the observation of the broken vent window but also on the officer's experience with stolen vehicles as well as his percep-

tion that the appellant was trying to evade him. This was enough to constitutionally justify an investigatory stop.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

John Burton HOBBS *v.* STATE of Arkansas

CA CR 92-1264 862 S.W.2d 285

Court of Appeals of Arkansas
Division I
Opinion delivered October 6, 1993

Harold W. Madden, for appellant.

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

MELVIN MAYFIELD, Judge. On July 26, 1991, John Burton Hobbs was charged with interference with custody, a Class D felony, in violation of Ark. Code Ann. § 5-26-502 (1987). That statute provides in pertinent part:

> (a) A person commits the offense of interference with custody if, knowing that he or she has no lawful right to do so, he or she takes, entices, or keeps any minor from any person entitled by a court decree or order to the right of custody of the minor.
>
> (b) Interference with custody is a Class D felony if the minor is taken, enticed, or kept without the State of Arkansas. Otherwise, it is a Class A misdemeanor.

The charges arose when appellant went to Texas to pick up his daughter for visitation. He contended that a standing order of the court, which was served on him in the pending Arkansas divorce case, gave him eight weeks visitation in the summer and that he told his ex-wife when he picked up his daughter that he intended to keep her for eight weeks pursuant to that order.

Mrs. Hobbs had been granted temporary custody of the child, and she did not agree that appellant was entitled to eight weeks summer visitation. Therefore, when her daughter was not returned after one week, she contacted the police, and they

eventually arrested appellant in Greenville, Mississippi, at the beginning of the seventh week of visitation. The child was returned to her mother, and the appellant was jailed in Arkansas.

On May 21, 1992, appellant filed a motion to dismiss. One of the reasons for the requested dismissal was:

> 3. Pleading further, in the divorce proceeding, Case No. E-90-883, Chancellor Andre E. McNeil found Defendant, John Hobbs, guilty of criminal contempt for interference with custody, and assessed fines and time incarcerated; that pursuit of the above-styled case constitutes double jeopardy.

On May 22, 1992, a hearing was held on the motion to dismiss and the judge took it under advisement. On May 28, 1992, the trial was held without a specific ruling from the trial judge on the motion to dismiss. Hobbs was tried by a jury, found guilty of misdemeanor interference with custody and sentenced to sixty-two days (time served) in the county jail and a fine of $500.00. On appeal appellant argues that he was placed in double jeopardy, and the trial court erred in denying his motion to dismiss.

Nancy Hobbs (now Guzman) testified that she and appellant had one child, Tabitha Nicole, and that she was awarded temporary custody on January 29, 1991, and given permission to move the child to San Antonio, Texas, where Mrs. Hobbs grew up, had family, and had been living since November 5, 1990. Appellant was given one week visitation every six weeks. Mrs. Hobbs said appellant picked up the child (then about twenty months old) on June 8 and was to have returned her on June 16. She said she had agreed to allow him to take Tabitha to Greenbrier, Arkansas, to spend the week with his parents, with whom he lived. Mrs. Hobbs said when Tabitha was not returned on June 16, she notified her attorney, had "fliers" printed up showing Tabitha as missing, then came to Arkansas to try to find her daughter and get her back.

On June 19, according to Mrs. Hobbs, she spoke to appellant's father in Greenbrier, but was never able to contact appellant himself. On June 20 an ex parte order was granted which gave law enforcement officials the right to retrieve and return Tabitha to Mrs. Hobbs. She said at that point she had done

all she could do and returned home to San Antonio. Mrs. Hobbs said she did not see her child again until July 25, when she got a phone call from the sheriff telling her Tabitha had been found in Greenville, Mississippi, and she flew there to pick her up.

Appellant John Hobbs testified that he and his estranged wife separated on October 4, 1990, and that he didn't see his child for two or three months because Mrs. Hobbs had moved to Texas with the child. At the temporary divorce hearing on January 29 Mrs. Hobbs was awarded temporary custody of Tabitha and appellant was given *reasonable* visitation. He said attached to the complaint for divorce was a small blue booklet entitled *Handbook for Domestic Relations Litigants*, 20th Chancery District of Arkansas, which stated that it was a court order and that he was to follow the suggested rules and regulations. He said from page six of that booklet, he understood reasonable visitation to be one week every six weeks, eight weeks in the summer, and alternate holidays. Appellant said that during the temporary hearing he was allowed four days visitation with his daughter.

According to appellant, when he talked to his former wife about summer visitation with Tabitha, he informed her that he intended to pick up the child, return to Greenbrier, and keep her for eight weeks. Appellant said Mrs. Hobbs argued with him that he was not entitled to eight weeks visitation until after the final divorce hearing but when he went to pick Tabitha up in San Antonio, Mrs. Hobbs let Tabitha go with him without any fuss. Appellant said during the time Tabitha was with him he had visited his parents and grandparents and a cousin in Greenville, Mississippi. He admitted he had also gone to Amarillo, Texas, to bid on a job, but said he did not get it, and he then went to Greenville. Appellant said he and his cousin bid on a couple of jobs and got them and that was the reason he stayed in Greenville. He said he was arrested on the seventh week of his eight week visitation period.

Appellant insisted that he did not "kidnap" Tabitha but was simply following the temporary order which said he had "reasonable visitation" and the definition of reasonable visitation contained in the *Handbook for Domestic Relations Litigants*. He said it "never even crossed my mind" to not return his child to her mother. Appellant also testified that he had waived extradition to

Arkansas, and was brought back and jailed for sixty-two days without ever appearing before a judge.

Both the Arkansas and United States Constitutions prohibit placing a person twice in jeopardy for the same offense. Ark. Const. art. 2 § 8; U.S. Const. amend. 5. *See also Baggett* v. *State*, 15 Ark. App. 113, 690 S.W.2d 362 (1985). The Arkansas Supreme Court has said that the test of double jeopardy is not whether a defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense, and where two statutes are intended to suppress different evils, conviction under one will not preclude prosecution of the other. *Decker* v. *State*, 251 Ark. 28, 471 S.W.2d 343 (1971).

In *Baggett* the defendant had failed to return the child to the mother at the appointed time. He was found guilty of contempt by the chancery court and sentenced to serve ninety days in jail and pay a fine of $1,000.00. Later, he was found guilty of criminal interference with custody. In that case, the appellant argued that he was placed in double jeopardy. Because the order of the chancery court stated that it would consider remitting part of the monetary fine and jail sentence upon proper application by the defendant, this court found the order to be coercive in nature and held that the contempt order was civil and, therefore, appellant was not placed in double jeopardy. 15 Ark. App. at 120.

In the instant case, Hobbs argues that he was fined and ordered incarcerated for time served and that this constituted criminal contempt. We agree.

In *Fitzhugh* v. *State*, 296 Ark. 137, 752 S.W.2d 275 (1988), our supreme court discussed the distinctions between civil and criminal contempt as follows:

> The purpose of a criminal contempt proceeding is that it is brought to preserve the power and vindicate the dignity of the court and to punish for disobedience of its order. A civil contempt proceeding is instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of those parties [citations omitted]. However, the substantive difference between civil and criminal contempt often becomes blurred. The character of the relief, rather than

the trial court's characterization of the substantive proceeding becomes the critical factor in determining the nature of the proceeding for due process purposes. The Supreme Court of the United States has clearly set out the distinction between the types of relief:

> "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). The character of the relief imposed is thus ascertainable by applying a few straight-forward rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." *Id.*, at 442. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.
>
> . . .
>
> The distinction between relief that is civil in nature and relief that is criminal in nature has been repeated and followed in many cases. An unconditional penalty is criminal in nature because it is "solely and exclusively punitive in character." *Penfield Co.* v. *SEC*, 330 U.S. 585, 593 (1947). A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act. "One who is fined, unless by a day certain he [does the act ordered], has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets.' " *Id.*, at 590, quoting *In re Nevitt*, 117 F. 448, 461 (CA8 1902).

Hicks ex rel. Feiock v. *Feiock*, 485 U.S. 624 (1988).

296 Ark. at 138-40, 752 S.W.2d at 276-77.

Appellant also argues that Ark. Code Ann. § 5-1-113(1)(B)(i) (1987) provides that it is an affirmative defense to a prosecution that there has been a former prosecution for a different offense if the former prosecution resulted in a conviction *unless*:

> The offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of the offenses is intended to prevent a substantially different harm or evil[.]

Appellant contends that the offense proven in this criminal trial contains exactly the same facts as the offense for which he was found in contempt of court, jailed and fined in chancery court. We agree. Although the hearing in which appellant was adjudged in contempt of court was in connection with a divorce and custody case in chancery court, it resulted in appellant's incarceration as punishment, and thus was in the nature of a criminal proceeding.

> Jeopardy denotes risk and is traditionally associated with a criminal prosecution. *See Serfass* v. *United States*, 420 U.S. 377 (1975). It has been held that the risk to which the double jeopardy clause refers is not present in proceedings that are not "essentially criminal." *Helvering* v. *Mitchell*, 303 U.S. 391 (1938). Stated another way, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943).

Fariss v. *State*, 303 Ark. 541, 543-44, 798 S.W.2d 103, 104 (1990).

The State contends that the double jeopardy argument was not preserved for appeal because appellant failed to get a definitive ruling from the trial court on his motion to dismiss. In order to preserve an issue for review by the appellate court an appellant must have obtained a ruling at the trial court level. *Menard* v. *City of Carlisle*, 309 Ark. 522, 529, 834 S.W.2d 632, 636 (1992); *State* v. *Torres*, 309 Ark. 422, 426, 831 S.W.2d 903,

905 (1992); *Pharo* v. *State*, 30 Ark. App. 94, 101, 783 S.W.2d 64, 68 (1990). The record shows that appellant did get a ruling on his double jeopardy motion. At the close of all the evidence counsel for appellant stated:

> MR. MADDEN: Your honor, at this time the Defendant would renew all of its previous motions[.] . . .
>
> THE COURT: The court will stand by its previous rulings and the motion[s] will be denied.

The State also argues that appellant's former jeopardy argument is procedurally barred because he has failed to bring forth a record that demonstrates error. In order to obtain reversal of his criminal conviction an appellant must place before this court a record that shows error occurred. *Kittler* v. *State*, 304 Ark. 344, 347, 802 S.W.2d 925, 927 (1991); *Burkett* v. *State*, 32 Ark. App. 60, 796 S.W.2d 355 (1990); and *Lee* v. *State*, 27 Ark. App. 198, 210, 770 S.W.2d 148, 154 (1989). The record on appeal is limited to that which is abstracted. *Irvin* v. *State*, 28 Ark. App. 6, 13, 771 S.W.2d 26, 29 (1989).

We think appellant has brought us an adequate record. It contains the temporary order in Faulkner County Chancery Court Case No. E-90-883 granting custody to Mrs. Hobbs, and the parties agreed that the facts are not in dispute. In addition, the prosecutor admitted appellant had been found in contempt of court and sanctions were administered.

