[redacted]

David L. WILSON *v.* STATE of Arkansas

CA CR 93-42 875 S.W.2d 510

Court of Appeals of Arkansas
Division II
Opinion delivered May 5, 1994

Robert Meurer, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant David Wilson was tried by the court without a jury and convicted of DWI, second offense. He was sentenced to seven days in jail; a fine of $400.00 plus costs; his driver's license was suspended for one year; and he was ordered to attend DWI school.

At trial, Billy Jones testified that on October 27, 1990, he was in bed about 3:30 or 4:00 a.m. when he heard a crash in front of his house. He got up, went to investigate, and saw appellant alone crossing the road from the direction of a car.

Mary Jones testified that she was awakened that night by a crash. She said she got out of bed, looked out the window, and saw tail lights on a car that had gone across the ditch into a field in front of her house. Mrs. Jones testified that they let the driver come into their house to make a telephone call. Later a car came, stopped by the vehicle in the field, blew the horn, and then turned around and went toward Brinkley. A few minutes later, another

vehicle came along and stopped. Mrs. Jones said that she then heard a bump and a bang. She looked out; saw some people trying to kick the windows out of the vehicle in the field; and she called the Sheriff's Office. Mrs. Jones testified that the boy who was driving the car that went into the field was not there when she called the sheriff and this could not have been more than 30 minutes after the boy had made his telephone call.

Tim Wheeler, who was a deputy sheriff on October 27, 1990, testified he was sent to the accident scene and arrived there about 3:30 a.m. While he was trying to figure out who the vehicle belonged to, appellant pulled up with some people and said it was his car and that he had been driving. Officer Wheeler testified that he smelled the odor of intoxicants about appellant; that he took him to the McCrory Police Department where a breath test was administered at 4:28 a.m.; and that the test showed a blood alcohol content of 0.11 percent.

The appellant testified he did not tell the officer that he was driving, but only that the vehicle belonged to him. He said that the accident happened about 12:00 or 12:30 a.m., and he was not intoxicated at the time of the accident.

On appeal, the appellant argues the evidence was insufficient to support his conviction for DWI. Appellant contends the State failed to prove he was intoxicated at the time he was driving, or in actual control of his vehicle, and that even though he failed a breath test at 4:28 a.m., there is no evidence that he drank anything until after the accident occurred.

In resolving the question of the sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the decision of the trier of fact. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989); *Ryan, supra.* The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982).

Here, Billy Jones testified that he was awakened about 3:30 a.m. by a crash in front of his house; that he saw appellant coming from the car; and that appellant was alone. Mary Jones

testified that appellant used their telephone and left and that, within the next 30 minutes, she called the sheriff because some boys were trying to break into the car. Officer Wheeler testified that he was sent to the scene at around 3:30 a.m.; that he could smell the odor of intoxicants about the appellant; and that appellant said the car was his and he had been driving it.

Although appellant testified he was not intoxicated at the time the accident happened; that the accident occurred at approximately 12:00 or 12:30 a.m.; and that he drank four or five beers between the time of the accident and 4:20 a.m., the trier of fact is not required to believe the testimony of a criminal defendant, who is probably the person most interested in the outcome of the proceeding. *Zones* v. *State*, 287 Ark. 483, 702 S.W.2d 1 (1985).

Viewing the evidence in the light most favorable to the state we think there is substantial evidence from which the trial court could find appellant guilty of driving while intoxicated.

Appellant also argues that the trial court erred in finding him guilty of DWI, second offense, because there was no evidence that the prior offense had occurred within three years of the present offense. Appellant contends that the date of his prior offense was not on the docket sheet introduced into evidence, but the trial court assumed the date of the offense was in 1988 because the docket sheet contained a 1988 docket number.

When the State utilizes a prior conviction to convict a defendant of a second or subsequent DWI offense, the State must show that the offense which resulted in the prior conviction occurred within three years of the date of the second offense. *Rogers* v. *State*, 293 Ark. 414, 738 S.W.2d 412 (1987). An offense occurs when the criminal act is committed. *Rogers, supra.*

Here, the accident giving rise to this case occurred on October 27, 1990. Therefore, to convict appellant of DWI, second offense, the previous offense must have occurred after October 27, 1987. The trial court admitted into evidence a copy of a docket sheet of the Municipal Court of Craighead County. That sheet states that the ticket number is 88-043360; that the docket number is 88-103; and that a plea of guilty was received on 2-22-88. On this copy the date of the charge is stated as "1/11/8" and the date of first setting is stated as "1/15/8" because, apparently, the docket sheet was improperly copied and did not show the last number of the year.

The State argues that because the docket sheet con-

tains a notation that the ticket number was 88-043360, and because other dates on the docket indicate that some aspects of the case occurred in 1988, the trial court could have found that appellant's prior offense occurred in 1988. But the due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every element of the crime of which the defendant is charged. *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1980). Here, we do not believe that there is sufficient evidence of the date of appellant's first offense. Even if we assume that appellant's ticket was written in 1988 and that he was charged in 1988, we cannot know how soon after the offense the ticket was written or the appellant was charged. Thus, the date of appellant's first offense, which is an essential element of DWI, second offense, cannot be established beyond a reasonable doubt; therefore, it was error to find appellant guilty of DWI, second offense.

Because the State only proved, by sufficient evidence, that appellant was guilty of DWI, first offense, double jeopardy considerations, *cf. Rogers, supra*, require that we reverse and remand this case to the trial court to resentence the appellant for that offense.

Affirmed in part; reversed and remanded in part.

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

JENNY'S CLEANING SERVICE and Wausau Insurance Company *v.* Mary Lois REDDICK

CA 93-83 875 S.W.2d 856

Court of Appeals of Arkansas
En Banc
Opinion delivered May 11, 1994

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Bassett Law Firm, by: *Curtis L. Nebbin*, for appellants.

Tolley & Brooks, for appellee.

MELVIN MAYFIELD, Judge. This is the second appeal of this Workers' Compensation case.

The initial claim was brought by appellee Mary Reddick who alleged she sustained a compensable injury on October 11, 1988, when she slipped and fell while leaving the premises of an apartment that she was cleaning. The appellants, Jenny's Cleaning Service, and its carrier, Wausau Insurance Company, controverted the claim for workers' compensation alleging the appellee was the sole proprietor of Jenny's Cleaning Service and not a covered employee under the Workers' Compensation Act, and it was stipulated that no filing was made with the Commission to elect coverage for her as the owner of Jenny's Cleaning Service.

After a hearing, held August 28, 1989, an administrative law judge held that the appellee was not a covered employee because she failed to file with the Commission written notice of her election to be included in the definition of "employee" as required by Ark. Code Ann. § 11-9-102(2) (1987). In an opinion filed June 15, 1990, the Commission found that the appellee was a covered employee, and the law judge's decision was remanded for a determination of whether the appellee sustained a compensable injury and, if so, the benefits to which she was entitled. The appellants appealed to this court, and in an unpublished opinion handed down June 12, 1991, we dismissed the appeal on the holding that orders of remand are not appealable orders.

On remand, after a hearing held January 21, 1992, an administrative law judge found that appellee sustained a compensable injury on October 11, 1988; that she was entitled to temporary total disability benefits at a compensation rate of $20.00 per week for a period commencing October 11, 1988, and

continuing through January 16, 1990; and that she had sustained a 20 percent physical impairment to the body as a whole but had no wage-loss disability because she was "now making wages which is obviously more than when she was working for Jenny's Cleaning Service." In an opinion filed November 24, 1992, the Commission affirmed and adopted the opinion of the law judge.

The appellants appeal from the June 1990 and November 1992 opinions of the Commission contending: (1) the Commission erred as a matter of law in determining it was not necessary for the appellee to make a formal written election for Workers' Compensation coverage; and (2) the Commission's finding that the appellee had substantially complied with Ark. Code Ann. § 11-9-102(2) and was a covered employee was not supported by substantial evidence. The appellee has filed a cross-appeal contending that the Commission's finding that she was not paid a wage was not supported by substantial evidence.

We affirm on appeal and reverse on cross-appeal.

The record on appeal consists of the transcript of the first appeal to this court as well as the transcript of the hearing after remand. The record contains testimony given by the appellee and her fourteen-year-old granddaughter, Jenny Sigmon; the appellee's daughter, Maxine Alvard (who is the mother of Jenny Sigmon); Pamela Sue Fuller, an insurance agent; and Patsy Doss, who ran a cleaning service for which the appellee had previously worked.

The appellee, a 70-year-old woman who had completed two years of high school, started Jenny's Cleaning Service in September 1987. Jenny's Cleaning Service was a sole proprietorship which employed the appellee and Maxine Alvard. Prior to September 1987, appellee worked for Patsy Doss the operator of Town and Country Cleaning, a cleaning service that cleaned newly constructed buildings for MCO. When Town and Country went out of business, Jenny's Cleaning Service took over cleaning for MCO, which required their subcontractors to carry workers' compensation insurance or allow a percentage to be taken from their checks to cover workers' compensation insurance under MCO's policy.

On September 16, 1987, appellee made application for workers' compensation insurance with Pamela Fuller. The applica-

tion, which did not elect coverage for a sole proprietor, listed Jenny's Cleaning Service as the employer, and Jenny Sigmon was listed as the "proprietor/officer, overseer" with an approximate annual salary of $10.00. The application also stated that the business had two employees and a total payroll of $8,500.00. The application bore the "signature" of Jenny Sigmon, but was actually signed by the appellee who signed the name "Jenny Sigmon."

There is some dispute as to whose idea it was to set up the business in Jenny's name. The appellee testified that Patsy Doss told her to use "Jenny's Cleaning Service" to set up the business and appellee would be covered. Maxine Alvard testified that appellee talked with her and said that the insurance agent, Pamela Fuller, said if it was set up in Jenny's name and used her social security number, then Jenny could be the sole proprietor and both Maxine and appellee would be covered if one of them got hurt. Pamela Fuller testified that the appellee gave her the information that Jenny was the proprietor and told her to set up the business in that manner. Patsy Doss testified that she explained to the appellee how to set up the business and that she had set her business up in the name of her five-year-old daughter.

On this evidence, the law judge held the appellee was not an employee of Jenny's Cleaning Service within the meaning of the Arkansas Workers' Compensation Act and was not entitled to benefits under the Act because she had failed to file written notice with the commission of an election to be included in the definition of employee as required by Ark. Code Ann. § 11-9-102(2).

The 1990 opinion of the full Commission reversed the decision of the law judge and remanded the case to him. The Commission stated:

> It is obvious to us that what took place was a comedy of errors rather than a deliberate attempt to defraud on the part of anyone. Ms. Doss told Ms. Reddick that she had had her own cleaning service set up in the name of her daughter because she was divorced and wanted to provide security for the child. Someone mentioned the arrangement to Pam Fuller, who had an office in the same building as Patsy

> Doss. Ms. Fuller had only sold 3 or 4 workers' compensation policies, and it appears that she was not well versed in the subject. She and Ms. Reddick seem to have thought that the premium would be lower that way. Ms. Fuller checked a policy manual and could not find a minimum age for an owner of a business. She therefore set up the policy in the manner that was suggested by Patsy Doss, deferring to Mrs. Doss' "expertise."
>
> There can be no doubt that the designation of Jenny Sigmon as the owner was a subterfuge and that Mary Lois Reddick was the true owner and sole proprietor of Jenny's Cleaning Service. However, we can find no dishonest intent in her action; rather, she was merely following suggestions of the previous owner and of an insurance agent. The application for insurance that she completed named Lois Reddick as an employee and truthfully showed a token annual salary ($10) for Jenny Sigmon. Mary (Lois) Reddick testified that Jenny did help her mother and grandmother clean a few times and that she was paid a small amount of money. Mary Reddick's draw from the operating account, however, was included in the payroll that she reported to the insurance company. There can be no doubt that she intended herself to be a covered employee. Pam Fuller had the same intention and knew that Mary Reddick was one of the two employees listed for the business. Furthermore, the premium was computed upon her salary. We therefore find that she was in substantial compliance with Section 102(2) and that it was unnecessary for her to file a formal A-18.

We think it important to note that Jenny's Cleaning Service, which cleaned for MCO, was subject to the Workers' Compensation Act by virtue of being a subcontractor employing one or more employees. Ark. Code Ann. § 11-9-102(3)(D) (1987).

Appellants argue that the Commission's finding that the appellee intended herself to be a covered employee and therefore substantially complied with the statute is not supported by the evidence. They contend the money drawn by the appellee was not included in the payroll reported to the insurer; that the evidence in the record supports anything but a "comedy of errors"; and that appellee is a shrewd conniving person with a fraudulent

scheme to obtain coverage without paying additional premiums. We think there is substantial evidence to support the Commission's version of the situation.

In the first place, Ms. Fuller testified that the appellee told her there would be two employees and that Jenny would not be doing any cleaning and did not need to be covered. Moreover, the copy of the application for insurance which is attached to Ms. Fuller's deposition lists the number of employees as "2" and at bottom of the front page of the application it is written "Lois Reddick-Employee(grandmother of owner)." In the second place, Ms. Alvard testified that Ms. Fuller told them to set the company up in that way so that both the appellee and Ms. Alvard would be insured. Finally, appellee testified that she went in to see Ms. Fuller who filled out an application, and both of them signed it. Appellee said that before she paid Ms. Fuller she asked "Will I be covered?" and Ms. Fuller responded if she set it up under Jenny's Cleaning Service she would be covered. The appellee said, "And I asked her three times."

Therefore, under the evidence we cannot say the Commission's finding that appellee intended herself to be a covered employee, that Ms. Fuller had the same intention, and that Ms. Fuller knew appellee was one of the two employees listed for the business is not supported by substantial evidence.