> PROSECUTOR: I believe the parties were divorced in Arkansas and she was given permission to take the child out of Arkansas to live in Texas but the father brought the child back without permission from the Chancery Court. The Court found him in contempt of court and assessed fines. *I will agree with the point that Judge McNeil assessed some penalties, but it was our understanding it was for civil contempt.*
>
> DEFENSE COUNSEL: Penalties make it criminal. Fines make it criminal.

In fact, appellant testified that he had been incarcerated for sixty-

two days and that testimony was not disputed. Because, as we have shown above, appellant's incarceration by the chancellor was "essentially criminal," we think jeopardy attached. Therefore, appellant could not be tried and punished a second time for the same offense.

Reversed and dismissed.

COOPER and ROBBINS, JJ., agree.

Sharon BELCHER *v.* HOLIDAY INN and American Motorist Insurance Company

CA 92-1332 868 S.W.2d 87

Court of Appeals of Arkansas
Division I
Opinion delivered October 13, 1993

Walker Law Firm, by: *Eddie H. Walker, Jr.*, and *James A. Lockhart*, for appellant.

Jones, Gilbreath, Jackson & Moll, by: *Charles R. Garner, Jr.*, for appellee.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case sustained a work-related injury while employed as a housekeeper for Holiday Inn on September 11, 1987. She received temporary total disability benefits and was released to return to work in March 1988. At that time, her treating physician assessed a five percent permanent impairment rating. She then returned to work for Holiday Inn until July 1989, when she was terminated for reasons unrelated to her injury. She then obtained employment with the Brownwood Life Care Center where she worked for approximately eight months. After obtaining additional treatment for her back injury, she filed a claim for benefits contending that she was entitled to payment for the additional medical treatment, that she suffered permanent physical impairment equal to eight percent to the body as a whole, and that she was entitled to benefits for a loss in wage earning capacity. The Commission found that the appellant was entitled to payment for the additional medical treatment and that she sustained a permanent physical impairment equal to eight percent to the body as a whole, but concluded that the appellant was barred from receiving benefits for a loss in wage earning capacity pursuant to Ark. Code Ann. § 11-9-522(b) (1987). From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in holding that Ark. Code Ann. § 11-9-522(b) bars her from receiving benefits for loss of wage earning capacity.[1] We agree, and we reverse and remand.

Arkansas Code Annotated § 11-9-522(b) provides that:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. *However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has*

[1] The appellant does not argue, and we do not address, the application of § 11-9-522(c) to this case.

> *a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.*

[Emphasis added]. The essence of the Commission's decision with respect to this subsection is that a claimant who has once returned to work at equal or greater wages is permanently barred from receiving benefits for a loss in wage earning capacity, even should her subsequent employment cease, unless the claimant is terminated for reasons relating to her compensable injury. We find that this interpretation of the statutory language was erroneous.

Ambiguities and conflicting interpretations of workers' compensation statutes must be resolved in favor of the claimant. *Noggle* v. *Arkansas Valley Electric Co-op.*, 31 Ark. App. 104, 788 S.W.2d 497 (1990). This is in keeping with the remedial purposes of the Workers' Compensation Act. *Reeder* v. *Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992).

In the case at bar, the statute prohibits a claimant from receiving wage-loss disability "so long as" the claimant has returned to work, obtained other employment, or had a bona fide and reasonable offer of employment. The principal definition of the term "so long as" is "during and up to the end of the time that." *Webster's New Collegiate Dictionary* 1098 (1979). We indicated that our interpretation of the statute was in keeping with the concept of limitation expressed by this definition in *Cook* v. *Aluminum Co. of America*, 35 Ark. App. 16, 811 S.W.2d 329 (1991), when we analyzed the sufficiency of a similar claim on the basis of whether there was evidence to show that the claimant was employed and making equal or greater wages *at the time of the hearing*. *Cook*, 811 S.W.2d at 333. Furthermore, as the appellant notes, the intent of the legislature to impose a bar on wage-loss benefits conditioned on continued employment or offer of employment, rather than a permanent bar, is implied by the provision for reconsideration based on changed circumstances found in Ark. Code Ann. § 11-9-522(d).

Interpreting the statute in light of the remedial and beneficent purposes of the Act, we conclude that § 11-9-522(b) precludes a claim for wage loss benefits as a matter of law only during such time as the claimant has returned to work, obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident. Because the Commission's interpretation of the statute was in error, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

ROBBINS and MAYFIELD, JJ., agree.

Randy L. CAFFEY *v.* STATE of Arkansas

CA CR 92-1380 862 S.W.2d 293

Court of Appeals of Arkansas
Division I
Opinion delivered October 13, 1993

The Law Offices of Greenhaw & Greenhaw, by: *John F. Greenhaw*, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of being in actual control of a motor vehicle while intoxicated. He was sentenced to serve one year in the Washington County jail, fined $1,000.00, ordered to pay $392.00 in court costs, ordered to comply with the Ozark Guidance Center recommendations and his driver's license was suspended for a period of ninety days. On appeal, the appellant argues that the trial court erred in allowing the results of the blood alcohol test to be introduced into evidence without a showing that the procedures performed were in compliance with the Arkansas State Department of Health regulations, as required under Ark. Code Ann. § 5-65-204 (Supp. 1991). We agree, and therefore reverse and remand.

Anthony Smith, a patrolman with the Fayetteville Police Department, testified that he was dispatched around 3:00 a.m. on May 8, 1991, to the Ramada Inn to investigate a complaint that a

couple was having sex in a vehicle in the parking lot. He discovered the appellant and his companion sitting inside a car in the parking lot. He testified that the appellant was sitting on the driver's side with the engine running. Officer Smith asked the appellant for his driver's license and asked him to step outside the vehicle. He stated that he could smell alcohol on the appellant. He administered two field sobriety tests to the appellant which he said the appellant failed. He stated that at this point the appellant became very agitated and started screaming that he had just recently undergone open heart surgery. The officer then placed the appellant under arrest. Subsequent to his arrest, the appellant complained of chest pains and was breathing heavily. Officer Smith transported him to the Washington Regional Medical Center emergency room where he was examined by Dr. Beam. He stated that once inside, he advised the appellant of his rights under the implied consent law. The appellant was unable to sign the consent form but gave his verbal consent to have his blood drawn for a blood alcohol test. After the appellant was treated, Officer Smith transported him to the police department. He testified that he forwarded the blood sample to the Arkansas Health Department for testing. Officer Smith received a completed blood alcohol report form from the Arkansas Department of Health which indicated a blood alcohol content of 0.11%.

The State argues that the appellant's argument is not preserved for appeal due to the lack of a specific objection in the trial court below. We disagree. The record reveals that the appellant objected when the State sought to introduce the blood alcohol report form into evidence. One of the grounds he argued was the lack of evidence that the drawing of the blood was in accordance with the health department rules and regulations which were promulgated to prevent contamination of the blood. The State noted that they had not been given ten days notice required by statute and that the test was self-authenticating. The appellant responded that he was not questioning the chemist but was questioning the drawing of the blood and whether or not it was done in accordance with the regulations. The trial court stated that he understood the appellant's objection and overruled it.

Under Ark. Code Ann. § 5-65-204(c) (Supp. 1991), a provision of our Omnibus DWI Act, chemical analysis of a

person's blood, urine, or breath shall be performed according to methods approved by the Arkansas State Board of Health in order to be considered valid under the provisions governing its admissibility as evidence. *Mosley* v. *State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987). Substantial compliance with these regulations is sufficient, *Goode v. State*, 303 Ark. 609, 798 S.W.2d 430 (1990), but such tests must be monitored carefully to assure reliability. *Weaver* v. *State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

At trial, there was no evidence presented by the State indicating that the procedure used to draw blood was performed according to a method approved by the State Department of Health. Dr. Beam, the physician who treated the appellant, testified at trial but did not testify regarding the procedures used when the blood was drawn. Furthermore, apparently the phlebotomist who actually drew the blood was subpoenaed but was not called to testify by the State. The State Department of Health has adopted regulations regarding how blood samples are to be collected, including how the skin is to be cleansed and disinfected and the instruments to be used. *See* Ark. Dep't of Health, Arkansas Regulations for Blood Alcohol Testing, § 3.20. In the case at bar, there was no evidence of the type of instruments used to draw the blood or whether they were sterile. There was no evidence of whether a non-alcohol skin sterilant was used or whether the test was contaminated by an alcohol swab used to sterilize the skin. Therefore, we find the evidence insufficient to demonstrate substantial compliance with the regulations and that this prevents the introduction of the test results into evidence. *Mosley*, *supra*.

We think the case at bar is analogous to those cases in which a showing that the chemical analysis was made by a method approved by the Director of the State Board of Health and/or the Director of the Arkansas State Police, as required by previous statute, was part of the foundation to be laid for the introduction of the results of such tests or analysis and the burden was upon the State to establish it. *Smith* v. *State*, 243 Ark. 12, 418 S.W.2d 627 (1967); *Jones* v. *City of Forrest City*, 239 Ark. 211, 388 S.W.2d 386 (1965).

The State contends that, according to Arkansas

Code Annotated § 5-65-206(d) (Supp. 1991), the blood alcohol report form is self-authenticating and is admitted into evidence without the necessity of those involved in the administration of the chemical test being present to testify at trial unless the State is given advance notice that the defendant desires them to be there. Section 5-65-206 provides, in pertinent part:

> (d) The records and reports of certifications, rules, evidence analysis, or other documents pertaining to work performed by the blood alcohol program of the Arkansas Department of Health under the authority of this chapter shall be received as competent evidence as to the matters contained therein in the courts of this state subject to the applicable rules of criminal procedure when duly attested to by the program director or his assistant, in the form of an original signature or by certification of a copy. These documents shall be self-authenticating.
>
> . . .
>
> (2) Nothing in this section shall be deemed to abrogate a defendant's right of cross-examination of the person calibrating the machine, the operator of the machine, or any person performing work in the blood alcohol program of the Arkansas Department of Health, who shall be made available by the State if notice of intention to cross-examine is given ten (10) days prior to the date of the hearing or trial.

The State cites *Smith* v. *State*, 301 Ark. 569, 785 S.W.2d 465 (1990) and *Johnson* v. *State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986) to support this contention. In *Johnson*, we found that Ark. Stat. Ann. § 75-103.1 (Supp. 1985) [now codified at Ark. Code Ann. § 5-65-206] required that (1) the method of testing be approved by the Board of Health, (2) the machine must have been certified in the three months preceding arrest and (3) the operator must have been trained and certified. We found that the State complied with the statutory requirements for admission of the breathalyzer test results. The State introduced a certificate which approved the method and the machine used, along with an operator's certificate issued to the officer who administered the test. We held that the statute did not require the State to introduce the installation certificate or the testimony of the senior

operator who calibrated the machine as a prerequisite to introduction of the chemical analysis test results. The Arkansas Supreme Court in *Smith* also found that the statutory law did not require the machine operator's testimony, or his certificate, as a prerequisite to the introduction of chemical analysis test results. In the present case, however, there is a statutory provision that requires a blood sample to be collected in keeping with certain Board of Health methods in order for the test to be admissible in evidence. There is simply no evidence that the Board of Health regulations were followed in this case, and under the circumstances, we find that the appellant suffered prejudice from the admission of the test result. Therefore, we reverse and remand for a new trial.