Nor do we agree with the appellants' contention that the Commission erred in finding that the money drawn from the business by the appellee was included in the payroll. The application for insurance states that the "Total Payroll Basis" is $8,500.00. In addition, the information page of the policy for the period 09-16-87 to 09-16-88 shows a "Total Estimated Annual Remuneration" of $8,500.00 upon which the premium of $411.00 is based. The business ledgers of Jenny's Cleaning Service for the period October 1987 through September 1988 reflect that Jenny's Cleaning Service received approximately $9,000.00 in gross income. From the other evidence in the record it is evident that Jenny's had at least $500.00 in expenses. Indeed, appellee paid a premium of $411.00 for workers' compensation insurance coverage. Therefore, the amount available to the appellee for payroll and her "draw" could not have exceeded $8,500.00, and there is evidence to support the Commission's finding that the

appellee's "draw" from the operating account was included in the payroll she reported to the insurance company.

Moreover, even if the initial premium was incorrectly computed, the insurer has the right to adjust the premium if more premium is owed. The policy itself states that the premium basis is subject to verification and change by audit. Indeed, the renewal policy for the period 09-16-88 to 09-16-89 reflects an increased total estimated annual remuneration of $8,925.00 and an estimated annual premium of $541.00.

Appellants also argue that the Commission erred as a matter of law when it held it was not necessary for appellee to make a formal written election for workers' compensation coverage.

Arkansas Code Annotated § 11-9-102(2) (1987), provides:

> "Employee" means any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his employer. The term "employee" shall also include a sole proprietor or a partner who devotes full time to the proprietorship or partnership and who elects to be included in the definition of "employee" by filing written notice with the Workers' Compensation Commission.

The form established by Commission regulations for such a filing is called an "A-18."

Appellants argue that the appellee cannot be covered because, although the name of the business was in Jenny Sigmon, appellee was the sole proprietor and she failed to make a written election of coverage.

The Arkansas Supreme Court has not decided the question of whether filing the A-18 form with the Commission is essential as a matter of law for coverage under the Act. In *Gilbert* v. *Gilbert*, 19 Ark. App. 93, 717 S.W.2d 220 (1986), a three-judge panel of this court thought it was essential. (See the last paragraph of the opinion at 19 Ark. App. 96, 717 S.W.2d 222.) However,

on rehearing three judges of the court did not agree. 19 Ark. App. 96B-96F, 719 S.W.2d 284. On review by the Arkansas Supreme Court, *Gilbert* v. *Gilbert*, 292 Ark. 124, 728 S.W.2d 507 (1987), the court did not reach the issue of whether the filing of the A-18 form with the Commission was essential, but citing 4 Larson, *The Law of Workmen's Compensation*, § 92.25 (1993), the court said there is some authority for the view that filing the form is not essential. 292 Ark. at 128, 728 S.W.2d at 509. The reason our supreme court did not reach the issue of whether filing the form is essential was because it said "even if Gilbert had filed, and was eligible for coverage under the Act, insurance coverage was never obtained." *Id.*

Thus, the holding of the court of appeals as to essentiality of filing the form was not necessary to its decision because, as held by the supreme court, even if the form had been filed — no insurance had been obtained. A slightly different situation was involved in *INA/Cigna Insurance Co.* v. *Simpson*, 27 Ark. App. 222, 772 S.W.2d 353 (1989), where this court held it was not necessary to decide whether the filing of the form was essential because we affirmed the Commission's finding that the insurance carrier who had collected premiums for four years on a policy that provided coverage for the proprietor was estopped to deny that such coverage existed. Therefore, the question of whether the filing of the form is essential for coverage of the proprietor of the business has not been decided where a policy has been issued which provides for such coverage.

The question of whether sole proprietors are employees was discussed in *Stone* v. *Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (1988), but the issue involved here was not involved there. In that case, the issue was whether the appellee-employer was subject to the Workers' Compensation Act and the issue turned on the question of whether the appellee's motel had three or more employees regularly employed in the same business. The Commission held the appellee was not subject to the act because he did not have the requisite number of employees. We affirmed the decision of the Commission because the appellee had not filed an election with the Commission to be included in the definition of employee. Therefore, that case is different from the instant case where the appellee wants to be an "employee" covered by workers' compensation insurance, and the policy so provides.

Thus, the question here is whether the appellee, who wanted to be covered by workers' compensation insurance and obtained a policy for that purpose, necessarily had to file an A-18 form in order to be a covered employee. The appellants contend the filing of the A-18 form is mandatory. Under the circumstances of this case, we do not agree. As our supreme court said in *Gilbert, supra*, Larson does not agree. The section of his treatise referred to in *Gilbert* concludes with a discussion of the case of *Carter* v. *Associated Petroleum Carriers*, 235 S.C. 80, 110 S.E.2d 8 (1959), where Larson, in agreeing with the dissent in that case, states:

> The dissent stressed that the compensation system, including election provisions, is for the benefit of employer and employee — and here both intended coverage. This coverage, in the dissent's view, should therefore not be thwarted for the benefit of the carrier. The majority's opinion seems to rest almost entirely on the assumption that the statute, by specifying one means of electing coverage, thereby rules out all other means. This seems to be an unnecessarily narrow interpretation. Suppose it were crystal clear, on the facts, that the employer and employee had chosen coverage, and suppose a policy of insurance had in fact been issued and had been in force for several years. Should the entire expectation of the parties be shattered and the purpose of the system thwarted merely because a method of election was not used which the statute says the employer "may" use? If the answer is "no," the result should not in principle be different because the insurance was oral, or because the thirty-day period applicable to the statutory method of election had not expired.

4 Larson, *The Law of Workmen's Compensation*, § 92.25 at 17-23 and 17-24 (1993).

We agree with *Larson's* reasoning. In our case, the appellee wanted to be covered; Ms. Fuller knew appellee wanted to be covered; and appellee purchased a workers' compensation insurance policy and paid the required premium based upon a total payroll that included the amount appellee received from the business. Under these circumstances, we cannot find that the

Commission erred in determining the appellee had substantially complied with our statute.

Finally, on this point, we note that the policy as written lists Jenny Sigmon as the proprietor and states that the sole proprietor does not wish to elect coverage; however, the appellee would be covered if she were an employee, and appellee believed she was covered as an employee. But, the insurer argues "the truth" of the matter is that the appellee, not Jenny, was the "true owner" and therefore the appellee was not covered. If "the truth" of the matter is that appellee is the "true owner," the truth of the matter also is that the "true owner" wished to elect coverage and did so by obtaining the policy of insurance which provides that she is covered as an employee. We also point out that the authority of Ms. Fuller to take the action taken by her is not questioned by the appellant. Indeed, the appellant relies upon Ms. Fuller's knowledge that the appellee was the owner of the business.

On cross-appeal, the appellee argues the Commission erred in finding she was not entitled to wage loss-disability because she was earning more wages after her injury than she had before. The law judge's opinion, which was adopted and affirmed by the full Commission, states:

> In that regard, the claimant is unable to prove that she was paid a wage. The claimant is unable to show that she reported any income to the IRS as a result of her activities for Jenny's Cleaning Service.

The record, however, contains appellee's 1988 federal tax return. Although line 7 of appellee's Form 1040 shows no wages, Schedule C of that return shows that Jenny's Cleaning Service is the business of appellee and reports a net profit of $3,039.00; and the appellee's Form 1040 shows payment of $396.00 self-employment tax. Under the authority of *Soltz Machinery & Supply Co.* v. *McGehee*, 208 Ark. 747, 187 S.W.2d 896 (1945), we think the profits from Jenny's Cleaning Service should be considered as wages. The opinion of the Commission does not deal with this point and we cannot tell whether it was considered by the Commission.

We therefore reverse the Commission on this issue and remand for a new determination, in keeping with this opin-

ion, of appellee's wage rate and any loss-of-earnings disability sustained by her.

Affirmed on appeal; reversed and remanded on cross-appeal.

PITTMAN and COOPER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I disagree with the majority's holding that, although the appellee failed to file an A-18 form, she was nevertheless in compliance with Ark. Code Ann. § 11-9-102(2) (1987), which requires a sole proprietor to file written notice with the Workers' Compensation Commission if the proprietor wishes to be included in the definition of "employee" under the Act so as to qualify for workers' compensation benefits in the event of injury.

The result reached by the majority is contrary to every indication concerning Arkansas law on the issue of whether a sole proprietor must file a written election with the Commission in order to be considered an employee under the Workers' Compensation Act. Arkansas is listed as being among those states where a sole proprietor cannot be an "employee" of the sole proprietorship within the meaning of the Workers' Compensation Act. Annotation, *Ownership Interest in Employer Business as Affecting Status as Employee for Workers' Compensation Purposes*, 78 A.L.R. 4th 973 (1990). Furthermore, an authority which the majority opinion cites as persuasive states that, under Arkansas law, an employer who fails to file the statutory form electing coverage is not an "employee" under the Arkansas Workers' Compensation Act. 4 Larson *The Law of Workmen's Compensation* § 92.25, N.25 (1993) (*citing Gilbert* v. *Gilbert*, 292 Ark. 124, 728 S.W.2d 507 (1987). Finally, we ourselves have cited the Supreme Court's *Gilbert* opinion for the very proposition we reject today. In *Stone* v. *Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (1988), we said that:

> It is clear that after 1979 sole proprietors could be considered employees, but only if they elected to be included in the definition of employees *and* filed their election with the Commission. *Gilbert* v. *Gilbert Timber Co.*, 292 Ark. 124, 126, 728 S.W.2d 507 (1987).

Stone v. *Patel, supra*, 26 Ark. App. at 58 (emphasis in the orig-

inal).

Nor do I agree with the majority's conclusion that the appellee substantially complied with the statutory writing requirement by obtaining a workers' compensation insurance policy. It is generally held that:

> The employer's election to come within a compensation act . . . must be indicated in the manner prescribed by the act, and if the employer does not manifest his election in accordance with the statute he is not covered even though he intended to be, and believed he was, covered.

99 C.J.S. *Workmens' Compensation* § 122 (1958). The appellee in the case at bar clearly did not manifest her election in the manner prescribed by the Act. Furthermore, although we have never addressed the question of whether substantial compliance would be sufficient to fulfill the statutory requirement of a written election, *see INA/Cigna Insurance Company* v. *Simpson*, 27 Ark. App. 222, 772 S.W.2d 353 (1989), I submit that there was clearly no substantial compliance with the statutory requirement in the case at bar, where the appellee failed to list herself as the proprietor of the business in her workers' compensation insurance application, and never notified the Commission, in writing or otherwise, of her election to be considered an employee for workers' compensation purposes. In a related area of workers' compensation law, we have held that this combination of deceit and failure to file does not constitute substantial compliance. *See Rogers* v. *International Paper Company*, 1 Ark. App. 164, 613 S.W.2d 844 (1981). I see no basis for a distinction in the case at bar, and I respectfully dissent.

PITTMAN, J., joins in this dissent.

Susan JACKSON *v.* POULAN/WEED EATER

CA 93-656 876 S.W.2d 276

Court of Appeals of Arkansas
En Banc
Opinion delivered May 18, 1994
[Rehearing denied June 22, 1994.*]

Lane, Muse, Arman & Pullen, by: *Richard S. Muse*, for appellant.

McMillan, Turner & McCorkle, by: *Edward W. McCorkle*, for appellee.

JOHN E. JENNINGS, Chief Judge. Susan Jackson worked for Poulan/Weed Eater for twelve years. In early 1990, she began

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

having numbness in her foot. She was diagnosed with heel spurs (plantar fasciitis) and underwent surgery in February 1992. Her workers' compensation claim was filed in January 1992. The administrative law judge denied her claim, and the Workers' Compensation Commission affirmed and adopted his opinion. Ms. Jackson now appeals, contending that the Commission erred in finding that she failed to prove by a preponderance of the evidence that the plantar fasciitis was caused or aggravated by her employment. We affirm the Commission's decision.

In 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 Commission's findings and affirm if those findings are supported by substantial evidence. *Beeson* v. *Landcoast*, 43 Ark. App. 132, 862 S.W.2d 846 (1993). Where the Commission denies relief based upon a claimant's failure to meet her burden of proof, the substantial evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for the denial. *Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *CDI Contractors* v. *McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993). The question 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. *Garrett* v. *Sears, Roebuck & Co.*, 43 Ark. App. 37, 858 S.W.2d 146 (1993).

Appellant testified that for about the last six years at Poulan she had operated a machine which bent tubes. She said that she always stood on one spot at the machine, standing on a little thin mat on a concrete floor. In October 1990, her right foot started hurting. She had no idea at that time that there was any connection between her problem and her work. Neither cortisone injections nor shoe inserts helped, and she was unable to comply with her doctor's instructions to lose weight. She underwent surgery in 1992.

Other evidence introduced at the hearing included medical reports and letters of Dr. Robert Olive and testimony of Harold

Broyles, appellant's production supervisor. In a letter written January 8, 1992, Dr. Olive addressed obesity as a factor in appellant's fasciitis. The letter he wrote to claimant's attorney on April 9, 1992, discussed the causal relationship between appellant's foot problems and her job:

> [You ask about] the causal relationship between Mrs. Jackson's condition and having to stand long periods of time at work. There definitely is a correlation between people who stand for long periods of time and those who develop plantar fascitis. There is also a correlation between people who are overweight and those who develop plantar fascitis as well because they put excessive strain on their feet. Unfortunately, we'll never know which had the greatest bearing on her condition, but her job situation did exacerbate the situation in terms of being required to stand for long periods of time . . . .

In finding that appellant failed to meet her burden of proof, the Commission found that Dr. Olive's opinion was entitled to little weight. The Commission's opinion stated "there was no indication that appellant's condition was caused or aggravated by her employment . . . until surgery was contemplated and claimant actually filed a compensation claim." The Commission also pointed to Mr. Broyles' testimony that appellant operated her machine only three or four months a year due to the seasonal nature of her work.

Giving the testimony its strongest probative force in favor of the findings of the Commission, we hold that there was substantial evidence to support the Commission's denial of the claim.

Affirmed.

ROBBINS and MAYFIELD, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. I must respectfully dissent from the decision of the majority of this court which today affirms the Commission's finding that an obese employee's heel spurs were not aggravated by her employment. Her employment required her to stand on her feet at one location throughout the work day for at least three or four months each year.

The Commission found, as the majority notes, that the medical opinion of the employee's physician, Dr. Robert Olive, was entitled to only little weight. Even so, the Commission's determination that the employee failed to prove that her plantar fasciitis (heel spurs) were caused *or aggravated* by her employment defies logic. This employee has a history of obesity. At the time of the hearing before the Administrative Law Judge she weighed two hundred pounds, approximately twice the weight recommended by her doctor. An employer takes his employees as it finds them. *Nashville Livestock Comm'n* v. *Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990). If this employee had not worked for appellee, but simply remained at home resting in a recliner without ever placing any weight on her feet, would her heel spurs ever have caused her discomfort? Common sense suggests that when she stood on her feet she aggravated her heel spurs. Although there may be several reasons why she might be on her feet over the course of a day, one undisputed reason was to go to work and perform her job duties which she did for more than a year after her feet began to bother her. While it may be debatable as to whether the employee's heel spurs were caused by her employment, and I acknowledge that there is substantial evidence in the record to support the Commission's finding that it did not, the Commission also found that the employee's employment did not *aggravate* her condition. There is, I submit, no substantial evidence which supports this finding. I suggest that employment which combines with a pre-existing obesity condition and aggravates a medical problem, even though the medical problem may not itself be job related, should be compensable. *See* 1 Arthur Larson, *The Law of Workmen's Compensation* § 12.21 (1993).

I would reverse and remand to the Commission for an award of appropriate benefits.

MAYFIELD, J., joins in this dissent.

Tony PLANTE *v.* TYSON FOODS, INC.

CA 93-334 876 W.W.2d 273

Court of Appeals of Arkansas
En Banc
Opinion delivered May 18, 1994
[Rehearing denied June 22, 1994.*]

Jay N. Tolley, for appellant.

Bassett Law Firm, by: *Curtis L. Nebbin*, for appellee.

---

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

JOHN E. JENNINGS, Chief Judge. Tony Plante hurt his right knee at work on September 12, 1988. He was ultimately treated by Dr. James Arnold, an orthopedic surgeon, who diagnosed a tear of the anterior cruciate ligament. On November 11, 1988, Dr. Arnold performed a "McIntosh repair," an orthoscopic surgical procedure.

On April 10, 1989, Dr. Arnold released Mr. Plante to return to work with no restrictions. Because there is a 20% failure rate with the McIntosh repair, Dr. Arnold instructed Plante to return periodically to his office for "evaluation and laxity testing" for the next five years.

Mr. Plante returned to Dr. Arnold's office on September 26, 1989, and July 26, 1990. He did not see Dr. Arnold on either occasion and the office notes designate these as "research visits." The claimant returned again to Dr. Arnold's office on July 22, 1991, for testing and evaluation. He was seen by Dr. Arnold on July 25, 1991, at which time it was determined that the McIntosh repair had failed and a synthetic ligament replacement was recommended.

The Commission found that the last bill received by respondents was paid on April 21, 1989; that no other bills were received from Dr. Arnold's office until July of 1991; and that the respondent was unaware that the claimant had been instructed to return periodically to Dr. Arnold's office.

This claim for additional compensation was filed on September 11, 1991. Before the Commission, the respondent contended that the statute of limitations had run. The claimant argued that the claim was not barred because medical services were "furnished" on September 26, 1989, and July 26, 1990. The Commission held the claim was barred and we agree.

Arkansas Code Annotated section 11-9-702(b) (Supp. 1993) provides, in part:

> In cases where any compensation, including disability or medical, 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 (2) years from the date of the injury, whichever is greater.

The supreme court has held that the *furnishing* of medical services constitutes payment of compensation in the context of this statute, and that such "payment" suspends the running of the time for filing a claim for compensation. *Heflin* v. *Pepsi Cola Bottling Co.*, 244 Ark. 195, 424 S.W.2d 365 (1968); *Reynolds Metal Co.* v. *Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *Ragon* v. *Great American Indem. Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954). *See also Cheshire* v. *Foam Molding Co.*, 37 Ark. App. 78, 822 S.W.2d 412 (1992).

In holding that the claim here was barred by the statute of limitations the Commission relied, correctly we think, on *McFall* v. *United States Tobacco Co.*, 246 Ark. 43, 436 S.W.2d 838 (1969). There, the supreme court said:

> The appellant is correct in his statement that we are committed to the rule under *Reynolds Metal Co.* v. *Brumley*, 226 Ark. 388, 290 S.W.2d 211, "that where an employer furnishes an injured employee medical services, this constitutes a payment of compensation or a waiver which suspends the running of the time for filing a claim for compensation." The keystone to this rule is the two words "*employer furnishes*." We have never held that medical services furnished by anyone *other* than the employer or his compensation insurance carrier, constitute payment of compensation or a waiver which suspends the running of the time for filing a claim for compensation. We are unable to see how an employer could *furnish* medical treatment without knowing, and without reason to know, that he is doing so.

The supreme court has also held that it is not the carrier's responsibility to find out whether medical treatments are continuing, but is rather the claimant's burden to act within the time allowed. *Superior Federal Sav. & Loan Ass'n* v. *Shelby*, 265 Ark. 599, 580 S.W.2d 201 (1979).

In the case at bar there is no contention that the respondent was aware of the claimant's visits to the doctor's office after April of 1989, nor was there any evidence that the respondent was aware that the doctor had instructed the claimant to return for periodic evaluation. The respondent therefore did not "furnish" any medical services after April of 1989, and the deci-

sion of the Commission holding the claim barred by the statute of limitations must be affirmed.

Affirmed.

ROBBINS, J., concurs.

COOPER and MAYFIELD, JJ., dissent.

JOHN B. ROBBINS, Judge, concurring. I concur with the majority opinion which holds that the Commission properly applied the statute of limitations as a bar to Mr. Plante's claim for additional benefits. I would add, however, that even if Mr. Plante's visits to Dr. Arnold's office on September 26, 1989, and July 26, 1990, constituted a furnishing of medical services by appellee and thus payments of compensation as Mr. Plante contends, his claim for additional compensation would nonetheless be barred by limitations. His claim was filed on September 11, 1991, well more than a year after his July 26, 1990, office visit. The July 25, 1991, office visit could not constitute a furnishing of medical services, nor does Mr. Plante argue that it did, because Dr. Arnold was not paid by appellee for this visit. Even if appellee paid for the 1989 and 1990 examinations as part of the original surgical charges, the July 25, 1991, examination was obviously not so covered because Dr. Arnold billed appellee for it after the visit.

JAMES R. COOPER, Judge, dissenting. I dissent because I strongly disagree with the majority's conclusion that the appellant's claim was barred by the statute of limitations because medical services were not furnished after April of 1989. There is no dispute concerning the essential facts: the appellant injured his knee in an industrial accident in 1988, underwent corrective knee surgery in 1988, returned to the surgeon for scheduled evaluation of the surgical results in 1989 and 1990, returned to the surgeon again in 1991, learned that the 1988 surgical repair had failed, and filed a claim for additional compensation two months later requesting the alternative treatment recommended by his surgeon, a synthetic ligament replacement. Nevertheless, the Commission denied the appellant's request for additional compensation on the grounds that the 1989 and 1990 examinations by the appellant's surgeon or office staff did not constitute the furnishing of medical treatment because the employer was unaware of

those return visits. In support of its decision, the majority cites *McFall* v. *United States Tobacco Co.*, 246 Ark. 43, 436 S.W.2d 838 (1969). I disagree because the *McFall* case is clearly distinguishable from the case at bar.

McFall involved a claimant who continued to receive treatment during the limitations period, and in that sense it is analogous to the circumstances in the present case. However, the majority fails to note a crucial distinction: the treatment at issue in *McFall* was rendered by a *second doctor* of whom the employer was unaware, *obtained by the claimant on his own initiative*. The fact that the treatment in *McFall* was rendered following an unauthorized change of physician is the crux of the opinion, which must be considered in order to comprehend the Court's statement that they were "unable to see how an employer could *furnish* medical treatment without knowing, and without reason to know, that he is doing so." *McFall, supra*, 246 Ark. at 47.

Our review in the present case is not limited to determining whether there is any substantial evidence to support the award: instead, we are obliged to examine the record for matters which would toll the statute or estop the appellee from pleading it. *Id.* at 44. The record shows that the appellant had regularly scheduled, yearly examinations with his original surgeon, an authorized treating physician. Furthermore, the procedure performed by the surgeon required such yearly examinations, because a substantial percentage of such operations fail and require further treatment. I think it is of no consequence whatsoever that the employer may have had no actual knowledge of the appellant's visits because the employer had abundant reason to know they would take place. To deny the appellant payment for subsequent treatment which was clearly needed and anticipated is pointless, contrary to the law, and unconscionable, and I vigorously dissent from this injustice.

MAYFIELD, J., joins in this dissent.

STATE of Arkansas *v.* Joseph FORE

CA CR 93-654 876 S.W.2d 278

Court of Appeals of Arkansas
Division II
Opinion delivered May 18, 1994

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

William R. Simpson, Jr., Public Defender, by: *C. Joseph Cordi, Jr.*, Deputy Public Defender, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal brought by the State to challenge an order of the trial court that dismissed all charges against the appellee, Joseph Fore, on the basis that the

affidavit for the arrest warrant did not show probable cause to justify the issuance of the warrant. The appeal is brought under the authority of Rule 36.10(b)-(c) of the Arkansas Rules of Criminal Procedure.

The trial judge based his decision on *Fairchild* v. *Lockhart*, 675 F. Supp. 469 (E.D. Ark. 1987), in which it was held that an arrest warrant "rubber-stamped" by a clerk of the court at the prosecutor's behest cannot meet the test of constitutionality which requires a determination by a neutral and detached magistrate that probable cause for the warrant exists. 675 F. Supp. at 478. The petitioner in *Fairchild* sought habeas corpus relief following a state court conviction for the murder and rape of Marjorie Mason. In making that decision the opinion in *Fairchild* examined the question of whether there was probable cause for the issuance of an arrest warrant for the petitioner for the attempt to kill Little Rock police officer, Joe Oberle. This question was involved because it was alleged that the Oberle arrest was illegal and that this affected the Mason conviction for the reason that Fairchild had confessed to the Mason crime after he was arrested on the Oberle warrant. Because the affidavit for Oberle's warrant was conclusory, recited no underlying circumstances supporting the affiant-officer's belief that Fairchild was involved in the Oberle assault, no information regarding the identity or reliability of the informants, and no corroborating circumstances in support of any informant's tips the judge concluded that the affidavit failed to establish probable cause for the issuance of the arrest warrant. The judge also determined that the "rubber-stamping" of the arrest warrant resulted in a failure of the real warrant-issuing authority to meet the necessary requirements of detachment and neutrality because that authority had actually been the prosecutor. Nevertheless, the judge went on to examine whether there was probable cause for the warrantless arrest of Fairchild for the murder of Marjorie Mason and determined that there was probable cause for that arrest, 675 F. Supp. at 488, and the petition for habeas corpus was denied.

Relying on a portion of the reasoning of the judge in *Fairchild*, the trial judge in the instant case held that the affidavit for the arrest warrant in this case was deficient, that the arrest here was invalid, and that the charges had to be dismissed. The judge stated that the affidavit on which the arrest warrant was

based did not identify the affiant's informant or establish why the informant's information was credible; that there was no corroboration of the affiant's allegations; and that, although the affidavit was clearly detailed, it was not accompanied by supporting statements. The judge's order of dismissal states that "none of the indicia of reliability are present in the affidavit" and that the clarity of detail "standing alone in the face of all the defects" does not provide a substantial basis for the issuing magistrate's decision.

The State argues on appeal that the trial court erred, as a matter of law, in dismissing the charges. The State contends that an illegal arrest is not grounds for dismissal of criminal charges. We think the State's argument is valid. In *United States* v. *Crews*, 445 U.S. 463 (1980), the United States Supreme Court held that "an illegal arrest, without more, has never been viewed as a bar to a subsequent prosecution, nor as a defense to a valid conviction." 445 U.S. at 474. Moreover, in *State* v. *Block*, 270 Ark. 671, 606 S.W.2d 362 (1980), *cert. denied*, 451 U.S. 937 (1981), the trial court dismissed criminal charges because the arresting officer had entered the defendant's home without an invitation or warrant, and the Arkansas Supreme Court reversed and remanded for trial stating that it was "unthinkable" that a person should go scot free because an officer enters his home without an invitation and arrests him without a warrant. The court quoted a footnote from *Peyton* v. *New York*, 445 U.S. 573 (1980), that said, "The issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal." *Id.* at 592. And in *State* v. *Holcomb*, 271 Ark. 619, 609 S.W.2d 78 (1980), the defendant had been arrested without a warrant, tried and convicted, but the conviction was reversed on appeal. On remand, Holcomb filed a pretrial motion to dismiss claiming that he could not be prosecuted because his warrantless arrest violated his Fourth and Fourteenth Amendment rights. The trial court agreed and dismissed the charges. The State appealed arguing that an illegal arrest does not bar prosecution. The Arkansas Supreme Court agreed and cited *State* v. *Block, supra.* In *Ellis* v. *State*, 302 Ark. 597, 791 S.W.2d 370 (1990), our supreme court again stated, "We have held many times that an illegal arrest does not necessarily invalidate a conviction" and cited *Davis* v. *State*, 296 Ark. 524, 758 S.W.2d 706 (1988); *O'Riordan* v. *State*, 281 Ark. 424, 665 S.W.2d

255 (1984); and *Singleton* v. *State*, 256 Ark. 756, 510 S.W.2d 283 (1974).