Reversed and remanded.

MAYFIELD, J., agrees.

ROBBINS, J., concurs.

JOHN B. ROBBINS, Judge, concurring. I concur with the majority opinion of this division that the trial court should have required the state to introduce evidence that the blood sample was drawn in substantial compliance with regulations of the State Department of Health, but for a somewhat different reason.

Arkansas Code Annotated § 5-65-206(d) (Supp. 1991) provides, in pertinent part:

> "[R]eports of . . . evidence analysis . . . pertaining to work performed by the blood alcohol program of the Arkansas Department of Health . . . shall be received as competent evidence *as to the matters contained therein* . . ."

(Emphasis added.) Although the blood alcohol report which was received into evidence set forth the procedure which was followed in preserving and transporting the blood sample, it did not address the manner in which the blood sample was drawn. If it had set forth the procedure and it appeared to be in compliance with the applicable regulation I would have found no error in admitting the report.

Roxanne Marie HANDY *v.* STATE of Arkansas

CA CR 92-1317 862 S.W.2d 291

Court of Appeals of Arkansas
En Banc
Opinion delivered October 13, 1993

Lee R. Watson, for appellant.

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

PER CURIAM. Appellant Roxanne Marie Handy was convicted on November 8, 1991, of theft by deception and the court withheld imposition of sentence for a period of five years conditioned on good behavior and appellant making monthly restitution payments. On June 5, 1992, the state filed a petition to revoke appellant's suspended sentence for failure to make her restitution payments. At the conclusion of a hearing held August 5, 1992, the judge announced that he found that appellant had violated the terms of her suspended sentence and sentenced her to ten years in the Arkansas Department of Correction with seven of those years suspended. Appellant filed notice of appeal on August 18, 1992. The judgment and commitment order was not entered until August 26, 1992.

Appellant's appeal must be dismissed. Rule 4(a) of the Arkansas Rules of Appellate Procedure requires that a notice

of appeal be filed "within thirty (30) days from the entry of the judgment" appealed from. Notice filed prior to entry of the judgment does not comply. *Mangiapane* v. *State*, 43 Ark. App. 19, 858 S.W.2d 128 (1993). Although *Mangiapane* was reversed upon review, the Supreme Court opinion explained that it did so because the notice of appeal and entry of judgment predated *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992) which was decided on July 13, 1992. *See Mangiapane* v. *State*, 314 Ark., per curiam op. del. Oct. 4, 1993. Here, the notice of appeal and entry of judgment occurred on August 18, 1992, and August 26, 1992, respectively, after *Kelly* v. *Kelly* was decided. We lack jurisdiction to entertain this appeal.

Dismissed.

MAYFIELD, J., concurs.

Beatrice HOUSTON *v.* STATE of Arkansas

CA CR 92-653 862 S.W.2d 292

Court of Appeals of Arkansas
En Banc
Opinion delivered October 13, 1993

James H. Phillips, for appellant.

PER CURIAM. On February 24, 1993, we affirmed appellant's

conviction of delivery of controlled substance. *Houston* v. *State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993). On September 23, 1993, appellant's attorney filed this motion for attorney's fees. We deny the motion.

A two-month delay between rendition of our decision and the motion for attorney's fees prompted us in 1982 to advise the bar that motions for attorney's fee should be filed in this court in time for them to be considered at the time the case is considered on its merits. *Cristee* v. *State*, 8 Ark. App. 33, 627 S.W.2d 38 (1982). We explained in *Cristee* that when motions for fees are delayed we are required to obtain and reconsider the briefs in order to determine the fees. *Id.*

A three-month delay prompted a similar explanation in *Stefanovich* v. *State*, 10 Ark. App. 233, 662 S.W.2d 476 (1984). Our request that motions for attorney's fees be filed so that we can consider them at the time the case was decided was, in *Stefanovich*, coupled with a warning that failure to do so could prevent an allowance or attorney's fee. *Id.*

Although we granted attorney's fees in both *Cristee* and *Stefanovich*, in *Fiveash* v. *State*, 12 Ark. App. 391, 676 S.W.2d 769 (1984), we denied a motion for attorney's fees filed eight months after our decision was rendered.

In *Scott* v. *State*, 28 Ark. App. 329, 775 S.W.2d 513 (1989), we granted a motion for attorney's fees filed four months after our decision was rendered, and repeated the warnings in *Fiveash*, *Stefanovich*, and *Cristee*, *supra*.

In *Terrell* v. *State*, 32 Ark. App. 58, 796 S.W.2d 348 (1990), we denied a motion for attorney's fees filed over eight months after our decision was rendered. In that per curiam opinion, we reviewed our prior warnings about filing motions for attorney's fees promptly and repeated the explanation for this requirement.

In *Williams* v. *State*, 42 Ark. App. 184, 854 S.W.2d 370 (1993), we denied a motion for attorney's fees filed approximately seven months following issuance of our mandate.

This opinion is being published as notice to the bar that hereafter, if no good cause for delay in filing the motion is presented, we will deny motions for attorney's fees filed more than

sixty (60) days after our mandate issues.

The motion for attorney's fees is denied.

ARKANSAS DEPARTMENT OF HEALTH and Public Employees Claims Division *v.* Juanita WILLIAMS

CA 92-1243 863 S.W.2d 583

Court of Appeals of Arkansas
En Banc
Opinion delivered October 20, 1993

Frank Gobell, for appellant Public Employees Claims Division.

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

MELVIN MAYFIELD, Judge. In this workers compensation appeal, appellants argue there is no substantial evidence to support the finding that appellee suffered a compensable injury.

Appellee, Juanita Williams, is employed by the Arkansas Department of Health as a personal care assistant whose duties involve going from house to house performing personal care and light-duty housework. At the hearing on her claim for compensation, Ms. Williams testified that she hurt her back on December 21, 1990, as she was helping Mr. Frank Ethridge to his chair after his shower. According to the appellee, Mrs. Ethridge was at home that day, but did not assist the appellee with Mr. Ethridge. She said he tried to turn around and sit down in the chair before he was close enough, that she tried to catch him, and that he put all his weight on her. She said she heard her lower middle back pop, and felt a dull, sharp, ripping pain like she never felt before. Ms. Williams said she completed her duties without telling Mrs. Ethridge she had hurt herself because she thought the pain would go away. Ms. Williams said she attended another patient that afternoon, where she did about the same duties as at the Ethridge's but was physically unable to sweep the floor.

Ms. Williams also testified that when she arrived home that day her back was sore. The next morning, Saturday, December 22, she "almost" couldn't move. On December 26, her next scheduled work day, she telephoned her supervisor and said she was not able to come to work because she hurt her back lifting Mr. Ethridge.

On December 27 Ms. Williams was seen by Dr. Nur Badshah who initially treated her with drug therapy and subsequently referred her to Dr. Clinton McAlister, an orthopedic surgeon. Ms. Williams testified her condition has gotten worse; it hurts her to stand and to sit for a long period of time; she cannot drive; she is unable to work; and she cannot do any heavy-duty housework. She said that since January 1991 there are never any days when she feels good enough to bend forward with no problems, and since that time she has not had a single pain-free day. She also testified she was aware her testimony was contradicted by Mrs. Ethridge but thought Mrs. Ethridge may have forgotten.

Mrs. Ethridge, who is 85 years of age, testified by deposition that her husband did not fall and that she was there and helped him. She said Ms. Williams did no more than she did; that Ms. Williams did not have to catch him that day when he sat down on the bed; and that the only time she caught him was "when he was doing the chair." She said Ms. Williams did not say a word about being hurt. Mrs. Ethridge also testified that the following Monday Ms. Williams called and said she did not feel good, and on Wednesday her employer called and said Ms. Williams had to go to the doctor because she hurt her back lifting Mr. Ethridge. Mrs. Ethridge said she was not saying Ms. Williams did not injure her back, but if she did, she did not tell her, did not act like she hurt her back, and did not cry out.

The medical records introduced into evidence start with a note written by Dr. Badshah after his first examination of the appellee. The note states that the appellee is "unable to do lifting and straining for 3 weeks."

The next record is a "History Sheet" dictated by Dr. McAlister and dated January 8, 1991. Dr. McAlister states that the appellee had been seen by Dr. Badshah but "he is out-of-town." Dr. McAlister goes on to state that the appellee complained of soreness in her arm area from her elbows to her wrist and that her back pain was in the mid-back area with no radiation. The doctor states that his "impression" is "lumbosacral sprain" and "muscle pull in both forearms," and he prescribed Parafon Forte and Darvocet.

On February 8, 1991, Dr. McAlister wrote he had examined the appellee again and could find no objective findings. He said the appellee had a great deal more complaints than he could answer from her examination, and he requested permission to do "MRIs and EMGs as these will help to shed more light on her complaints." In a letter written that same day, Dr. McAlister stated the appellee has had difficulty since December 21, 1990, when she injured her back and arms and that "the pain that has evolved has not allowed her to devote the proper amount of time to her schooling, and I have suggested that she not attend school and take care of her health first and to return next semester."

On June 18, 1991, Dr. Badshah wrote that the appellee "continues to have low back pain for the last 6 months," and "she

needs MRI scan of lumbosacral spine." The doctor also wrote a note stating that appellee "is totally disabled from 12-21-90 to present because of back injury."

On the evidence outlined above, the administrative law judge made the following findings of fact:

> 1. The employee-employer relationship existed on December 21, 1990, on which date the claimant sustained an accidental injury arising out of and in the course of her employment.
>
> 2. At the time of her injury, the claimant was earning an average weekly wage of $187.28 which computes to a compensation rate of $124.85.
>
> 3. The claimant has remained temporarily, totally disabled since her accidental injury.
>
> 4. The claim has been controverted in its entirety.

And on appeal to the full Commission, the Commission issued an opinion in which it stated:

> After our *de novo* review of the entire record herein, we find that claimant has sustained her burden of proof and accordingly, affirm the opinion of the Administrative Law Judge.

On appeal to this court the appellants argue there is no substantial evidence to support "the findings and opinion of the Arkansas Workers' Compensation Commission that appellee suffered a compensable injury."

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. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

In their brief, appellants review the evidence and question appellee's credibility. They contend appellee's testimony is diametrically opposed to that of Mrs. Ethridge and that this shows appellee's lack of veracity. They also contend that the medical evidence demonstrates appellee's claim is without merit and that there are no objective findings to support her complaints.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Robinson* v. *Ed Williams Construction Company*, 38 Ark. App. 90, 828 S.W.2d 860 (1992). Although the appellants argue that the basis by which the Commission found appellee to be credible is specious at best, the Commission found appellee to be credible and that is a matter for the Commission to determine. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). We agree that there are contradictions in the evidence but it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Jackson Cookie Company* v. *Fausett*, 17 Ark. App. 76, 703 S.W.2d 468 (1986).