The Arkansas Court of Appeals has made the same holding. In *Urquhart* v. *State*, 30 Ark. App. 63, 67-8, 782 S.W.2d 591, 594 (1990), the defendant argued on appeal that the lower court erred in denying his motion to dismiss based on the alleged invalidity of the warrant issued for his arrest. We cited *United States* v. *Crews, supra*, for the rule that an illegal arrest is not grounds for dismissal of charges and citing *Clark* v. *State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989), which cited *Pipes* v. *State*, 22 Ark. App. 235, 738 S.W.2d 423 (1987), we said, "An invalid arrest may call for the suppression of a confession or other evidence but it *does not entitle* the defendant to be discharged from the responsibility for the offense." *See also Whitaker* v. *State*, 37 Ark. App. 112, 117, 825 S.W.2d 827, 831 (1992).

Appellee contends that this argument was not presented to the trial court, and cites *State* v. *Watson*, 307 Ark. 333, 820 S.W.2d 59 (1991), for the proposition that, even if the decision of the trial court was erroneous, the appellate court will not reverse if the State did not object on the proper grounds below. In that case the defendant, who had been charged with recklessly failing to take action to prevent the abuse of a child, filed a motion to dismiss the charges claiming that the State could not prove she was a "parent, guardian, or person legally charged with the care or custody of a child." After a hearing at which the State made a proffer of the evidence it expected to produce at trial, the circuit judge dismissed the charge. On appeal by the State, the Arkansas Supreme Court stated:

> While we agree with the state that it was error to dismiss the subject count of the information based upon a proffer of "facts," we do not agree that the court lacked subject matter jurisdiction. Jurisdiction is the power of the court to hear and determine a cause, including the power to enforce its judgment; it is the power to hear and determine the subject matter in controversy between the parties. . . .
>
> . . . .
>
> We do not suggest the state concurred in any manner

> to the dismissal of this case. But it is evident the state did not object on the basis now argued. The ground of the state's objection, as we interpret the record, was that the proffered evidence was sufficient to sustain the allegation that Ms. Watson was legally charged with the care or custody of [the child]. Had the state objected on the ground that the "facts" could be determined only by means of a trial and not by way of a proffer at a pretrial hearing, presumably the error would not have occurred.

307 Ark. at 335-36, 820 S.W.2d at 60-61 (citations omitted).

We think *Watson* is clearly distinguishable from the case now before us. Here, the issue is whether the lower court properly dismissed the criminal charges based on a deficient affidavit for the arrest warrant, and the State did, in fact, present to the trial court the contention that an illegal arrest is not grounds for dismissing the charges against a criminal defendant.

The State's brief abstracts, largely with quotes from the record, the colloquy between court and counsel as to this issue. Co-defendants had filed motions to "quash and dismiss" the arrest warrants issued against them and the trial court allowed defendant Fore, the appellee here, to orally join in his co-defendants' motions. At the hearing on the motions, the trial judge told the attorneys that he wanted to hear opening statements. After a defense counsel had addressed the judge, a deputy prosecuting attorney responded as follows:

> Your Honor, I'm not quite actually sure where to begin, but what you just heard is argument on the evidence that the State intends to produce at trial. First is the affidavit. I haven't heard any testimony in support of the argument that we just heard that would tend to prove that what was alleged in the affidavit is not what was sworn to before another competent Judge. Second, the affidavit and any subsequent information are two separate propositions. Third, this same issue has come up before in previous hearings before this Court last year and we had some discussions, I don't know that any formal ruling was issued, but the filing of the information stands on its own. And I'm kind of at a loss to be real honest to - -

THE COURT: Well I think, excuse me, I didn't mean to cut you off. I thought you had stopped. But I think the basis, the core of Mrs. Grinder's motion is that Officer Swesey is incompetent to support, his affidavit is incompetent to support probable cause. And I think that's - -

MR. JEGLEY: Okay.

THE COURT: - - very clear that's what she's saying.

MR. JEGLEY: Well I agree, your Honor, and I don't know that without more what in the world the Court would choose to interpose its judgment over that of the Pulaski Municipal Court which in and of itself had the affiant before him and had opportunity to - - This affiant was sworn in and unless they are prepared to prove the propositions they are arguing about then I would submit, your Honor, that the matter stands before the Court as mere argument. There's nothing to support their position before the Court.

THE COURT: Okay. Mr. Jegley, essentially I understand you to say that a defendant cannot put the State to its proof by filing a motion to dismiss?

MR. JEGLEY: I'm saying that this is their motion and that this matter has been brought up before this Court before, your Honor.

THE COURT: And I thought you said without a formal ruling.

MS. GRINDER: That's correct.

MR. JEGLEY: And I don't know, I don't think that, I think that in filing their motion they have to be prepared to go forward to prove up their motion to the Court. And then - -

THE COURT: Oh, no question about that. I am not saying the burden shifts to you because they filed the motion.

MR. JEGLEY: And I mean we're prepared to prove our case up at trial certainly and that's basically what we're talking about in the sum and substance of this.

THE COURT: Okay.

MR. JEGLEY: I mean there's two sides to all these criminal cases.

THE COURT: No, sir. Your burden at this point once she goes forward your burden is to prove the adequacy of the affidavit to support probable cause and that's whey [why] we're here today as I understand it. She's attacking the adequacy of probable cause.

MR. JEGLEY: By argument, your Honor. We haven't had a witness before us.

THE COURT: Oh, certainly. No I asked for opening statements from both of you.

MR. JEGLEY: Okay.

THE COURT: And that's where we are.

MR. JEGLEY: Okay.

THE COURT: And I'm waiting to hear your statement.

MR. JEGLEY: My statement is, your Honor, the motion is not well taken. That the case cited Fairchild versus Lockhart is not on point as argued and I would also tell the Court at this point that, advise the Court that the civil actions in this don't have any relevance whatsoever. And I don't know who was subpoenaed or who wasn't subpoenaed and I know that we've heard some argument about what proof there is and she knows which case, what the case file contains. So I think it is meritless, your Honor, and I think the motion should be denied.

THE COURT: All right. Are you ready, Ms. Grinder?

The trial court then heard testimony presented by defense counsel. At the conclusion of this evidence, the judge asked the deputy prosecutor if he was prepared to go forward and was told, "Well, your Honor, we can stand on the affidavit." Other discussion between court and counsel ensued, and the prosecutor again told the court that "once the affidavit question is over with we have a felony information." The trial judge, however, ended the

hearing with the statement that "in order for the search warrant to stand you have to show that the reviewing officer, the judge, did more than just rubber stamp." He then said he would take the issue under advisement and subsequently an order was entered which quashed the arrest warrant and dismissed the information.

It seems fairly clear that the deputy prosecuting attorney advised the trial judge of the State's contention that regardless of whether there was probable cause for the issuance of the arrest warrant the defendant was charged by a felony information, and the case of *Fairchild* v. *Lockhart*, was not authority for dismissing charges simply because the arrest warrant had not been properly issued. The prosecutor said that "the affidavit and any subsequent information are two separate propositions." He said "this issue has come up before in previous hearings before this Court last year and we had some discussions, I don't know that any formal ruling was issued, but the filing of the information stands on its own." He said "the motion is not well taken" and that "Fairchild versus Lockhart is not on point as argued." And he told the trial court that "once the affidavit question is over with we have a felony information."

Nevertheless, the trial court clearly took the position that the issue involved was whether the affidavit was adequate to establish probable cause for the issuance of the arrest warrant. Although there was discussion about the sufficiency of the affidavit, the trial judge was informed that the State took the position that the affidavit question and the felony information were two separate propositions. Thus, we think that *State* v. *Watson, supra*, relied upon by appellee Fore, is distinguishable from the instant case. There the State argued on appeal that the trial court did not have jurisdiction to dismiss the information charging the defendant with failing to take action to prevent the abuse of a child, but the issue presented to the trial court was "that the proffered evidence was sufficient to sustain the allegation that Ms. Watson was legally charged with the care and custody of [the child]." Here, the State argued in the trial court (and now argues in this court) that this affidavit for the search warrant and the felony information are two separate propositions. The State is right; *Fairchild* v. *Lockhart* does not hold that the charges should be dismissed if the arrest warrant is not properly issued; the trial court erred in its view of the law, and we do not think the State

failed to advise the court of the State's contention that insufficiency of the affidavit for the arrest warrant did not mean that the information should be dismissed.

Reversed and remanded.

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

Byron FOSTER *v.* STATE of Arkansas

CA CR 93-785 876 S.W. 2d 594

Court of Appeals of Arkansas
Division II
Opinion delivered May 25, 1994

Garry J. Corrothers, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Byron Foster was found guilty of possessing cocaine with intent to deliver and possessing drug paraphernalia, and was sentenced to twenty-five years in the Arkansas Department of Correction. He argues on appeal that the trial court erred in denying his motion to suppress evidence seized in a nighttime search of his residence, because the search warrant was based on an affidavit that contained an insufficient factual basis to justify a nighttime search. We disagree and affirm.

In reviewing a trial court's ruling on a motion to suppress because of insufficiency of the affidavit, we make an independent determination based upon a totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Thompson* v. *State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993).

An affidavit must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *See State* v. *Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980). The issuing judicial officer must have reasonable cause to believe that (i) the place to be searched is difficult of speedy access; or (ii) the objects to be seized are in danger of imminent removal; or (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy. Ark. R. Crim. P. 13.2(c); *State* v. *Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991). The affidavit should speak in factual and not mere conclusory language. *State* v. *Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980).

The affidavit in the case at bar described the purchase of a controlled substance by a confidential informant at

appellant's residence, "3524 Asher." That purchase was made on December 2, 1991; the warrant was executed that night at 10:30 p.m. The affidavit contained the following pertinent language:

> Affiant states that the residence is so situated that the approach of the serving officers will be readily apparent to persons at the residence due to the residence being situated on the corner of Asher Avenue and Valentine Streets offering no immediate cover and/or concealment for the approaching officers to the residence and the use of darkness, as concealment, in the approach of the residence would better protect the evidence sought as well as the approaching officers because the evidence sought is concealed and packaged in such a manner that its destruction or removal will be likely prior to the officers arrival. Affiant states that because Byron Foster frequently removes cocaine from his residence and transports it to other locations and because cocaine is being distributed from the residence at all times of the day or night, the Affiant prays that a warrant be issued for a search of the residence, curtilage, and person of Byron Foster, and that said warrant be issued for a search of the residence any time of the day or night.

Appellant argues that these statements are conclusory rather than factual, and cites *Coleman* v. *State*, 308 Ark. 631, 826 S.W.2d 273 (1992), in support. As in *Coleman*, this affidavit does contain some general conclusory language. However, this language read in conjunction with additional factual information in the affidavit, such as the residence's location on a corner lot and the lack of immediate cover for the approaching officers, can support a finding of reasonable cause of a nighttime search. *See, e.g., Houston* v. *State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993). While the factual information in this affidavit is not extensive, this is not a situation where we can characterize the statements as wholly conclusory or as having no factual basis. *See e.g., Thompson* v. *State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993).

Having reviewed the totality of the circumstances, we cannot say that the trial court's ruling is clearly against a preponderance of the evidence.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Carolyn ORREN *v.* SMACKOVER NURSING HOME
and Arkansas Guaranty Fund

CA 93-300 876 S.W.2d 600

Court of Appeals of Arkansas
En Banc
Opinion delivered May 25, 1994

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

Kevin Staten, for appellee.

JOHN E. JENNINGS, Chief Judge. On January 11, 1989, Carolyn Orren, an employee of Smackover Nursing Home, sustained a compensable injury to her back while lifting a patient. On April 17, 1989, Ms. Orren again hurt her back at work.

During the course of this litigation the employer's workers' compensation insurance carrier went bankrupt, and the Arkansas Guaranty Fund has entered an appearance for the purpose of pay-

ing benefits due to the claimant. In the meantime some of the claimant's medical bills incurred as a result of the compensable injury have been paid by Blue Cross Blue Shield, her medical insurance carrier.

The primary issue in the case at bar is whether the Guaranty Fund must pay the claimant's medical bills, notwithstanding that they have already been paid by Blue Cross Blue Shield. On this question the Commission said:

> The initial issue in this case is whether A.C.A. § 23-90-117 applies in this case. That section states in pertinent part:
>
> > (a)(1) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer, which is also a covered claim, shall be required to exhaust first his right under the policy.
> >
> > (2) Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under the insurance policy.
>
> We agree with the Administrative Law Judge and find that a correct interpretation of the statute is that those amounts which claimant had previously received as payment for medical benefits by Blue Cross/Blue Shield, are not now to be repaid by the Guaranty Fund. Claimant on appeal argues that the statute has no application to workers' compensation. We find no merit to that argument. First, the purpose of the Guaranty Act as set forth in A.C.A. § 23-90-102 is to provide funds to pay claims of insolvent insurers. Thus, the Fund is designed to protect individuals, not pay double benefits. Claimant is asking the Guaranty Fund to pay her benefits. Although claimant contends that the section has no application to workers' compensation, we note that she is asking the Guaranty Fund to pay her benefits. If claimant is going to receive benefits from the Guaranty Fund, then the provisions of the Guaranty Fund Act must apply. Further, with respect to this issue, we note that A.C.A. § 23-90-105 states that the Guaranty Fund Act is to be liberally construed to effect the purpose of the Act.