It is true, as appellants argue, that a claimant's testimony is not considered to be uncontroverted, but this does not mean that the fact finder may not find such testimony to be credible and believable or that it must reject the testimony if it finds the testimony worthy of belief. *Ringier America* v. *Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993).

In a claim for benefits, a claimant has the burden of proof by a preponderance of the evidence. *Voss* v. *Ward's Pulpwood Yard*, 248 Ark. 465, 452 S.W.2d 629 (1970). In its opinion, the Commission discussed the evidence and stated "based on claimant's credible testimony, we find that claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment."

Although the appellants do not raise the point, the dissenting opinion by the judges of this court takes the position that the Commission's opinion does not make "findings of fact on the essential issues of the existence, extent, and cause of appellee's disability, if any," and would remand for such findings to be made. In *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), we held in reliance upon *Clark* v.

Peabody Testing Service, 265 Ark. 489, 579 S.W.2d 360 (1979), that the Commission must make sufficient factual findings that would enable the appellate court to conduct a meaningful review of the Commission's decision. We quoted from *Clark* the statement: "We do not deem a full recitation of the evidence to be required, as long as the Commission's findings include a statement of those facts the Commission finds to be established by the evidence in sufficient detail so that the truth or falsity of each material allegation may be demonstrated from the findings . . . ." *See Clark*, 265 Ark. at 507, 579 S.W.2d at 369. In the instant case the appellants' only argument is that the evidence was not sufficient to show that the claimant suffered a compensable injury, and the dissenting opinion concedes that the Commission's finding in that regard is sufficient. But the appellants, as a part of their argument on the sufficiency of the evidence, have also argued that there are no objective physical findings to support the appellee's complaints, and the dissent takes the position that in order to be "compensable" an injury must cause a disability in earning capacity and contends that "the existence of a physical impairment is a necessary component of disability." Therefore, because Ark. Code Ann. § 11-9-704(c)(1) (1987) requires that any determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings, the dissent concludes that the Commission's opinion failed to make sufficient findings of fact in that regard.

In *Keller* v. *L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), we discussed the requirement of "objective" physical findings as required by Ark. Code Ann. § 11-9-704(c)(1) (1987), and we pointed out that the requirement was added to our "Workers' Compensation Law" by Section 10 of Act 10 of the Second Extraordinary Session of 1986, which amended Section "c" of Ark. Stat. Ann. § 81-1323 (now Ark. Code Ann. § 11-9-704). The statute now provides that any determination of the existence or extent of physical *impairment* shall be supported by objective and measurable physical or mental findings. However, the issues for the Commission to decide in the instant case were whether the appellee suffered an accidental injury arising out of and in the course of her employment and whether she had been temporarily, totally disabled since that time. In *Arkansas State Highway Commission* v. *Breshears*, 272 Ark. 244, 613

S.W.2d 392 (1981), which was decided before the "objective and measurable" requirement became part of our workers' compensation law, the court discussed provisions found in Ark. Stat. Ann. § 81-1302 (now Ark. Code Ann. § 11-9-102) and Ark. Stat. Ann. § 81-1313 (now Ark. Code Ann. § 11-9-519 to § 11-9-526) and held that "temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages" and that "temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury."

However, the dissenting opinion in the instant case argues that *Breshears* and *Sanyo Manufacturing Corp.* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984), which was also decided before the "objective and measurable" requirement became law, hold that a physical impairment must exist before benefits for temporary total disability may be awarded. *Sanyo* involved an occupational disease and it was argued that even if the claimant was entitled to benefits for such disease, there was no substantial evidence to support a finding that the claimant was temporarily and totally disabled after a certain date. In that context — and without any "objective and measurable" requirement for the determination of impairment — the court in *Sanyo* quoted a statement from *Breshears* that said the Commission was in a better position than the appellate court to evaluate the claimant's ability to earn wages and that, once the Commission has before it "firm medical evidence of physical impairment and functional limitations, it has the advantage of its own superior knowledge of industrial demands, limitations and requirements" and thus "can apply its own knowledge and experience in weighing the medical evidence of functional limitations" together with the other evidence to determine the claimant's ability to work.

It is obvious that *Breshears* and *Sanyo* could not be dealing with the not-yet-enacted statutory "objective and measurable" requirement discussed by the dissenting opinion in this case. It is true that physical impairment does have some practical relationship to earning capacity. However, incapacity to earn wages can exist without physical or mental impairment. This is discussed in 1C A. Larson, *The Law of Workmen's Compensation*, § 57.11 at 10-16 (1993), as follows:

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is *de facto* inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.
>
> The two ingredients usually occur together; but each may be found without the other: A claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living for himself; conversely, a claimant may be able to work, in both his and the doctor's opinion, but awareness of his injury may lead employers to refuse him employment. These two illustrations will expose at once the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability.

Specifically, with regard to temporary total disability Larson says:

> Temporary total (although the majority of claims are in this group) and temporary partial occasion relatively little controversy, since they are ordinarily established by direct evidence of actual wage loss. In the usual industrial injury situation, there is a period of healing and complete wage loss, during which, subject to any applicable waiting period, temporary total is payable. This is followed by a recovery, or stabilization of the condition, and probably resumption of work, and no complex questions ordinarily arise.

1C A. Larson, *The Law of Workmen's Compensation*, § 57.12(b) at 10-19 and 10-20 (1993).

But the dissenting opinion in the present case is concerned with impairment as related to the statutory requirement in Ark. Code Ann. § 11-9-704(c)(1) that "any determination of the

existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." The Commission, however, was not making a "determination of physical impairment." The issue before the Commission involved the question of capacity to earn during the healing period and that is not the same thing as the determination of "physical impairment" referred to in Ark. Code Ann. § 11-9-704(c)(1). As far as this court is concerned this issue appears to have been settled by our decision in *Arkansas Methodist Hospital* v. *Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993), where we said that objective and measurable physical or mental findings "are necessary" to support a determination of physical impairment but "they are not necessary to support a determination of wage loss disability," 43 Ark. App. at 3, 858 S.W.2d at 127.

Another case cited by the dissent is *Legacy Lodge Nursing Home* v. *McKellar*, 26 Ark. App. 260, 763 S.W.2d 101 (1989), where we responded to the appellant's argument but did not hold that a finding of physical impairment was necessary to allow benefits for temporary disability. We did say that such a finding would be a "fact finding function for the Commission," and we also said that the Commission's award of benefits in that case was supported by evidence that the physicians who had seen the claimant anticipated that she would receive continued treatment, had recommended surgery, and had said she would have increasing symptoms until surgery was performed. And in *Reeder* v. *Rheem Manufacturing Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992), we said that the "determination" of physical impairment as used in Ark. Stat. Ann. § 11-9-704(c) refers to the Commission's determination; and we rejected the idea that unless a doctor's opinion as to impairment was "expressly" based on objective and measurable findings it was "unworthy of consideration." In that case we held that tests which a doctor said were "subjective" were "sufficiently objective to satisfy the statute," and we held that "it is the function of the Commission and the courts to decide what is an objective finding within the meaning of the law."

Thus, without implying that such a case could never exist, we hold that the determination of temporary disability in this case is not governed by the requirement in Ark. Code Ann. § 11-9-704 (c)(1) that a determination of physical impairment

must be supported by objective and measurable physical or mental findings.

We also hold that the decision of the Commission is supported by substantial evidence and that its opinion sufficiently states the factual findings on which the decision is based. We agree that the dissenting opinion is correct when it states that the Commission must make findings of fact in sufficient detail so that an appellate court — as well as the parties — can know the factual basis upon which the case was decided. But this case is not like the *Wright* v. *American Transportation* case, *supra*, where the Commission simply held that the claimant had failed "to prove her claim by a preponderance of the evidence" without revealing whether she failed to prove an injury, or that she was working while injured, or some other factual element of her claim. Neither is this case like the case of *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992), cited by the dissent. In that case, the Arkansas Supreme Court held that the prevailing opinion of the Court of Appeals was wrong in holding that the Commission's finding that the claimant had "met his burden of proof" under Ark. Code Ann. § 11-9-523(a) (1987) was sufficient when there was no finding that the necessary element of physical distress following the occurrence of the hernia was such as to require the attendance of a physician within 72 hours. In other words, the supreme court said we held that a finding by the Commission was sufficient, but we were wrong because that finding did not apply to a necessary element in the case.

But unlike the cases where the necessary elements on which a claim was based were not specifically found by the Commission, here the only question presented to the Commission by the appellant, and the only question presented by the appellant to this court, is whether there is substantial evidence to support the finding that the appellee suffered a compensable injury. The issue of objective physical findings was only a part of the appellants' argument that the Commission's decision was not supported by substantial evidence. However, regardless of how the issue was raised, if there is no requirement that the award of temporary total disability in this case must be supported by objective and measurable findings of *physical impairment*, then the absence of factual findings by the Commission on that point

does not prevent us from affirming the Commission without a remand.

As to the merits of the claim for temporary disability, the administrative law judge's opinion discusses the evidence in that regard and points out that Dr. Badshah "took [claimant] off from work on account of her back condition." The law judge's opinion also states that "according to the reports of Dr. Badshah, the claimant has remained temporarily, totally disabled since her injury." And the law judge's opinion states that Dr. McAlister, the other doctor seen by the claimant, "diagnosed a lumbosacral sprain and muscle pull in both forearms." Based on the evidence discussed by the law judge, he made the specific finding that "the claimant has remained temporarily, totally disabled since her accidental injury." The Commission affirmed the law judge's decision and directed the appellants to comply with that award. In *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984), we pointed out that the Commission had affirmed the decision of the law judge, and we said, "This action by the Commission had the effect of adopting the findings and conclusions of the Administrative Law Judge as its own." 10 Ark. App. at 316, 663 S.W.2d at 948. The same thing happened in the instant case.

The dissenting opinion draws a distinction between the Commission "expressly" adopting the law judge's opinion and simply "affirming" the law judge's opinion, and *Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991), is cited in support of that distinction. However, *Hardin* held that the "law judge failed to make the findings necessary for us to review . . . the decision of the Commission." *ITT/Higbie Manufacturing* v. *Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991), is also cited by the dissent as drawing a distinction between "expressly" adopting and "affirming" the law judge's decision. *Higbie*, however, did not expressly overrule *City of Fayetteville* v. *Guess*, and *Higbie* involved a case where the Commission had adopted the law judge's decision. Thus, there was no discussion, and no need to discuss, whether that case was in conflict with *City of Fayetteville*. The real thrust of the discussion of "adopting" in *Higbie* was whether this would allow the Commission to "rubber stamp" the law judge's decision. This was also the concern of the concurring opinion in *City of*

Fayetteville. That opinion pointed out that "it is the duty of the Commission to make a finding according to a preponderance of the evidence" and not to simply determine if there was substantial evidence to support the law judge's opinion. But the issue of the Commission "in effect" adopting the opinion of the law judge was specifically decided in *City of Fayetteville* and that case has not been overruled.