We agree with the Commission's interpretation of Ark. Code Ann. § 23-90-117 and its holding that the Guaranty Fund is not responsible for paying medical bills previously paid by Blue Cross Blue Shield.

Appellant also argues that the disposition of the case at bar is governed by our decision in *Owen Drilling Co.* v. *Allison*, 33 Ark. App. 60, 800 S.W.2d 728 (1990). In *Owen Drilling* we held that neither the employer nor its insurance carrier was entitled to an offset for the amount paid toward medical expenses by a claimant's private medical insurance carrier. Our opinion was based on case law and an analogy to the collateral source rule. We agree with the Commission that the case at bar is governed by statute, not the common law.

Appellant contends that the Commission erred in holding that she was not entitled to additional temporary total disability benefits beyond February 5, 1990. The Commission found that the claimant's healing period ended on February 5, 1990, and this finding is not challenged on appeal. Clearly, temporary benefits may not be paid after the end of the healing period. *Arkansas Secretary of State* v. *Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).

Affirmed.

MAYFIELD and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached by the majority opinion in this case.

The appellant was injured while employed by appellee Smackover Nursing Home. An administrative law judge determined her claim to be compensable and ordered payment of reasonable and related medical expenses. The employer and its carrier, Intercontinental Insurance Managers (now bankrupt), appealed to the full Commission. During the pendency of that appeal, Blue Cross/Blue Shield paid certain of appellant's medical charges. The full Commission affirmed the law judge.

Subsequently, appellant filed this claim alleging certain medical benefits had not been paid. An administrative law judge held appellee Arkansas Guaranty Fund (which provides funds to pay claims of insolvent insurers) "shall pay all medical benefits which

have not been paid by Blue Cross." The full Commission affirmed, holding the Guaranty Fund is entitled to an offset for medical benefits paid by Blue Cross/Blue Shield based upon Ark. Stat. Ann. § 23-90-117 (Repl. 1992). The Commission said it was not faced with a claimant who has not received compensation benefits, but with a claimant who wants a double recovery; that she is not entitled to a double recovery; and that the Guaranty Fund is entitled to an offset for medical benefits paid by Blue Cross/Blue Shield. I think the Commission was wrong for two reasons.

In the first place, the Arkansas Supreme Court has said:

> Act 871 of 1977, as amended by Act 738 of 1987 and Act 901 of 1993, now codified as Ark. Code Ann. §§ 23-90-101 through 123 (1987 and Supp. 1993), is known as the "Arkansas Property and Casualty Insurance Guaranty Act." Its purpose, declared in § 23-90-102, is to provide funds in addition to assets of insolvent insurers for the protection of "covered claims" against such insurers which would otherwise go unpaid. To achieve that purpose, the Act is to be interpreted liberally. § 23-90-105.

Douglass v. *Levi Strauss & Co.*, 315 Ark. 380, 868 S.W.2d 70 (1993). The evidence in this case shows that all benefits to the appellant were first controverted by Intercontinental Insurance Managers. In an attempt to get the appellant some relief, her attorney agreed with Blue Cross/Blue Shield that, even though her policy with it provided it would not pay for any benefits covered by workers' compensation, if Blue Cross/Blue Shield would go ahead and pay, it would be reimbursed for any payments it advanced to the appellant. No finding was made by the law judge or Commission on this point, and if there is any question as to the facts in this regard, I would certainly agree to remand for the factual issue to be resolved. However, my point is that the appellant will not actually make a double recovery. The truth of the matter is the appellant really only "borrowed" money from Blue Cross/Blue Shield. Moreover, I think it is bad public policy to adopt a view of the law that discourages an insurance company from advancing benefits in situations like the one involved here.

In addition, we have clearly held that an employee is entitled to recover the full amount of medical expenses as a result

of a workers' compensation injury, without any offsets for amounts previously paid by his own private medical insurance. *Owen Drilling Co.* v. *Allison*, 33 Ark. App. 60, 800 S.W.2d 728 (1990). The majority opinion states that this holding "based on case law" does not apply to the present case because it is governed by statute. However, I submit that a careful reading of Ark. Code Ann. § 23-90-117 (Repl. 1992) will reveal that it simply does not provide that a claim, under the factual circumstances in this case, should be reduced. It does provide for claims against other insurers to be exhausted before the Guaranty Fund shall pay, but it does not provide for a reduction in the Fund's liability under the circumstances in this case.

In the second place, the appellant points out that there are two entities who were originally liable here. She says:

> [T]he Smackover Nursing Home, Mrs. Orren's employer, is the one charged with the primary responsibility to pay benefits under the Act. A.C.A. § 11-9-401(b) states "The primary obligation to pay compensation is upon the employer, and the procurement of a policy of insurance by an employer. . . shall not relieve him of the obligation." The Smackover Nursing Home is simply permitted to transfer its responsibilities to an insurance carrier. It could, if it elected, become self insured. If the respondent's insurance carrier is insolvent and unable to pay benefits, then the responsibility to pay those benefits goes back to the employer . . . Smackover Nursing Home. The Smackover Nursing Home was a party to the first hearing and it is obligated to pay all reasonable and related medical expenses. If the Guaranty Fund does not reimburse Blue Cross/Blue Shield, Smackover Nursing Home will have to do so under the [Commission's decision.]

Thus, it is clear that the Commission's refusal to require the Guaranty Fund to pay the appellant because she has "borrowed" some money from Blue Cross/Blue Shield is "not on target." The Guaranty Fund owes what the Smackover Nursing Home's bankrupt insurance carrier owes — it should pay that amount to the appellant. I agree with the following conclusion from the appellant's brief.

The failure of this Court to reverse the finding of the full commission [and] order that the Guaranty Fund reimburse Blue Cross/Blue Shield will allow for an inequitable and inconsistent result in cases involving the Guaranty Fund as opposed to cases involving private insurers. Further, it will discourage private insurers such as Blue Cross/Blue Shield from coming forward and assisting their policy holders. Instead of assisting policy holders in the prompt payment of medical claims, where there is a workers' compensation claim pending, Blue Cross and other insurers will simply wait on the sideline for the outcome of the workers' compensation claim. Meanwhile, the individual worker will suffer by being denied medical treatment when the workers' compensation carrier refuses to shoulder its responsibilities and [the] private health insurance company does the same while awaiting an outcome of the workers' compensation claim.

The decision of the full workers' compensation commission in this case is unsupported by the law, represents bad public policy and should be reversed.

ROGERS, J., joins in this dissent.

James Roy ROGERS *v.* WOOD MANUFACTURING

CA 93-395 877 S.W.2d 43

Court of Appeals of Arkansas
En Banc
Opinion delivered May 25, 1994

Frederick S. "Rick" Spencer, for appellant.

Bassett Law Firm, by: *Tod C. Bassett*, for appellee.

JOHN E. JENNINGS, Chief Judge. James Roy Rogers sustained an admittedly compensable injury on October 1, 1987, while attempting to move a boat. He had sustained a previous back injury while working for another employer in 1981, which resulted in a laminectomy.

An administrative law judge held a hearing in August 1991. The primary issue at that hearing centered on a dispute between the employer's insurance carrier and the Second Injury Fund as to which incident was the cause of the claimant's current condition. In an opinion dated October 14, 1991, the law judge made the following specific findings:

> 4. Claimant's present lumbar dysfunction is attributable to the aggravation or new injury sustained on or about October 1, 1987.
>
> 5. Claimant is entitled to an award of benefits for medical care provided and to be provided by Dr. Schoedinger for his back condition.

In an opinion dated March 6, 1992, the Commission affirmed and adopted the opinion of the ALJ. On June 11, 1992, the law judge entered an "Interim Order and Opinion." That order stated:

> I have Mr. Bassett's June 9, 1992 letter with which he enclosed a copy of Mr. Spencer's June 5, 1992 letter and Mr. Bassett's June 9, 1992 letter to Dr. Schoedinger.
>
> I have reviewed my October 14, 1991 order and opinion as well as my May 1, 1991 letter, the April 22, 1991 order setting this case for a hearing, and the August 31, 1990 letter referred to in Mr. Bassett's June 9 correspondence.

> It appears that for reasons I do not now recall I did, in Finding 5, award benefits for past and future medical care by Dr. Schoedinger. This was a mistake on my part for, as indicated by Mr. Bassett in his June 9 letter, I indicated at pages 17-18 of the transcript an intent to defer making decisions on mileage and pre-authorization treatment by Dr. Schoedinger. Apparently, my oversight was not pointed out to the Commission on appeal, and the Commission failed to discover it on its own.
>
> Therefore, while I'm puzzled about why I awarded medical benefits for past, as well as future, medical care by Dr. Schoedinger — I can only assume that this was an oversight —the October 14, 1991 order does appear to do this. Of course, I cannot speak for the Commission, which might place a different interpretation on Finding No. 5, as affirmed in its March 6, 1991 order, and find that it did not intend to rule on an issue not drawn in issue at the hearing.
>
> IT IS SO ORDERED.

This order was appealed by both the claimant and the employer's insurance carrier. After noting that the record in the case indicated that the administrative law judge had expressly deferred consideration of the question of whether some of Dr. Schoedinger's treatment was unauthorized, the full Commission stated:

> In summary, we find that the respondents' request for clarification of our March 6, 1992, decision should be granted in light of the dispute that has arisen. In that decision, we found that the claimant was entitled to an award of benefits for *authorized* medical care provided and to be provided by Dr. Schoedinger for his back condition. We did not find that the claimant was entitled to an award of benefits for all medical care provided by Dr. Schoedinger in the past. Any consideration of the claimant's entitlement to medical care provided by Dr. Schoedinger which the respondents contend was unauthorized was expressly deferred at the first hearing, and that issue remains unresolved. Consequently, we remand this claim to the Administrative Law Judge so that any unresolved matters may be settled.

On appeal to this court, appellant raises one point for reversal: "The Commission erred and was without jurisdiction when it modified a clear and unambiguous finding which had become final and res judicata after the issue was previously affirmed by the full Commission and was not appealed to this court."

We conclude that the Commission's order is not final and appealable. In *American Mut. Ins. Co.* v. *Argonaut Ins. Co.*, 33 Ark. App. 82, 801 S.W.2d 55 (1991), we said:

> As a general rule, orders of remand are not final and appealable; ordinarily, an order is reviewable only at the point where it awards or denies compensation. For an order to be appealable, it must be a final one. To be final, the order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter of the controversy.
>
> It also has been stated that appealable orders of the Commission are not limited to those that make a final disposition of an entire case. However, we have held that the test for determining whether an order of the Workers' Compensation Commission is appealable is whether it puts the Commission's directive into execution, ending the litigation or a separable part of it. An order that establishes a party's right to recover but remands for a determination of the amount of that recovery ordinarily is not an appealable one. [Citations omitted.]

The issue is one that we are obliged to raise on our motion because it goes to our own jurisdiction. *See Hampton & Crain* v. *Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991). In the case at bar the order appealed from is an order of remand which neither awards nor denies compensation. We conclude that it is a decision on an incidental matter that is not reviewable because of its lack of finality. *See Stafford* v. *Diamond Constr. Co.*, 31 Ark. App. 215, 793 S.W.2d 109 (1990).

Appeal dismissed.

MAYFIELD and COOPER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I would not dismiss this appeal but would reach the merits. On the merits, I would reverse.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached by the majority opinion in this case because it dismisses the appeal but leaves the controversy pending without any guidance as to how it can be resolved.

The problem started when the administrative law judge entered an order dated October 14, 1991, in which his finding number "5" stated, "Claimant is entitled to an award of benefits for medical care provided and to be provided by Dr. Schoedinger for his back condition." There was an appeal from the law judge's order and the order (including finding "5") was affirmed by the full Commission on March 6, 1992.

On June 9, 1992, the attorney for the employer's workers' compensation carrier wrote a letter to the law judge asking for a "clarification" of the law judge's finding number "5". The law judge then issued an opinion that the finding was a mistake on his part as he had intended to "defer making decision on mileage and pre-authorization treatment by Dr. Schoedinger."

This opinion was appealed to the full Commission and by majority vote the Commission in a opinion entered February 26, 1993, held that the law judge had no jurisdiction to act on the matter because the law judge's original order had been appealed to the Commission and it was, therefore, the Commission's order which the insurance carrier wanted clarified. However, the Commission treated the carrier's letter to the law judge as a request for clarification by the Commission and held that the record was clear that it was only the "authorized" medical care provided and to be provided that the law judge had intended to cover in finding "5." Therefore, the Commission remanded the matter to the law judge for the determination of any "unresolved matters" as to this issue.

The claimant appealed to this court and argued that the doctrine of *res judicata* prevented the Commission from changing the order it had previously entered affirming the law judge's original order of October 14, 1991. This court has today held that the Commission's order is not final and therefore is not appealable. Thus, we have dismissed the appeal and have left the parties, the law judge, and probably the full Commission without any guidance on how to resolve the problem which is still pending.

In the first place, there is one view that we can take that would make it unnecessary to send this case back to the law judge — and that is the result the appellant asks that we reach. In *State* v. *Hatton*, 315 Ark. 583, 868 S.W.2d 492 (1994), the State argued that a juvenile division judge erred in refusing to accept the case after the circuit court transferred it to juvenile court. Our supreme court dismissed the State's appeal (thus ending the controversy as to which trial court should try the case) on the holding that the State had failed to file a notice of appeal within the proper time after the juvenile court had first held that the case should be tried in circuit court. Thus, in the instant case it could be held that the appellant should have timely appealed from that part of the law judge's order here involved, made on October 14, 1991, instead of waiting until June 9, 1992, to write the law judge asking for a "clarification" of the law judge's order of October 14, 1991. *See also Arkansas State Highway Commission* v. *Bollinger*, 230 Ark. 877, 327 S.W.2d 381 (1959). Indeed, I find it highly unusual that such a request would be made or acted upon, even by an administrative agency, in face of the well-established rule that courts do not issue advisory opinions. *See Waldrip* v. *Davis*, 40 Ark. App. 25, 842 S.W.2d 49 (1992). Moreover, we have held that under the Workers' Compensation Act neither an administrative law judge nor the full Commission has the power or authority to reconsider a decision after the time to appeal that decision has run — except in the specific situations provided by the Act (which are not applicable here). *See Lloyd* v. *Potlach Corporation*, 19 Ark. App. 335, 342, 721 S.W.2d 670, 674-75, (1986).