The claimant in the present case sustained a compensable injury on December 21, 1990. At the time of the hearing before the law judge on September 24, 1991, she had not worked or been paid workers' compensation since her injury, nor had she been released to return to work. Today, almost three years after the injury, we think the issue of temporary total disability should be resolved without further delay.

Affirmed.

JENNINGS, C.J., concurs,

PITTMAN and ROGERS, JJ., dissent.

JOHN E. JENNINGS, Chief Judge, concurring. I agree with the dissent that we may raise on our own motion the question of the adequacy of the Commission's findings for review. I cannot agree, however, that under the circumstances presented those findings are inadequate. This case is not like *Wright* v. *American Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). There the Commission in a two sentence opinion found that the claimant failed to meet her burden of proof and "affirmed" the decision of the administrative law judge. Here, the Commission's opinion runs seven pages. The dissenting opinion runs an additional four. As the majority opinion states, the Commission's opinion focuses on the question of "injury" and it did so because this was the question that the parties focused on. The question of whether the claimant received a compensable injury was dependent on credibility issues which were the primary arguments made before the Commission and the primary argument made in this court. It is apparent that the question of "disability," in the event a compensable injury was found by the Commission, was really not contested before the Commission and in reality is not argued here. This is probably because of the statement in the administrative law judge's opinion that it was the opinion of the claimant's

family doctor, Dr. Badshah, that "the claimant has remained temporarily, totally disabled since her injury."

The appellant did note in a brief submitted to the Commission that Dr. McAlister had x-rayed the claimant, that the x-rays were normal, and that "no objective findings supporting claimant's complaints were found." The Commission recognized the argument and stated:

> Respondents argue that claimant cannot meet her burden of proof because her treating physician [Badshah] has been unable to find objective evidence of an injury. However, there is no indication in the record that the treating physician even ordered x-rays. Further, the treating physician sought 'permission to do MRI's and EMG's as these will help shed more light on her complaints' but this has not been done due to respondent's controversion of this claim.

Even the dissenting commissioner tacitly found this to be an adequate response to the argument.

I do not agree that the issue which both the majority and minority spend much effort to resolve has been raised. That issue is whether Ark. Code Ann. § 11-9-704(c) is applicable to an award of temporary disability. It was not raised by the appellant at any level of this proceeding, it was not decided by the ALJ or the Commission, and it is not even raised by the dissenting commissioner. The appellant's argument before us is that the Commission's decision is not supported by substantial evidence. Everyone but this court believes that this case turns on the credibility of the witnesses to the incident. Surely it is premature for us to decide an issue not ruled on by the Commission and neither argued nor briefed by the parties on appeal. Accordingly, I take no position on the issue.

For the reasons stated I concur in the affirmance of the Commission's decision.

JOHN MAUZY PITTMAN, Judge, dissenting. The prevailing opinion affirms an order of the Arkansas Workers' Compensation Commission awarding appellee benefits for temporary total disability. I dissent for two reasons.

I.

First, the Commission wholly failed to make any finding of fact for us to review regarding whether appellant is, in fact, disabled. Despite the supreme court's recent attempt to clarify the issue, three members of this court have again demonstrated a fundamental misunderstanding of the Commission's duty to find facts. *See Cagle Fabricating, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992). In fact, the prevailing judges have fallen into precisely the same error that the supreme court had to correct in *Cagle*.

The prevailing judges point to one thing in support of their conclusion that the Commission made sufficient findings of fact regarding the issue of disability: the ALJ found facts and the Commission "affirmed" the ALJ. The only other statement by the Commission that might be regarded as applying to this issue is its "finding" that appellee had "sustained her burden of proof." Of course, neither of these statements by the Commission constitutes a finding of fact.

The respective functions of the Commission and this court can be summarized briefly. "The Commission [is] required to find as facts the basic component elements on which its conclusion [is] based." *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 309 Ark. 365, 369, 830 S.W.2d 857, 859 (1992). On appeal, this court does not review decisions of the Commission *de novo* on the record or make findings that the Commission should have made but did not. Rather, our function is to review the sufficiency of the evidence to support the findings that the Commission does make. *Sonic Drive-In* v. *Wade*, 36 Ark. App. 4, 816 S.W.2d 889 (1991). A finding of fact is "a simple, straightforward statement of what the Board finds has happened." *Wright* v. *American Transportation*, 18 Ark. App. 18, 21, 709 S.W.2d 107, 109 (1986). Neither an expression of belief nor "a statement that a witness, or witnesses, testified thus and so" is sufficient. *Id.* Likewise insufficient is language by the Commission that is merely "conclusory and does not detail or analyze the facts upon which it is based." *Cagle*, 309 Ark. at 369, 830 S.W.2d at 859. *Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991). When the Commission fails to make specific findings on an issue, the case must be reversed and remanded for the Commission to make

such findings. *Sonic Drive-In* v. *Wade*, *supra.*

I have no quarrel with the Commission's finding that appellee had suffered an "injury" arising out of and in the course of her employment with appellant, or with this court's conclusion that that finding is supported by substantial evidence. The Commission's opinion summarizes *that part* of appellee's testimony describing the occurrence of a work-related accident and the painful "pop" in her back, finds that testimony credible, and specifically finds that appellee sustained a work-related injury. However, the finding of a work-related injury, standing alone, simply does not justify an award of temporary total disability benefits. In order to be "compensable", an injury must not only be causally connected to one's work, Ark. Code Ann. § 11-9-102(4) (1987), but must also cause disability for a minimum length of time, Ark. Code Ann. § 11-9-501(a) (1987). Disability means incapacity because of injury to earn, in the same or any other employment, the wages that the employee was receiving at the time of the injury. Ark. Code Ann. § 11-9-102(5) (1987). Temporary disability is determined by the extent to which a work-related injury has affected an employee's ability to earn a livelihood. *Arkansas State Highway Department* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Id.*

Contrary to the prevailing opinion, the fact that the Commission "affirmed" the ALJ in no way satisfies the need for findings of fact by the Commission on the issue of disability. It has long been the law that we review the Commission's findings, not those of the ALJ. It is the Commission's duty to make findings according to the preponderance of the evidence and not whether there is substantial evidence to support the findings of the ALJ. *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963); *Oller* v. *Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). Therefore, the findings of the ALJ are of no significance to the appellate court and are given no weight whatever. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Lane Poultry Farms* v. *Wagoner*, 248 Ark. 661, 453 S.W.2d 43 (1970); *Oller* v. *Champion Parts Rebuilders*, *supra*; *Dedmon* v. *Dillard Department Stores, Inc.*, 3

Ark. App. 108, 623 S.W.2d 207 (1981). It is true that the Commission may expressly "adopt" the ALJ's findings as the Commission's own, assuming the ALJ's findings are themselves sufficient. *Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991); *ITT/Higbie Manufacturing* v. *Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991). However, the Commission did not adopt any part of the ALJ's opinion in this case. Therefore, this court's reference to (indeed, quotation of) portions of the ALJ's opinion in this context is inappropriate, as the ALJ's opinion is inconsequential.

It would also be wrong to characterize as a finding the Commission's statement that appellee had "sustained her burden of proof." This court recently held that the Commission's statement that a claimant had "met his burden of proof under [Ark. Code Ann. § 11-9-523(a)]" was "definitely a finding of fact." *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 36 Ark. App. 49, 57, 819 S.W.2d 14, 19 (1991). On review, however, the supreme court unanimously reversed, holding that the Commission's language was insufficient because "it is conclusory and does not detail or analyze the facts upon which it is based." *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 309 Ark. at 369, 830 S.W.2d at 859 (1992). The Commission's statement in this case is no different, and to treat it as a finding flies in the face of the supreme court's decision in *Cagle*.

The prevailing opinion also provides a summary of those parts of appellant's testimony and the medical evidence going to appellant's present condition. However, the *Commission* did not detail or analyze this proof. In fact, the Commission completely failed even to mention this or any other evidence pertinent to whether appellee is, or ever was, disabled as a result of her injury, much less to make any finding of fact regarding that issue. The Commission likewise completely failed to make any findings regarding whether such disability, if any, was total or partial in nature or whether appellee remained within her healing period. Indeed, the Commission's opinion does not even contain the words "disabled," "disability," "temporary," "permanent," "partial," "total," or "healing period."

In *Wright* v. *American Transportation, supra*, the Commission denied the appellant/employee's claim without stating any

basis for its finding that she had failed to prove entitlement to additional medical or temporary total disability benefits. We reversed and remanded the case for the Commission to make sufficient specific findings of fact to support its decision. In holding that we were unable to make any meaningful review of the Commission's decision as it then stood, we pointed out that:

> The Commission made no findings as to whether appellant sustained a compensable injury, or when the healing period ended if there was a compensable injury, or whether she was disabled at the time of the hearing, and if so, what was the cause of the disability.

Wright, 18 Ark. App. at 22, 709 S.W.2d 107 (1986). In my opinion, the present case is materially indistinguishable from *Wright* and should be remanded for the Commission to make findings of fact on the essential issues of the existence, extent, and cause of appellee's disability, if any.

II.

The second flaw in the prevailing opinion can be found in its discussion of the meaning of impairment and the statutory requirement of objective physical findings. Within its challenge to the sufficiency of the evidence, appellant makes a compelling argument that the record is devoid of any objective physical findings to support appellee's subjective complaints of continuing back pain or other physical problems, and that the award of disability benefits, therefore, cannot stand.[1] The prevailing judges point to no such objective findings, but dispense with appellant's argument by holding that the requirement of objective findings is simply inapplicable to the issues in this case.

As the prevailing opinion notes, Ark. Code Ann. § 11-9-704(c)(1) (1987) provides that "*[a]ny* determination of the *existence* or extent of physical *impairment* shall be supported by

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[1] Contrary to the position taken in the concurring opinion, five members of this court agree that this issue was raised below and is argued on appeal. Indeed, the concurrence quotes the Commission's response to the argument. The fact that the Commission dispensed with the argument by erroneously placing on appellant appellee's burden of proving her entitlement to benefits is of no consequence as to whether the issue was preserved for appeal.

objective and measurable physical or mental findings." (Emphasis added.) *See also Keller* v. *L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992); *Reeder* v. *Rheem Manufacturing Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992); *Taco Bell* v. *Finley*, 38 Ark. App. 11, 826 S.W.2d 313 (1992). Although the prevailing judges concede that one of the issues for the Commission to decide was whether appellee has been temporarily totally disabled since her injury, they nevertheless hold that the case does not involve the determination by the Commission of even the existence of physical impairment. I agree that it is not necessary in cases of temporary disability to assign a precise anatomical impairment rating to the claimant. However, I simply cannot agree that it is possible in the ordinary case for one to be "disabled" in the workers' compensation sense, either temporarily or permanently, without suffering, even temporarily, at least some degree of "impairment." In other words, the "existence" of a physical impairment is a necessary component of disability.[2]

Professor Larson explains the two components of disability as follows:

> [T]he distinctive feature of the compensation system, by contrast with tort liability, is that its awards, apart from medical benefits, . . . are made not for physical injury as such, but for "disability" produced by such injury.
>
> [T]he disability concept is a blend of two ingredients . . .: The first ingredient is *disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions* [*i.e.*, physical impairment]; the second ingredient is *de facto* inability to earn wages . . . .