In the second place, even if we think that a more relaxed view should now be taken, as is the case in administrative agencies other than the Workers' Compensation Commission, *see McCarty* v. *Board of Trustees*, 45 Ark. App. 102, 872 S.W.2d 74 (1994), we should affirm the Workers' Compensation Commission, rather than dismiss the appeal, and let it — and everyone — know what our current view is. As the matter stands, the dismissal of this appeal simply leaves this case hanging and all concerned confused.

I dissent.

Benjamin ROARK *v.* STATE of Arkansas

CA CR 93-121 876 S.W.2d 596

Court of Appeals of Arkansas
Division I
Opinion delivered May 25, 1994

William E. Johnson, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Benjamin Roark, was found guilty by a jury of possession of a controlled substance (marijuana) with intent to deliver for which he was sentenced to a term of four years in prison with a fine of $10,000. Appellant raises four issues for reversal, contending that: (1) the trial court erred in denying his motion to exclude the testimony of two state witnesses; (2) the trial court erred in denying his motion to suppress; (3) the trial court erred in denying his second motion to suppress; and (4) the trial court erred in failing to conduct hearings on his motion to dismiss for violation of the speedy trial rule and his motion for a continuance. We cannot disagree with the trial court's rulings on these matters and thus we affirm.

Although appellant does not contest the sufficiency of the evidence to support his conviction, a short recitation of the underlying facts is necessary for an understanding of the issues raised on appeal. On April 8, 1992, law enforcement officers stopped a vehicle driven by Gary Falkenberg. Falkenberg was arrested when a half pound of marijuana was discovered in the vehicle. Falkenberg later identified appellant as his source for obtaining the contraband and he informed the officers that he was to meet appellant later on that day for the purchase of an additional quantity of marijuana. Falkenberg agreed to cooperate with the authorities, and plans were made for the police to monitor Falkenberg's rendezvous with appellant. After a series of events, the police stopped appellant's vehicle in which a quarter-pound of marijuana was found. Appellant was subsequently arrested, along

with the passenger in appellant's car, Jon Kevin Lindsey.

As his first issue on appeal, appellant argues that the trial court erred in denying his motion to exclude the testimony of Falkenberg and Lindsey. Relying on the federal decisions of *United States* v. *Cervantes-Pacheco*, 800 F.2d 452 (5th Cir. 1986), and *United States* v. *Waterman*, 732 F.2d 1527 (8th Cir. 1984), appellant contends that, because these witnesses were afforded leniency, he was denied due process by the State's use of their testimony. The leniency referred to by appellant was that Falkenberg pled guilty to the offense of possession of a controlled substance for which he was placed on probation and fined, while Lindsey was released without being charged. We find that the cases relied upon by appellant are distinguishable from the present case and that the credibility of these witnesses, who were subject to cross-examination, was for the jury to determine.

Generally speaking, in the decisions cited by appellant, it was deemed a violation of due process for the compensation of an informant-witness to be made contingent upon the success of the prosecution. The courts considered such arrangements as being an inducement to testify falsely and thus an invitation to perjury, thereby depriving the accused of a fundamentally fair trial. By contrast, absent in this case is the contingent nature of the arrangement. No reward was to be forthcoming dependent on the performance of these witnesses or the successful outcome of trial. In this respect, the instant case more closely resembles that of *United States* v. *Dailey*, 759 F.2d 192 (1st Cir. 1985), where the court declined to require the exclusion of witnesses whose plea agreements depended upon the value or benefit of the witnesses' cooperation, but not the success of the prosecution. Although it was recognized that such plea agreements do entail some risk of perjury, the court determined that the risk did not render the witnesses' testimony inadmissible, and that it was an adequate safeguard for the jury to be fully apprised of the existence of these agreements when performing its function of weighing the credibility of the witnesses.

Similarly, in *Williams* v. *State*, 304 Ark. 279, 801 S.W.2d 296 (1990), the supreme court held that the appellant was not denied due process when the confidential informant was paid a flat fee at the time the drug transaction took place. In so holding,

the court stated that it chose to follow the policy articulated in *Hoffa* v. *United States*, 385 U.S. 293 (1966), leaving the veracity of witnesses to be tested on cross-examination and the credibility of a witness's testimony to be judged by a properly informed jury.

As his second point, appellant claims error in the denial of his motion to suppress evidence, the contraband, which was discovered in his vehicle. At the hearing on the motion to suppress, it was disclosed through the testimony of Drew County Sheriff Tommy Free and others that, based on the information provided by Falkenberg, surveillance was set up at appellant's home and at a church parking lot where the meeting was to take place. Almost at the last moment, officers learned from Falkenberg that appellant had changed the delivery point to some trash dumpsters located on a nearby highway. Appellant was followed as he drove toward the new location, while other officers attempted to reach the area to again set up surveillance. By radio contact, Sheriff Free was advised by another officer that appellant had identified him as being a police officer and Free was asked to stop appellant's vehicle. Sheriff Free said that he activated the strobe light on the dash and pulled into appellant's lane of traffic in an attempt to make the stop. Free testified that appellant tried to get around him by pulling into the ditch. Nevertheless, Free was able to block appellant's vehicle. Sheriff Free also testified, without objection, that another officer observed a marijuana bud lying on the console of appellant's vehicle. In a subsequent search of the vehicle, officers found a McDonald's bag which contained marijuana. Lindsey also testified that a bud of marijuana had been placed on the console.

On this point, appellant first argues that there was no justification for the stop of his vehicle. We disagree.

The Fourth Amendment protection against unreasonable searches and seizures extends to persons driving down the street. Consistent, however, with the Fourth Amendment, police may stop persons on the street or in their vehicle in the absence of either a warrant or probable cause under limited circumstances. One of those limited circumstances involves the investigatory stop. *Bliss* v. *State*, 33 Ark. App. 121, 802 S.W.2d 479 (1991). Rule 3.1 of the Arkansas Rules of Criminal Procedure permits an officer to stop and detain any person the officer

reasonably suspects may be engaged in criminal activity to obtain identification or to determine that the person's conduct is lawful. Rule 2.1 defines "reasonable suspicion" 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. One factor that can be considered in determining whether reasonable suspicion exists is the apparent effort of a person to avoid identification or confrontation by the police. *Coffman* v. *State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988). Also, reasonable cause can be based on the collective knowledge of the police officers. *Haygood* v. *State*, 34 Ark. App. 161, 807 S.W.2d 470 (1991).

In reviewing a trial court's decision to deny an appellant's motion to suppress evidence, the appellate court makes an independent determination based on the totality of the circumstances and reverses the decision only if it is clearly against the preponderance of the evidence. *Houston* v. *State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993).

Here, the officers had learned from Falkenberg that appellant was his supplier of the controlled substance and that another exchange was to occur later in the day. Falkenberg's reliability was strengthened when he informed the officers that the exchange point had been changed, and his information was corroborated when appellant was observed leaving his home at around the appointed time and when appellant drove in the direction of the newly designated area. The record further reflects that appellant appeared to detect the presence of the police and that he took evasive measures to avoid the stop. Considering the totality of the circumstances, we cannot say that the officers were not justified in reasonably suspecting that appellant was involved in criminal activity, and thus we cannot say that the trial court's ruling is clearly against the preponderance of the evidence.

Appellant further maintains that the subsequent search of his vehicle and the opening of the sack was unlawful. However, there was testimony that the search took place after a bud of marijuana had been sighted in plain view on the console in appellant's vehicle, and thus the officers could properly conduct

a search to determine whether the vehicle contained other contraband. *See Russell* v. *State*, 295 Ark. 619, 751 S.W.2d 334 (1988). And, if the officers had reasonable cause to search the vehicle, they could search every part of it and its contents that could conceal the object of the search. *United States* v. *Ross*, 456 U.S. 798 (1982); *Haygood* v. *State, supra*; *Lopez* v. *State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989). In sum, we find no error in the denial of the motion to suppress.

Appellant next argues that the trial court erred in denying his motion to suppress evidence found in Falkenberg's vehicle and any statements he made to the authorities as the "fruit of the poisonous tree." In *State* v. *Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992), our supreme court observed that it had repeatedly held that a defendant has no standing to question the search of a vehicle owned by another person. It was on this basis that the trial court denied appellant's motion. Although appellant recognizes this principle, he maintains that he had standing in that he was the "target" of the Falkenberg search and that he was a co-conspirator of Falkenberg. In essence, he asks us to overrule those cases requiring standing to challenge a search. We simply note that we are without authority to overrule decisions made by the supreme court. *Leach* v. *State*, 38 Ark. App. 117, 831 S.W.2d 615 (1992). And, even assuming for the moment that appellant could challenge the search, the record does not disclose any of the particulars surrounding the stop of the Falkenberg vehicle, and thus appellant has failed to show that the stop or the subsequent search, which was said to have been based on consent, was somehow illegal and that suppression was in order.

As his final contention, appellant argues that the trial court erred by not holding hearings on his motion to dismiss based on a speedy trial violation and his motion for a continuance. The record reveals that appellant was arrested on April 8, 1991. Trial was originally scheduled for December 19, 1991. The trial was not held until July 7, 1992, which was ninety days beyond the speedy trial limitation. *See* Ark. R. Crim. P. 28.1(c). The record further reflects that the case was continued on numerous occasions. At each and every juncture, the trial court promptly entered orders continuing matters until a date certain and excluding the intervening period of time. The first such continuance was granted on appellant's motion which was filed on December 3, 1991. The

stated reason for the continuance was lack of preparation for trial, and it was asked that trial be continued until after February 28, 1992. In the motion, it was specifically acknowledged by appellant that any delay would be attributable to the defense. On December 6, 1991, the trial court entered an order granting appellant's motion and excluding for speedy trial purposes the period of time from December 19, 1991 to March 31, 1991, the next available trial date.

The record also reflects further delays while hearings were held on appellant's motions to suppress and to exclude the testimony of witnesses. Additionally, the record shows that continuances were granted due to illness of appellant's counsel, counsel's conflicts with other trials, and counsel's family vacation.

By order of May 19, 1992, trial was finally set for July 7, 1992. Appellant filed his motion to dismiss on May 22, 1992. The trial court denied the motion on June 26, 1992, by the entry of an order setting out in precise detail the reasons for its decision. On July 1, appellant filed a motion to set aside this order in which a hearing on the motion to dismiss was also requested. The trial court summarily denied this motion the next day.

Under the facts of this case, we find no merit to the argument that the trial court erred by failing to hold a hearing on the motion to dismiss. In the first place, appellant does not complain in this appeal that he was denied a speedy trial. Secondly, the record in this case clearly supports the denial of the motion. With regard to the continuances alone, in commendable fashion the trial judge painstakingly complied with Rule 28.3(c) of the Rules of Criminal Procedure by entering orders continuing the trial to a date certain and providing for the exclusion of that period of time. Although the record reflects that appellant was afforded several continuances, the first such continuance, which we described above, sufficed to bring the trial within the limitations period. In his motion, appellant conceded that the resulting delay would be imputed to him. In making this argument, appellant does not question the order granting that continuance, and he has only vaguely alluded to matters which might have been presented at a hearing. Prejudice is not presumed and we do not reverse absent a showing of prejudice. *Wallace* v. *State*, 314 Ark. 247, 862 S.W.2d 235 (1993). In light

of this record, we cannot conclude that the trial court erred by not conducting a hearing.

With regard to the motion for continuance, this motion was filed six days before trial. Appellant maintained that a continuance was necessary in that the trial court had just denied several of his pre-trial motions and thus more time was needed to prepare for trial. The trial court denied the motion after noting that trial had been continued on several occasions and that appellant had been made fully aware of the evidence to be offered against him as disclosed during the various hearings which were held on appellant's other motions. From our review of the record, we can discern no prejudice resulting from the denial of this motion; the record contains nothing to suggest any lack of preparation for trial. It is well settled that a motion for a continuance is addressed to the sound discretion of the trial judge, and a decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *King* v. *State*, 314 Ark. 205, 862 S.W.2d 229 (1993). We find no abuse of discretion here, and again, appellant has failed to demonstrate how he might have benefitted from a hearing on this matter.

Affirmed.

PITTMAN and COOPER, JJ., agree.

FRIENDS OF CHILDREN, INC. *v.* Randall MARCUS, et ux.

CA 93-101 876 S.W.2d 603

Court of Appeals of Arkansas
Division II
Opinion delivered June 1, 1994

[redacted]

Rose Law Firm, by: *Kenneth R. Shemin* and *Sammie P. Strange, Jr.*, for appellant.

Robert A. Newcomb, for appellees.

JOHN E. JENNINGS, Chief Judge. Appellant, Friends of Children, Inc., is a nonprofit corporation doing business in the State of Arkansas. The appellees, Randall and Diane Marcus, are residents of Potomac, Maryland. In the fall of 1990 appellees contacted American Friends of Children, Inc., also a nonprofit corporation, seeking to adopt a child. The child that was ultimately delivered to the Marcuses was born May 23, 1991, in New York City, was moved to Washington, D.C., and was placed in foster care by American Friends of Children. The child was later transferred by American Friends of Children to Friends of Children and transported to the State of Arkansas.