1C A. Larson, *The Law of Workmen's Compensation* § 57.11 (1993) (emphasis added) (footnotes omitted). Our own case law also points out the need that a physical impairment exist before one can be found entitled to temporary total disability benefits. *See, e.g.*, *Arkansas State Highway Department* v. *Breshears*,

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[2] It should be noted that this case does not involve and this dissent does not consider any issue of an increase or prolongation of a disability by any emotional disorder.

supra; *Sanyo Manufacturing Corp.* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984) (*once* the Commission has before it firm medical evidence of *physical impairment and functional limitations*, it can apply its superior knowledge and experience in arriving at a reasonably accurate conclusion as to the extent of disability).[3]

The prevailing judges argue that "incapacity to earn wages [such that one would be entitled to disability benefits] can exist without physical or mental impairment." The only authority cited for this proposition is a passage from Professor Larson's treatise in which he points to one possible exception to the rule that one must suffer from a physical impairment before being disabled: where a claimant is able to work, in both his and his doctor's opinion, but awareness of his injury leads employers to refuse him employment. Assuming, *arguendo*, that this exception to the general rule would apply in this state, reference to the exception in this case is meaningless. This case simply presents no circumstances even approaching those on which the stated exception is based, and the prevailing opinion offers no other example of how a person can be disabled and not be impaired. The mere existence of a theoretical possibility that bears absolutely no relationship to this appellee is no explanation for avoiding the general rule in this case.

Separate and apart from the above, the prevailing judges also appear to indicate that, as used in § 11-9-704(c), the word "impairment" means only "permanent impairment." Therefore, they conclude that the statutory requirement that there be objective findings to support the existence of a physical impairment is inapplicable in this case and in temporary disability cases generally.[4] I cannot agree.

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[3] The prevailing judges apparently misunderstand why *Breshears* and *Leisure* are cited at this juncture. I do not disagree with the statement in the prevailing opinion that these two cases were decided before enactment of that part of § 11-9-704(c)(1) that requires that a determination of physical impairment be supported by objective and measurable findings. I cite *Breshears* and *Leisure* only to demonstrate that the existence of an impairment is, and always has been, a necessary component of disability. The statutory provision simply specifies how such an impairment must be proved.

[4] Although the prevailing judges state that they are not implying that "such a case could never exist," they clearly indicate that the statutory requirement is inapplicable in

The General Assembly deliberately placed the requirement of objective findings in Ark. Stat. Ann. § 81-1323 (now Ark. Code Ann. § 11-9-704). This statute, at the time entitled "Procedure before the commission in respect of claims," is very general and obviously applies to all proceedings on all claims, temporary as well as permanent. Had "impairment" been intended to be limited only to "permanent impairment," it would have been a very simple matter for the legislature to use the word "permanent." The legislature has demonstrated both its ability and its willingness to do so when it chooses. *See* Ark. Code Ann. §§ 11-9-522; 11-9-525 (1987). However, any such adjective is conspicuously missing from § 11-9-704 and should not be inserted by this court without good reason.

Furthermore, I note that in *Legacy Lodge Nursing Home* v. *McKellar*, 26 Ark. App. 260, 763 S.W.2d 101 (1989), we were faced with the same issue as in this case. There, the appellant/employer argued that the Commission's award of temporary total disability was not supported by substantial evidence because there were no objective and measurable findings to support any determination of physical impairment. However, in that case, we did not hold the requirement of objective and measurable findings inapplicable. While we affirmed the Commission's award of temporary total disability, we did so only after concluding that the Commission's decision was supported by substantial evidence, presumably including evidence of objective and measurable findings supporting the existence of a physical impairment. (Among other things, the record there contained evidence of a CT scan and myelogram that revealed a herniated disc for which the claimant's physicians recommended surgery.)

In sum, I dissent because the Commission failed to make any findings of fact for us to review relative to the issue of disability. Under these circumstances, the case should be remanded for the Commission to make specific findings. However, if appellant's arguments are to be addressed despite the lack of such findings as to disability, then I strenuously object to the holding that the existence or non-existence of some level of physical impairment is

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all but the most exceptional of temporary disability cases. The opinion fails to provide any clue as to the type of temporary disability case to which the statute might apply.

irrelevant to the issue of whether appellee is temporarily totally disabled. In my opinion, every finding of disability, by definition, at least implicitly carries with it a determination that some degree of impairment exists, and the statute requires that objective and measurable findings support that determination of impairment.

JUDITH ROGERS, Judge, dissenting. I join with the dissenting opinion insofar as it points out that the Commission did not make adequate findings for this court to review. I further agree that the language employed by the Commission was conclusory. I would, therefore, remand this case to the Commission to make adequate and specific findings of fact.

Consequently, I would not address the meaning of "impairment" nor discuss the statutory requirement of objective physical findings because I cannot, and do not, anticipate the findings the Commission might make on remand.

Robert C. HUDSON *v.* STATE of Arkansas

CA CR 92-1315 863 S.W.2d 323

Court of Appeals of Arkansas
Division II
Opinion delivered October 27, 1993

Elcan & Sprott, by: *James D. Sprott*, for appellant.

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

JOHN B. ROBBINS, Judge. On August 7, 1992, Robert C. Hudson, appellant, was found guilty of driving while intoxicated, second offense, and running a red light. He was sentenced to six months in the Boone County Jail with all but ten days suspended, fined $550.00, his driver's license suspended one year, and he was required to attend eighteen Alcoholics Anonymous meetings. On appeal, appellant contends that the trial court erred in failing to suppress the results of a breathalyzer test because the arresting officer did not permit and assist him in obtaining a complete chemical test in addition to the breathalyzer. We find no error and affirm.

The facts are as follows. On November 27, 1991, at 11:35 p.m., appellant was pulled over after running a red light in Harrison, Arkansas. Officer Daryl Smith of the Harrison Police Department testified that when he approached appellant he smelled intoxicants on his breath and gave him a field sobriety test. Smith testified that appellant failed the field sobriety test and was arrested and taken to the Boone County Sheriff's Office for a breathalyzer test. Appellant was read a statement of rights form which advised him of his right to additional tests at his own expense and that the officer would permit and assist him in obtaining an additional test. Appellant signed the form con-

senting to the breathalyzer and initialed the form indicating that he requested an additional urine test. A certified officer administered the breathalyzer which indicated appellant's blood alcohol content to be .134 percent, over the legal limit.

Officer Smith then transported appellant to the North Arkansas Medical Center in Harrison to have the urine test administered. Appellant and Smith were told by a hospital representative that the hospital did not administer urine tests for blood alcohol content. Appellant was told that a urine specimen cup could be provided for his use at a cost of $108.00; however, appellant would have to take the urine specimen elsewhere to have it tested. Appellant rejected that offer and also testified that he had less than $20 with him at that time. Smith testified that he and hospital personnel informed appellant that they could draw a blood specimen for a blood alcohol test; however, appellant refused the offer. He was then transported back to the jail and held until released the next day.

The trial court ruled on appellant's motion to suppress as follows:

> [T]he statute here is you're entitled to an alternative test which may be blood or urine test. The Sheriff's Office or the Harrison Police Department is not offering the test. It's saying, as it's set out in the statement of rights, that you can have your own chemical test. Presumably it means that has to be a test that's available. There's no guarantee here — the sophistry of the argument here is that somehow you're guaranteed a urine test. All this does is says, "The alternative test may consist of a breath test or a urine test." Then it's just a matter of whether that's available. It doesn't mean that law enforcement is required to make these tests available. They don't have any control over what tests are available through the hospital. The Court doesn't have any problems with finding that the officer gave reasonable assistance, under the circumstances, in trying to provide this defendant with a test. It would appear that they went to the time and trouble of taking him to the hospital for a test when he didn't even have monies available to pay for any testing that was done. The assistance provided under the circumstances was reasona-

ble, so the motion to suppress will be denied.

In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances. *King* v. *State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993). We will only reverse if the ruling was clearly against the preponderance of the evidence. *Brown* v. *State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992).

The statute in issue is Ark. Code Ann. § 5-65-204 (Supp. 1991), which provides in part:

> (e) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete chemical test in addition to any test administered at the direction of a law enforcement officer.
>
> (1) The law enforcement officer shall advise the person of this right.
>
> (2) The refusal or failure of a law enforcement officer to advise such person of this right and *to permit and assist* the person to obtain such test shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

(Emphasis added.) The test results from a breathalyzer may be admitted into evidence if there was substantial compliance with the statute. *Fiegel* v. *City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989). The officer must provide only such assistance for additional testing as is reasonable at the place and time of the particular case. *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985). As the fact finder, the trial court must decide whether the assistance provided was reasonable under the circumstances presented. *Girdner* v. *State*, 285 Ark. 70, 684 S.W.2d 808 (1985).

The record here shows that Officer Smith took appellant to the local medical center to have a urine test performed. As pointed out above, the hospital could not perform the urine test as requested by appellant. Appellant refused the alternative to urinate in the specimen cup and take it with him. He also refused to undergo a blood test which the hospital could have performed.

The evidence shows that even if the hospital could have performed the test the appellant did not have the money to pay for the test. The appellant did not present any evidence that there was another facility in the area which could have performed the urine test.

The trial court's finding that the level of assistance offered to the appellant by Officer Smith was reasonable under the circumstances and was amply supported by the evidence. We hold that the officer's actions constituted substantial compliance with Ark. Code Ann. § 5-65-204(e) (Supp. 1991).

Affirmed.

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

Richard Franklin ANDERSON *v.* Robin Annette ANDERSON (Prault)

CA 93-65 863 S.W.2d 325

Court of Appeals of Arkansas
En Banc
Opinion delivered October 27, 1993

Michael Knollmeyer, for appellant.

Richard Garnett, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the chancellor's order denying appellant's petition for a change in custody.

Appellant Richard Franklin Anderson and appellee Robin Annette Anderson (Prault) were divorced on March 14, 1991. Custody of the parties' minor child Tamara Anderson, born February 3, 1989, was awarded to the appellee. On May 27, 1992, the appellant filed a motion for change of custody alleging Tamara had been in the custody of Brenda Calva, her maternal grandmother, since May 1991 and that appellee is mentally and financially unstable. On September 30, 1992, the chancellor entered a decree which, among other things, continued custody with the appellee and ordered appellee and her present husband, Mr. Prault, to attend counseling.