On July 5, 1991, the Marcuses met with John Rushing, assistant executive director of Friends. They signed a Placement Agreement, the child was delivered to the Marcuses, and the parties immediately obtained an interlocutory decree of adoption in the Pulaski County Probate Court. Almost immediately, Mrs. Marcus noticed what she believed were signs that the child was not "normal" and "healthy." Friends was notified and the child was examined by a series of physicians both in Arkansas and in Washington, D.C. While, as the trial court pointed out, the evidence was in conflict, there was evidence that the child had a neurological impairment and might have cerebral palsy.

On August 15, 1991, an agreed order was entered in probate court dissolving the interlocutory decree of adoption. The order provided, in part:

> Friends of Children is revested with the right to place said child for adoption. The claims either the petitioners or Friends of Children may have against each other are not settled with this order.

In December 1991, the Marcuses filed suit against Friends seeking "rescission" and restitution of the $25,000.00 fee they had paid to adopt the child. The complaint alleged that the appellant

had committed fraud by concealing certain medical information about the child.

In July of 1992, the child was placed for adoption once again and Friends collected a placement fee of $28,000.00 from the new adopting couple.

There was evidence at trial that the literature provided by the appellant stated that it placed for adoption "healthy white infants," and that the appellees were told that if the adoption did not go through their money would be refunded. The trial court found that the appellees had told the appellant that they preferred that the child's birth mother have no history of alcohol or drug abuse. While the chancellor found that appellant was aware that the birth mother had used alcohol and marijuana occasionally during the early months of her pregnancy and that this information was not provided to the appellees, no fraud was proven because the appellees' concern was with drug abuse, not mere use.

The chancellor did find, however, that the appellant had been unjustly enriched "by being in possession of placement fees from two adopting couples for the same child." The court awarded the appellees judgment for $22,300.00 plus attorneys' fees.

On appeal, Friends contends that the chancellor erred in finding that it had been unjustly enriched and erred in allowing attorneys' fees. We affirm on the first point, but must reverse on the second.

Initially appellant argues that since the court did not specifically order the contract rescinded, restitution is inappropriate. But many transactions may be judicially avoided without mention of rescission by the simple decision to award some form of restitution. Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.3 at 254 (1973). In the case at bar the contract between the parties, the Placement Agreement, was fully executed. By the agreed order entered in probate court the Marcuses returned to Friends that which they had received under the contract, the child. This is at least analogous to rescission at law. *See Maumelle Co.* v. *Eskola*, 315 Ark. 25, 865 S.W.2d 272 (1993); *Savers Fed. Sav. & Loan Ass'n* v. *First Fed. Sav. & Loan Ass'n*, 298 Ark. 472, 768 S.W.2d 536 (1989).

Appellant also contends that "the doctrine of unjust enrichment does not apply when there is a valid, legal, and binding contract," citing, inter alia, *Lowell Perkins Agency* v. *Jacobs*, 250 Ark. 952, 469 S.W.2d 89 (1971). In *Jacobs*, the plaintiff bought a low-mileage used car from an automobile dealer, signing a contract and a promissory note to finance it. The next day the plaintiff learned she would have to pay sales tax of $86.00 on the car. She returned the car and declined to make the payments on the note because she felt that the salesman should have told her she had to pay the sales tax.

In reversing the trial judge's award of restitution the supreme court stated, "There can be no 'unjust enrichment' in contract cases." It is clear, however, that the court recognized its statement merely as a general rule: "It is generally held that where there is an express contract the law will not imply a quasi or constructive contract." *Jacobs*, 250 Ark. at 959 (quoting 17 C.J.S. *Contracts* § 6 at 574). The mere fact that there is a contract between the parties does not prevent the grant of restitution in an appropriate case. Appropriate cases include those in which there has been a rescission at law, *see e.g., Maumelle Co.* v. *Eskola*, 315 Ark. 25, 865 S.W.2d 272 (1993); where a contract has been discharged by impossibility or frustration of purpose, 1 George E. Palmer, *The Law of Restitution* § 1.7 at 42 (1978); or where the parties to a contract find they have made some fundamental mistake about something important in their contract. Dobbs, *supra*, § 4.3 at 256.

In *Frigillana* v. *Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979), the court said that in unjust enrichment cases "the simple, but comprehensive, question is whether the circumstances are such that equitably defendant should restore to plaintiff what he has received[,]" (quoting 77 C.J.S. *Restitution* 322). The *Restatement of Restitution* § 1 states simply, "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." An action based on unjust enrichment is maintainable in all cases where one person has received money under such circumstances that, in equity and good conscience, he ought not to retain it. *Frigillana, supra* at 307. The remedy is neither given nor withheld automatically, but is awarded as a matter of judgment. *See* Dobbs, *supra*, § 4.3 at 256; *Frigillana*, 266 Ark. at 306.

In the *Jacobs* case the contract was executory and the plaintiff had no reasonable basis to rescind. Any "enrichment" of the automobile dealer was therefore not unjust. In the case at bar the parties effectively rescinded the transaction by agreement, and the appellees had fair reason for their dissatisfaction. Under the facts of the case at bar the award of restitution in equity was at least discretionary. We find no abuse of discretion.

Friends also contends that an award of restitution is barred by exculpatory clauses in its Placement Agreement:

> (8) We hereby release and discharge Friends of Children, Inc., its officers, its agents, and employees from any and all liability and claims we have or may have based on events, conduct or misconduct or failure to act from the beginning of time to present.
>
> (9) We hereby release and discharge American Friends of Children, a Washington, D.C. nonprofit corporation, its officers, agents and employees from any and all liabilities and claims we have or may have based on any events, conduct or misconduct or failure to act from the beginning of time to present.

We agree with the chancellor that the exculpatory clauses will not prevent an award of restitution. The clauses, by their own terms, relate to liability based on events occurring at or before the time the Placement Agreement was signed. Restitution in this case is based on events occurring after the contract was executed, such as the discovery of the child's neurological deficit, the agreement between the parties to dissolve the interlocutory decree of adoption, the agreement of the Marcuses to return the child, and the subsequent placement of the child by Friends. Furthermore, fault is not a prerequisite to an award of restitution. *See* Dobbs, *supra*, §§ 4.3 and 4.4.

Finally, we must agree with appellant's argument that the chancellor's award of attorneys' fees to the appellees was error. The rule in Arkansas is that attorneys' fees are not awarded unless expressly provided for by statute or rule. *Security Pacific Housing Services, Inc.* v. *Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993). The only possible basis for an award of attorneys' fees here is Ark. Code Ann. § 16-22-308 (1989 & Repl. 1994):

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

The case at bar was an action in equity seeking restitution. The appellees argue that since unjust enrichment is based on the concept of "quasi-contract," the cause of action will fit as a suit on a contract under the statute. But the implied-in-law contract, or quasi-contract, is indeed no contract at all; it is simply a rule of law that requires restitution to the plaintiff of something that came into defendant's hands but belongs to the plaintiff in some sense. Dobbs, *supra*, § 4.2 at 235. We conclude that there was no authority for an award of attorneys' fees in this case. Our decision in this regard renders moot the appellees' argument on cross-appeal that the attorneys' fees awarded were inadequate.

For the reasons stated the chancellor's award of restitution is affirmed, but his award of attorneys' fees is reversed.

Affirmed in part; Reversed in part.

PITTMAN and COOPER, JJ., agree.

Sheldon Paul MANGIAPANE *v.* STATE of Arkansas

CA CR 92-1079 876 S.W.2d 610

Court of Appeals of Arkansas
Division I
Opinion delivered June 1, 1994

Daniel D. Becker, by: *Terri L. Harris*, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Sheldon Paul Mangiapane, was found guilty by a jury of theft of property, a class B felony, and was sentenced as an habitual offender to a term of twenty-five years in prison. For reversal, appellant contends that the trial court erred in accepting one of his prior convictions for the purpose of enhancing his sentence. We affirm.

The trial court found that appellant had been convicted of four previous felonies, and was thus subject to being sentenced under the enhancement provision found at Ark. Code Ann. § 5-4-501(b) (Repl. 1993). At issue in this appeal is a 1988 conviction from the Grant County Circuit Court for theft by receiving. Appellant's argument on appeal is that the use of this conviction was improper because it was not shown that he was represented by counsel.

The proof presented by the State was the docket sheet from Grant County which contained the entry "B. Murphy appted - Bond set at $5,000 - Signature of def. & his father approved." In conjunction with this document, the State offered the concomitant judgment showing that appellant pled guilty and was sentenced to a term of six years in the Arkansas Department of Correction. No mention of representation was made in the judgment.

It is settled that a prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or he validly waived counsel. *Tims* v. *State*, 26 Ark. App. 102, 760 S.W.2d 78 (1989). The principles which govern the resolution of the issue at hand were succinctly stated in *Stewart* v. *State*, 300 Ark. 147, 777 S.W.2d 844 (1989):

> For the purpose of sentence enhancement ... the State may prove a prior conviction by any evidence that satisfies the court beyond a reasonable doubt that the defendant was convicted or found guilty. On appeal, the test is whether there is substantial evidence that the appellant was previously convicted of the felonies in question.
>
> Unless the records of prior convictions show that the defendant was represented by counsel, there is a presumption that the defendant was denied assistance of counsel, and the convictions cannot be used to enhance punishment under our habitual offender provisions.

Id. at 148, 777 S.W.2d at 845 (citations omitted).

In recent times we have dealt with this issue on three occasions. First, in *Tims* v. *State, supra*, the appellant had been convicted of DWI, fourth offense. We found error in the use of one of the previous convictions where the words, "Atty. O'Bryan," appeared under a column for the name of the arresting officer. We deemed this designation as being too ambiguous to be relied upon to show that the appellant had been represented or had waived counsel. On the other hand, in *Rodgers* v. *State*, 31 Ark. App. 159, 790 S.W.2d 911 (1990), we upheld a conviction for DWI, fourth offense, where a challenge was made to two prior convictions evidenced by documents containing the entries "Jeff Duty, Atty." We sustained the use of these convictions because the clerk of the court from which the convictions were obtained explained that the entries signified that Jeff Duty had been appointed as defense counsel. In *Neville* v. *State*, 41 Ark. App. 65, 848 S.W.2d 947 (1993), we found proof of representation lacking where the two docket sheets in question listed the respective names of Richard Lewallen and Susan Wilson under the column designated "Atty." As in *Tims, supra*, we considered those listings to be too ambiguous, standing alone, to support a finding that the appellant was represented or had waived counsel. The distinction between the decisions in *Tims* and *Neville*, and the decision in *Rodgers*, is that in *Rodgers* the docket entries were supplemented with other proof of representation.

In the case at bar, the trial court allowed the usage of the Grant County conviction finding that the entry "B. Murphy appted. . . ." indicated that an attorney had been appointed to represent appellant. In so finding, the trial court took note of the fact that prosecutors are not appointed. The court also reasoned that appellant was represented at the time the guilty plea was accepted since the docket contained no entry showing that counsel had been relieved.

As in the cases discussed above, we are not faced with a silent record from which representation or the waiver of counsel cannot be presumed. The question here is whether there is substantial evidence to support the trial court's determination that appellant was represented by counsel in the earlier proceeding. We consider this case as falling somewhere between the

decisions in *Tims* and *Neville* on one end of the spectrum, and *Rodgers* on the other. From our review, however, we conclude that the trial court's finding is supported by substantial evidence. The docket sheet in question includes an express notation from which it can reasonably be inferred that counsel was appointed to represent appellant. We also cannot disagree with the trial court's conclusion that representation continued throughout the course of the proceedings since there was no entry showing that counsel had been dismissed. Accordingly, we affirm appellant's conviction and the sentence imposed therefor.

Affirmed.

PITTMAN and MAYFIELD, JJ., agree.

Billy Ray JOHNSON *v.* STATE of Arkansas

CA CR 93-497 876 S.W.2d 607

Court of Appeals of Arkansas
En Banc
Supplemental Opinion on Denial of Rehearing June 1, 1994

James R. Marschewski, for appellant.

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

JOHN B. ROBBINS, Judge. By opinion filed March 2, 1994, we reversed the conviction of Billy Ray Johnson for the crime of possession of methamphetamine with intent to deliver. This decision resulted from our determination that appellant's motion to suppress evidence seized in his arrest and search should have been granted. The state has now petitioned for rehearing, which we deny.

This case does not involve a challenge to the reliability of a known informant. At issue is the credibility of an anonymous tipster.

At the suppression hearing, Officer Terry Grizzle of the Ft. Smith Police Department testified that a secretary at the police station received an anonymous telephone call. The caller said that "Billy Ray [appellant] and Angela" were selling crank out of room 56 at the Stonewall Jackson Inn and that a blue van was being used in the drug sales. The police set up surveillance at the motel and recognized Angela Highsmith and appellant as they entered a blue van in the motel parking area. They did not see the room from which they came. The police stopped the van and a quantity of methamphetamine was found.