Appellant first argues that the chancellor's decision is against the preponderance of the evidence and is clearly erroneous. He says the choice was between awarding custody to a man who was an excellent father, and awarding custody to a woman who had lived a life that was unsuitable for the raising of children, and who would not be a suitable person to have custody if she continued to live as she had in the past.

At the hearing on appellant's motion for change of custody there was evidence that the parties' two sons, who were not

mentioned in the divorce but who live with the appellant, are happy and well adjusted; that the appellant's house is nice and clean; that he has a stable job; that Tamara loves him; and that he has no current drug or alcohol problems.

There was also evidence that the appellee had three children in addition to Tamara, that she maintained very little contact with her other children, had given up guardianship of Tamara, had twice attempted to commit suicide, could not hold a job, was promiscuous, had a somewhat violent nature, was emotionally unstable, and was married to a man who had assaulted his former wife and who had been awarded only supervised visitation with his own child.

But, Barbara Bunton, a licensed clinical social worker, testified she had done a home study of appellee and found the physical environment adequate and that she had no concerns about placing Tamara with the appellee and Mr. Prault. On cross-examination Ms. Bunton testified she was not aware that Mr. Prault was convicted of third degree battery in 1991, that he had attempted to commit suicide in the near past, or that appellee had also attempted to commit suicide. After reviewing some confidential court records, Ms. Bunton testified that both suicide gestures appeared to be "just that, gestures, reactive depression," — his following a divorce with his wife and frustration over visitation problems and hers after a "big blowout" with her mother — and that if the court were to order family counseling she would have no qualms about placing Tamara with them.

Moreover, the evidence showed that Brenda Calva, appellee's mother, obtained guardianship over Tamara because Mrs. Calva was concerned about obtaining medical care for Tamara. Appellee agreed to the guardianship, but it was part of their agreement that when appellee became able to take care of Tamara, Mrs. Calva would return her. Shortly before filing the motion for change in custody, the appellee filed a petition to set aside the guardianship, but the guardianship continued until the hearing on the motion to change custody.

Finally, we note that during the testimony the chancellor stated:

> [S]he was granted custody of this child in March of 1991.

> Nobody in her family, her husband at the time, her mother or her sister or anybody else came forward to tell this Court that this was a bad deal and that this child was in danger or at risk.
>
> Now, the law says for me to — I've listened to so much today that my mind is beginning to kind of get boggled with it. I want to know how the circumstances have changed, and if so, how significant it is since March 14, 1991.
>
> I have really been patient of listening to stuff back twelve and fourteen years ago and even seven and eight years ago. I want to know how things have changed since March 14, 1991, and I'm going to restrict everybody from that day forward to that.

A change in custody cannot be made without showing a change in circumstances from those existing at the time the original order was made as the original decree constitutes a final adjudication of the issue. *Carter* v. *Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986). The primary consideration in awarding the custody of children is the welfare and best interests of the children involved; other considerations are secondary. *Scherm* v. *Scherm*, 12 Ark. App. 207, 671 S.W.2d 224 (1984). Moreover, in a child custody case, the chancellor's findings will not be reversed unless they are clearly against the preponderance of the evidence. *Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). In *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981), we said:

> In cases involving child custody a heavier burden is cast upon the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony and the child's best interest. This court has no such opportunity. We know of no case in which the superior position, ability and opportunity of the chancellor to observe the parties carry as great weight as one involving minor children.

3 Ark. App. at 273.

After careful consideration of the record in this case, we cannot say that the decision of the chancellor was clearly against a preponderance of the evidence or clearly erroneous.

Appellant also argues the chancellor erred in not basing his decision on the best interest of the child. He contends the court did not base its decision on the best interest of the child, but rather sought to give the appellee one last chance to be a mother. We do not agree.

At the conclusion of the hearing the trial judge stated "the hardest thing any judge can do, is to decide who is — what would be in the best interest of a child when more than one party wants custody of a child." He said he has "to do what's in the best interest of the child within the best of my ability." The chancellor stated that Tamara deserves to know her mother and he is going to give the appellee the chance to give Tamara the nurture and the love and upbringing Tamara deserves, needs, and is entitled to. The judge also noted that the appellant and appellee both have had "a bad, stormy past." He said the appellant had admitted to drug habits in the past, although he appears to be an excellent father now. The judge also said he was requiring the appellee and her present husband to seek counseling and he wanted a report from the counseling center every three months.

We cannot say the trial judge did not consider the child's best interest or that his decision in that regard was clearly erroneous.

Affirmed.

JENNINGS, C.J., PITTMAN and ROBBINS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent. I have no disagreement with Judge Robbins' dissenting opinion. I write only to address factors pertaining to the best interest of the child.

The original decree is a final adjudication that one parent or the other was a proper person to have care and custody of the child and before that order can be changed there must be proof that conditions have so materially changed as to warrant modification *or* proof of material facts which were unknown to the court at the time. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777; *see Thigpen* v. *Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510.

There would appear to be no disagreement on the part of the trial court or the members of this court that appellant met the above standard. *Watts* v. *Watts*, *supra*. Even so, any modification

of custody must also be in the best interest of the child. The court looks to a variety of factors to determine what is in the child's best interest: moral fitness of each parent; the age, gender, and health of the child; the attitude of each parent toward the child; the psychological relationship between the parents and the child; the physical and mental health of the parties; the child's need for stability and continuity in her relationship with parents and siblings; whether the child's social or family relationship would be disrupted by one parent having custody rather than the other parent; the relationship between the parents and the child as revealed by the parents' past conduct and by the strength and sincerity of the parents' desire to have custody; the reasonable preferences of a child the parents' affection and guidance and a continued religious education, if any. Clearly, these examples are not intended to be exhaustive, nor will each be applicable in every case. In custody litigation, some factors weigh more heavily than others; at times, only the aggregate influence will make the difference. While such factors do not mechanically decide cases, they do tell counsel and trial courts what to look for.

When the applicable criteria are applied to the specifics of this case, I believe that the chancellor's findings are clearly against the preponderance of the evidence and that custody of the child should have been placed with her father.

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

JOHN B. ROBBINS, Judge, dissenting. I respectfully dissent from the prevailing opinion of this court because I believe that the evidence overwhelmingly proves that it is in the best interest of this minor child to be placed in her father's custody.

While I acknowledge that a chancellor's decision in child custody matters is entitled to considerable deference, there are occasions when we may, and should, reverse the trial court's decision. I submit that this is one of those occasions.

The object of this custody action is Tamara Anderson, a three- year-old child. The proof at trial portrayed the two competing parents in very sharp contrast. The father, Richard Anderson, has stable employment and resides in Alvin, Texas, where he has lived for thirty years. His three sons, Richard, age 13, Christopher, age 5, and Sean, age 4, have always lived with

him. Richard is his son from a prior marriage. Christopher and Sean were born of his marriage to appellee, Robin Prault. These children are doing well in a nearby school and attend church each weekend. Mr. Anderson's mother is available and helps him with his sons. He spends his time with his sons when he is not at work. Tamara has a very close relationship with these brothers. Ms. Prault stipulated at trial that Mr. Anderson is "doing a good job of raising the boys." The chancellor also found "I have absolutely no doubt that Mr. Anderson is an excellent father."

Ms. Prault's mother, Mrs. Calva, and her sister, Kim Randall, appeared at the hearing and testified for Mr. Anderson. Both testified about Ms. Prault's emotionally instability. Her mother testified that soon after the parties' divorce, Ms. Prault voluntarily placed Tamara with her and agreed to Mrs. Calva's appointment as guardian of Tamara's person. Until Ms. Prault married William Prault in November, 1991, she only visited Tamara infrequently, and then only for a few minutes at a time. She visited more often after her remarriage but only kept Tamara overnight on two occasions. She further stated that Ms. Prault frequently changed jobs, and since June 1990 she has had at least eight different jobs. She stated that Ms. Prault often throws "fits" without regard to who is present, sometimes in the presence of Tamara. She testified that Ms. Prault drinks frequently and causes scenes when she is drunk. She and her husband have fought in front of Tamara. Mrs. Calva refused to let Ms. Prault take Tamara in her car on one occasion because she had drunk too much to be driving. Ms. Prault had a son prior to her marriage to Mr. Anderson. This son is now ten years of age. She does not visit nor maintain communication with the child and seldom has contact with her two sons who are in Mr. Anderson's custody. Ms. Prault attempted suicide on February 4, 1992.

Mr. Prault's former wife, Dana Hathcoat, testified that she and Mr. Prault have a three-year-old daughter for whom Prault was ordered to pay support but does not. His visitation rights, though not exercised, are restricted to be supervised at his mother's home. When Ms. Hathcoat was eight and one-half months pregnant Mr. Prault put a rope around her neck, threatened her with a bottle opener, pulled hair from her head, and forced her to the ground, for which he was convicted of third degree battery. Mr. Prault also attempted suicide on July 28,

1990.

All of the foregoing proof was unrebutted because the hearing was concluded when the court granted Ms. Prault's motion for a directed verdict at the close of Mr. Anderson's case.

While announcing his ruling from the bench, the chancellor made these observations:

> I have some serious, serious reservations about putting this child back with you, Ms. Prault. You've had three other children, and you've either given up custody of them or — your efforts at trying to see them is not stellar.
>
> . . .
>
> If Ms. Prault and if Mr. Prault continue to live as they have lived in the past, then they're not suitable parents, would not be suitable at all to raise this child. You surely should recognize that. You cannot live recklessly in multiple relationships, not being able to work, emotional outburst, that sort of thing cannot be in the best interest of a child if a child is exposed to that.
>
> . . .
>
> Robin [Prault] has had a stormy life and a stormy past and I'm very, very reluctant to allow this child to go and be raised by her, but I'm going to grant custody to Robin, and I going to do it for several reasons.
>
> . . .
>
> She's got these other children that she has allowed to be taken off. Granted, one, she probably doesn't know where they are — or is, but she's going to find that out I'm sure. Two down in Texas that she's not made very many efforts to go see, and one of them is only five, only two years older than that little girl. Doesn't have a mama. And that's not very exemplary.
>
> But that doesn't mean that you cannot reestablish a relationship. It doesn't mean you're probably ever going to get custody, but it means that — it doesn't mean that you can't reestablish a relationship. And that little girl deserves to know her brothers and needs to know her brothers. Not

> just two, not just three, but four. She's got four brothers. Two by you and Mr. Anderson, one by Mr. Anderson with this lady and one by you that lives down in Florida somewhere.
>
> . . .
>
> So, I'm going to give you an opportunity, one last opportunity, to become a mother and to give her the nurture and the love and the upbringing that she deserves and needs and is entitled to.

While the chancellor correctly articulated the issue before him, i.e., "what would be in the best interest of [the] child," the court's explanation of why custody was being placed with Ms. Prault would only have been applicable if Ms. Prault and a non-parent had been vying for custody. *Schuh* v. *Roberson* 302 Ark. 305, 788 S.W.2d 740 (1990). Ms. Prault's parental right to custody, or her fitness for custody, is not the issue. As pitiable as Ms. Prault may be, the focus must be on the child, without regard to Ms. Prault's welfare and some hope for her rehabilitation. The issue is, as stated by the chancellor, what is in the best interest of this child, i.e., as between Mr. Anderson and Ms. Prault, which of these two, with the sole consideration being the best interest of the child, should have custody. Based upon the evidence before the court, to conclude that it is in the child's best interest to be placed with Ms. Prault, rather than Mr. Anderson, is clearly against the preponderance of the evidence. I would reverse and remand to the trial court.

JENNINGS, C.J., and PITTMAN, J., join.

David STONE *v.* STATE of Arkansas

CA CR 92-1429 863 S.W.2d 319

Court of Appeals of Arkansas
Division II
Opinion delivered October 27, 1993

Joe Kelly Hardin, for appellant.

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

MELVIN MAYFIELD, Judge. David Marshall Stone was convicted by a jury of theft of property and sentenced to seven years in the Arkansas Department of Correction. His only argument on appeal is that it was error for the trial court to allow admission of statements he made after being promised leniency by the arresting officer.

The record contains no motion to suppress the statements. Nevertheless, the trial judge held an in camera hearing on the admissibility of the statements. Detective Morris Pate, of the Eureka Springs Police Department, testified that on September 20, 1991, he took a statement from appellant. He said he advised appellant of his Miranda rights by reading him the Miranda warning form, and appellant placed his initials beside each right

to indicate he understood it. Appellant also signed the form in two places to signify that he both understood his Miranda rights and waived the right to remain silent and to have an attorney present during questioning. The form signed by appellant also states, "No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." The signed rights form, an audio tape of the interview, and a transcript of the tape were introduced into evidence at this hearing.

On cross-examination Detective Pate said that Officer Sam Parker had arrested appellant and that Pate had no way of knowing whether Officer Parker had promised appellant anything for his confession, but Pate had not. Pate also admitted that he had not inquired whether appellant was under the influence of drugs or alcohol and that it was not customary for him to do so.

Charles Carty, a detective with the Benton police department, testified that he picked up appellant at the Carroll County Sheriff's office in Berryville and transported him to the Benton Police Department. He said he read appellant his rights when he first came in contact with appellant at approximately 5:16 p.m. on September 20, 1991, and that appellant initialed and signed the form. A copy of this form, the audio tape of the statement appellant made in the car on the way back from Berryville, and a transcript of that statement were also introduced into evidence at the hearing. In his statements appellant admitted stealing a car from Lander's Auto Sales in Benton.

At the beginning of the second statement, appellant was asked if he had been advised of his Miranda rights, if he understood his rights, and if he had a problem with making a statement. Appellant answered that he understood his rights and wanted to make a statement. He was then asked, "Okay, there's no threats or promises made to you?" Appellant answered, "No."

Officer Carty testified on cross-examination that he had not made any promises to appellant and that appellant had specifically denied that he was under the influence of alcohol or drugs before the second statement was made.

The appellant testified that he was arrested in Eureka Springs by Officer Parker at approximately 5:30 a.m. on September 20, and taken to the Carroll County Detention Facility.

Defense counsel then asked appellant,

> Q. Did you agree to give them a statement?
>
> A. Officer Parker, as we were standing outside the hotel, told me that it would be in my best interest and that the prosecutor, whomever, would go easier on me if I went ahead and told the truth up front and that's what I did.
>
> Q. So you gave this statement on condition or for being treated leniently?
>
> A. Yes.
>
> Q. And that's what the officer told you would happen?
>
> A. That's word for word what he told me.
>
> Q. And that's the reason you gave the statement?
>
> A. Yes.

On cross-examination appellant admitted signing Exhibits 1 & 3, the Miranda rights forms, and testified that he understood his rights but made the statements anyway. He also testified that neither Detective Pate nor Detective Carty made him any promises. He said:

> I voluntarily gave him [Detective Carty] a statement, remembering what Mr. Parker had said and that was very simple, that if I came up front and told them the truth, that he would do what, not he would, but that the system would be lenient with me.

To the trial judge's inquiry, "Where is Officer Parker?" the prosecutor replied, "He's the one that was subpoenaed, Your Honor." Defense counsel added, "He's no longer with the Eureka Springs Police Department. He was fired." The prosecutor then stated, "He's unemployed and lives in Springdale." The trial judge then informed counsel that when there is an allegation of coercion everyone who is a witness to the statement must be present to testify but that Officer Parker had not been a *witness* to either statement that was introduced into evidence. The judge concluded that the statements were voluntary and that Officer Parker made no promises to appellant which would supersede the waiver of his rights as evidenced by his signature on the Miranda

forms.

An in-custody confession is presumed to be involuntary and the burden is on the State to show that the statement was voluntarily made. *Smith* v. *State*, 254 Ark. 538, 494 S.W.2d 489 (1973). In determining whether a statement was voluntarily and freely given, we make an independent review of the totality of the circumstances and will reverse only if the trial court's findings are clearly against the preponderance of the evidence, and conflicts in testimony are for the trial court to resolve as it is in a superior position to determine the credibility of witnesses. *Addison* v. *State* 298 Ark. 1, 765 S.W.2d 566 (1989). Whether a confession was made pursuant to a promise of leniency is an issue which, over the years, the Arkansas appellate courts have had to decide on a case-by-case basis. *Davis* v. *State*, 275 Ark. 264, 630 S.W.2d 1 (1982).

In *Addison*, *supra*, the Arkansas Supreme Court explained:

> Pursuant to the "totality of the circumstances" approach, we focus on two basic components: the conduct of the police and the vulnerability of the accused. Some of the factors that we consider in making the determination of whether a confession was voluntary include the youth or age of the accused, lack of education, low intelligence, lack of advice as to constitutional rights, length of detention, repeated and prolonged questioning, and use of physical punishment.

298 Ark. at 6, 765 S.W.2d at 568 (citations omitted.) Some police promises of reward are so clearly false that it is not necessary to consider the vulnerability of the accused in determining whether the confession was involuntary. *Hamm* v. *State*, 296 Ark. 385, 757 S.W.2d 932 (1988). In *Freeman* v. *State*, 258 Ark. 617, 527 S.W.2d 909 (1975), the prosecutor had told a defendant that a confession "would not result in more than 21 years incarceration." The sentence was life. In *Teas* v. *State*, 266 Ark. 572, 587 S.W.2d 28 (1979), the defendant had been promised a recommendation of leniency and perhaps even dismissal of the charge, but he was given the maximum sentence. In *Hamm*, the court described the promises in *Freeman* and *Teas* as prosecutorial misconduct.

On the other hand, by focusing on the vulnerability of the accused, the court has found no false promise of reward in such statements as, "it would probably help if you go ahead and tell the truth," (*Harvey* v. *State*, 272 Ark. 19, 611 S.W.2d 762 (1981)); and "things would go easier if you told the truth," (*Wright* v. *State*, 267 Ark. 264, 590 S.W.2d 15 (1979)). But the appellate court did find false promises of reward in the statements, "I'll help you any way I can," (*Tatum* v. *State*, 266 Ark. 506, 585 S.W.2d 975 (1979)); and, "I'll help all that I can," (*Shelton* v. *State*, 251 Ark. 890, 475 S.W.2d 538 (1972)).

In the instant case there is no evidence of appellant's age or education in the abstract of the hearing but it is obvious from the rights forms introduced into evidence that appellant can read and write his name and his testimony is, as a whole, grammatically correct. He testified that he first made a statement to Officer Parker in the patrol car after Parker had advised him to tell the truth. Appellant then made two additional tape recorded statements in which he admitted stealing the car. There is evidence in the trial transcript that appellant was 29 years old and was a manager trainee at Roadrunner.

Another consideration also comes into play in the instant case, and that is the fact that Officer Parker did not testify. In *Smith* v. *State*, 254 Ark. 538, 494 S.W.2d 489 (1973), the Arkansas Supreme Court adopted the rule that whenever an accused offers testimony that his confession was induced by violence, threats, coercion or offers of reward, then the State has a burden to produce all material witnesses who were connected with the controverted confession or give adequate explanation of their absence. 254 Ark. at 542, 494 S.W.2d at 491. In that case, the two defendants accused one of the interrogating officers of physical abuse and threats during interrogation. The other interrogating officer testified that no threats, coercion, intimidation, or promises of leniency were made. The conviction was reversed because the State failed to call the officer appellants had accused and the stenographer who took appellants' statements in shorthand. The court held these were material witnesses.

In another case, *Smith* v. *State*, 256 Ark. 67, 505 S.W.2d 504 (1974), the defendant had accused both interrogating officers of physically abusing him. One of the officers denied

the accusations, and the other officer did not testify. This conviction was reversed. The court said:

> We have never held, and we do not now hold, that the state must call every witness who had any connection, however remote and inconsequential, with the giving of an in-custody statement. When that participation is significant, however, and the witness would be a "material" one, the rule of *Smith* v. *State*, 254 Ark. 538, 494 S.W.2d 489, stands undiluted.

256 Ark. at 72, 505 S.W.2d at 508. *See also*, *Northern* v. *State*, 257 Ark. 549, 518 S.W.2d 482 (1975), reversed and remanded because the alleged abusing officer was absent; *but see*, *Gammel & Spann* v. *State*, 259 Ark. 96, 531 S.W.2d 474 (1976), in which the State had failed to call a witness who was in jail with the defendant and might have shed some light on the defendant's argument that his statement was involuntary. The court in *Gammel and Spann* refused to extend the *Smith* v. *State*, 254 Ark. 538, 494 S.W.2d 489 (1973), decision beyond its specific language. 259 Ark. at 103, 531 S.W.2d at 479.

In the instant case the arresting officer, who allegedly made the promise of leniency to appellant, was apparently subpoenaed but failed to appear for the trial. The only explanation given was that he had been fired, was unemployed and living in Springdale. The trial judge held that the appellant's testimony that he had been advised of his Miranda rights, understood them, and had voluntarily signed the waiver of those rights and made his confession, adequately outweighed the failure of the arresting officer to testify. Moreover, the trial judge noted that the arresting officer had not been a witness to either of the two statements of the appellant that were introduced into evidence.

Appellee treats appellant's argument as asserting that because his testimony of a promise of leniency by Parker was uncontradicted, the trial judge was required to believe it. If this is what appellant is arguing, his premise is incorrect. The trier of fact is not required to accept the uncontradicted testimony of the defendant as truth. The defendant is the person most interested in the outcome of the trial. *Zones* v. *State*, 287 Ark. 483, 702 S.W.2d 1 (1985). The trier of fact has the right to accept that part of the defendant's testimony it believes to be true and to reject

that part it believes to be false. *Thomas* v. *State*, 266 Ark. 162, 583 S.W.2d 32 (1979). Based on all the circumstances discussed above, we affirm.

Affirmed.

JENNINGS, C.J. and ROGERS, J., agree.

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[redacted]