In *Alabama* v. *White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), an officer of the Montgomery, Alabama police department received an anonymous telephone call. The caller stated that the accused would be leaving a certain apartment within an apartment complex at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to a certain motel, and that she would be in possession of about an ounce of cocaine inside a brown attache case. The police officer and his partner traveled to the apartment complex and saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the building which contained the apartment identified by the caller. The officers observed the accused leave the building and enter the station wagon. The officers followed the vehicle as it drove for a distance of four miles, including several turns, along the most direct route to the motel which the caller had identified. After one of the offi-

cers requested a patrol unit to stop the vehicle, the vehicle was stopped just short of the motel. The United States Supreme Court held that independent corroboration by the police of significant aspects of the informant's predictions imparted some degree of reliability to the other allegations made by the caller. The significance of the court's reference to "predictions" was explained as follows:

> We think it also important that, as in Gates, "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *Id.*, at 245, 76 L.Ed.2d 527, 103 S.Ct. 2317. The fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have "predicted" that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's *future behavior*, because it demonstrated inside information — a special familiarity with respondent's affair. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. *See id.*, at 245, 76 L.Ed.2d 527, 103 S.Ct. 2317. When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

496 U.S. at 332.

We addressed a similar factual situation in *Kaiser* v. *State*, 24 Ark. App. 19, 746 S.W.2d 559 (1988). Randolph County officers had received information from Missouri officers that an informant had given them a tip that Kaiser would be traveling through Randolph County in a gray or silver 1979 Lincoln, license

number KLN436, and would be carrying a pistol and either $25,000 cash or 50 pounds of marijuana. Acting on this information the vehicle was stopped by Randolph County officers. The propriety of the stop arose in the context of a forfeiture proceeding. We held that because the vehicle appeared within the predicted area and period of time, matched the description given and bore the predicted license plates, those details were sufficient indicia of the informant's reliability to permit an investigatory stop of the vehicle. The supreme court reversed because the record did not otherwise show that the informant was reliable. *Kaiser* v. *State*, 296 Ark. 125, 752 S.W.2d 271 (1988).

After being reversed in *Kaiser*, we retreated somewhat when confronted with a closely analogous factual situation. *Lambert* v. *State*, 34 Ark. App. 227, 808 S.W.2d 788 (1991). In *Lambert* the state police received an anonymous tip that a man named "Jerry" would be leaving the Hot Springs area at approximately 3:00 p.m. driving to Little Rock in a black truck with "Woodline Motor Freight" in orange letters on it, hauling a shortbed trailer, and that Jerry would have approximately 10 pounds of marijuana with him. The police set up surveillance between Hot Springs and Little Rock and at about 3:50 p.m. stopped a vehicle traveling toward Little Rock which met this description. We held that the facts corroborating the tip were insufficient in quality and quantity to give rise to a sufficiently reasonable suspicion to make the stop.

The facts corroborating the details disclosed by the anonymous informant in the case at bar were less in quality and quantity than those in *Lambert* v. *State, supra*, and less in quality than those in *Alabama* v. *White, supra*. Here, the only facts corroborated by the police before making an investigatory stop were the presence of appellant and Ms. Angela Highsmith on the premises of the Stonewall Jackson Inn and their possession of a blue van. Significantly missing was corroboration of any prediction of future behavior as existed in *Alabama* v. *White, supra*, or other such details as would demonstrate a special familiarity with appellant's affairs.

Unless we overrule *Lambert* v. *State, supra*, it stands as a controlling precedent and requires a reversal of appellant's conviction.

JENNINGS, C.J., COOPER and MAYFIELD, JJ., would grant rehearing.

JOHN E. JENNINGS, Chief Judge, dissenting. I would grant the State's petition for rehearing. Certainly the matter is not clear cut, but I am persuaded that the panel's view was wrong.

Billy Ray Johnson, the appellant, was charged with the possession of methamphetamine with intent to deliver. After the trial court denied his motion to suppress evidence, Johnson entered a conditional plea of guilty and was sentenced to twenty years imprisonment with ten suspended. The appeal from the conditional plea of guilty is pursuant to Ark. R. Crim. P. 24.3(b).

At the hearing on the motion to suppress and on appeal, the issue is whether the stop of a certain van, in which appellant was a passenger, violated the United States Constitution's prohibition against unreasonable searches and seizures. The trial court held that it did not and on appeal, in an unpublished opinion, we reversed.

The pertinent facts were fairly set out in the division's opinion. On October 6, 1992, the Fort Smith Police Department received an anonymous phone call stating that Billy Ray Johnson and Angela Highsmith were in room 56 at the Stonewall Jackson Inn dealing methamphetamine and that a blue van was being used in the drug sales. Fort Smith police officers, including Terry Grizzle, set up surveillance in a parking lot across the street from the motel. They watched as Ms. Highsmith came out of the motel and entered the van on the driver's side. A few minutes later they saw Mr. Johnson also get into the van.

Officer Grizzle knew both Johnson and Highsmith. He was also aware of Johnson's previous felony drug convictions and had been involved with arresting him on several occasions in the past.

When the van left the Stonewall Jackson Inn, Grizzle called for a marked unit to stop it. Officer Grizzle approached Mr. Johnson and asked him if he was in possession of drugs. Johnson replied that he was not and then consented to a search of the van where methamphetamine was subsequently found.

On this evidence, the panel felt that *Lambert* v. *State*, 34

Ark. App. 227, 808 S.W.2d 788 (1991), governed and that *Alabama* v. *White*, 496 U.S. 325 (1990), was distinguishable. I cannot agree. This case, like *Lambert* and *Alabama* v. *White*, involves an anonymous tip. The question is whether that tip, taken together with other information, would constitutionally permit an investigative stop of a vehicle. Probable cause is required to make an arrest, but an investigative stop may be made upon "reasonable suspicion." Ark. R. Crim. P. 3.1; *Alabama* v. *White, supra; Willett* v. *State*, 298 Ark. 588, 769 S.W.2d 744 (1989); *Lambert* v. *State, supra.* In evaluating the information possessed by the police, courts are to consider the "totality of the circumstances." *See Alabama* v. *White, supra.* The test is, based on the totality of the circumstances, whether these officers had a reasonable suspicion that the defendant was engaged in criminal activity. *See White, supra.*

We summarized the facts in *Alabama* v. *White* in our opinion in *Lambert*:

> In *White* the police officer received a telephone call from an anonymous person, stating that Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attache case. The officers went to Lynwood Terrace Apartments and saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building. The officers saw the defendant leave the 235 building and get into the station wagon. They then followed the defendant as she drove "the most direct route to Dobey's Motel." Just before the defendant reached the motel, she was stopped by the officers who, after obtaining her consent to search, found cocaine in the car.

The United States Supreme Court said in *White*, "Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car."

Again, in *Lambert*, we said:

> If *Alabama* v. *White* was a "close case," we cannot hold that the facts corroborating the tip in the case at bar are sufficient in quality or quantity, under the totality of the circumstances test, to give rise to reasonable suspicion. The only information that the trooper had at the time of the stop which matched with the anonymous telephone call was that he saw a Woodline Motor Freight truck on the highway between Hot Springs and Little Rock at about the time the caller said the truck should be there. In contrast to *White*, there was no confirmation of the departure point and the officers did not follow the truck to see whether it was, indeed, going to Little Rock as the caller predicted. The description of the vehicle here was also less precise.

In my view the facts in the case at bar more clearly permit a finding of reasonable suspicion than those in *Alabama* v. *White*. Here, the officers verified by surveillance that Johnson and Highsmith were at the Stonewall Jackson Inn, leaving in the blue van described in the tip. Unlike the situation in either *White* or *Lambert*, they could verify the identity of the suspects referred to in the tip because the officers knew them. Furthermore, Officer Grizzell had knowledge of appellant Johnson's prior drug convictions and had arrested him in the past.

In the case at bar, the trial judge's finding that the officers had a reasonable suspicion that Johnson was engaged in criminal activity was not clearly erroneous.

COOPER and MAYFIELD, JJ., join in this dissent.

William M. SLAVIK *v.* The ESTATE OF Mike SLAVIK

CA 93-568 880 S.W.2d 524

Court of Appeals of Arkansas
En Banc
Opinion delivered June 15, 1994

Kincade Law Office, by: *Ronald P. Kincade*; and *Osmon, Chism & Ethredge, P.A.*, by: *Kerry D. Chism*, for appellant.

Johnson, Sanders & Morgan, by: *James C. Johnson* and *Roger L. Morgan*, for appellee.

JOHN E. JENNINGS, Chief Judge. Mike Slavik died testate on August 21, 1991, in Mountain Home. He was survived by five children and two stepchildren. His will left to each 16% of the assets of his estate, except for a stepdaughter who received 4%. The will named a son, Joseph Slavik, and a stepson, Edward Bishop, as co-executors.

When the proceeds of a $15,000.00 life insurance policy were not included in the inventory of the estate assets, the appellant, William Slavik, filed an objection. The probate judge held that the life insurance proceeds passed outside the will to the named beneficiaries, Joseph Slavik and Edward Bishop, and on appeal William Slavik argues that the judge's decision was clearly erroneous. We find no error and affirm.

The policy in question was taken out in 1979, at which time the decedent designated his then wife, Mary, as the primary beneficiary. His son, Joseph Slavik, and stepson, Edward Bishop, were designated as contingent beneficiaries. Mrs. Slavik died in April, 1991, and on July 12, 1991, Mr. Slavik signed a change of beneficiary form[1] that read:

Name	Relationship	Date of Birth	Address	Share
Joseph Slavik and Edward Bishop	Co-Executors of Estate or, in the alternative, The Estate of Insured		Rt. 4, Box 263 Mtn. Home, AR 72653	100%

[1]The relevant portion of this form is reproduced at the end of this opinion.

Appellant correctly states the generally governing rules. Provisions in insurance policies as to beneficiaries are construed in accordance with the rules applicable to the construction of wills. *American Foundation Life Ins. Co.* v. *Wampler*, 254 Ark. 983, 497 S.W.2d 656 (1973). The cardinal rule in the interpretation of wills or other testamentary documents is that the intent of the testator should be ascertained from the instrument itself and effect given to the intent. *See Ware* v. *Green*, 286 Ark. 268, 691 S.W.2d 167 (1985). The testamentary gift to an executor, designated as such, vests in him as a fiduciary and not personally, unless the intention of the testator is plainly otherwise. 95 C.J.S. *Wills* § 683 (1957).

Appellant argues, as evidence of the decedent's intent, that had Mr. Slavik wanted the life insurance proceeds to go to Joseph and Edward outright, he need not have executed the change of beneficiary form, because they would have received the proceeds after the death of Mary Slavik anyway. While it is true that this would have been the effect of the 1979 designation, there is no indication that the decedent was doing more than merely "updating" his insurance policy as the result of his wife's recent death, as opposed to making a substantive change. And while it is true that insurance policies will be generally interpreted pursuant to the rules governing the construction of wills, leaving property to a legatee as "executor" is somewhat different from inserting the word "executor" in a change of beneficiary form requiring a statement of the relationship between the policy holder and the beneficiary.

But the most serious difficulty with appellant's argument is that the change of beneficiary designation provided that proceeds would go "in the alternative" to the estate of the insured. If possible, a will (or a change of beneficiary form) must be construed to give force and meaning to every clause and provision; it is only if there is an irreconcilable conflict between two clauses that one must give way to the other. *In re Estate of Lindsay*, 309 Ark. 596, 832 S.W.2d 808 (1992). Had Mr. Slavik intended that his son and stepson take the proceeds of his insurance policy only in a representative capacity, there would obviously be no need for the additional language.

Where, on a fair construction of the entire will, the inten-

> tion of the testator is clearly manifested that the executor should take personally, he may do so. This is particularly true where the executor is a close blood relative of the testator.

95 C.J.S. *Wills* § 683. The only case we have found with facts somewhat similar to the case at bar is *Carter* v. *Hochman*, 269 Cal. App. 2d 28, 74 Cal. Rptr. 669 (1969). There the decedent executed a designation of beneficiary form naming Mrs. Hochman as beneficiary. Under another heading entitled, "Related to me as," the form showed, "administrator and executrix of my will." The appellate court affirmed the trial court's finding that the decedent intended for the beneficiary to take the proceeds in her own right.

For the reasons stated the decision of the trial court is affirmed.

ROBBINS and MAYFIELD, JJ., dissent.

In accordance with the conditions of various Group Policies issued to American Telephone and Telegraph Company and its subsidiary and affiliated companies for Basic Group Life Insurance and Supplementary Group Life Insurance by Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company and Prudential Life Insurance Company of America, I hereby revoke any previous designations of primary beneficiary(ies) and/contingent beneficiary(ies) (if any) (as to all of the Policies covering me) and designate as primary beneficiary(ies) and contingent beneficiary(ies) (if any) in the event of my death, the following:

NAME (SHOW GIVEN NAME)	Relationship	Date of Birth	ADDRESS	SHARE
Joseph Slavik,	Co-Executors of Estate			100%
And	OR: In the alternative,			
Edward Bishop,		The	Estate of Insured	
		Rt. 4, Box 263		
		Mtn. Home, AR 72653		

In the event all said primary beneficiaries predecease me I designate as contingent beneficiaries

Contingent Beneficiary Designation

JOHN B. ROBBINS, Judge, dissenting. I must respectfully dissent from the majority's decision which holds that the probate judge correctly ruled that the proceeds of a life insurance policy were properly payable to Joseph Slavik and Edward Bishop, individually, and not as co-executors of the insured's estate, notwithstanding the fact that the insurance policy designated them beneficiaries, as "co-executors."

The majority opinion appropriately cites the applicable law that provisions in insurance policies as to beneficiaries are construed in accordance with the rules pertaining to the construction of wills, *American Foundation Life Ins. Co.* v. *Wampler*, 254 Ark. 983, 497 S.W.2d 656 (1973), and that a testamentary gift to an executor, especially to an executor designated as such, vests in him as a fiduciary and not personally, unless the intention of the testator is plainly otherwise. 95 C.J.S. *Wills* § 683 (1957). My disagreement with the majority in this case is that I do not believe that there was proof that the intention of the decedent was plainly otherwise. I believe the decedent clearly expressed his intent that Joseph Slavik and Edward Bishop were to receive the insurance proceeds as co-executors by designating them as such in the beneficiary designation form.

The facts are not in dispute and no testimony was introduced before the trial court. Counsel stipulated to the following facts. Mike Slavik was the owner of a $15,000 life insurance policy. In 1979 he made the original beneficiary designation[1] which listed his wife Mary as primary beneficiary, and his step-son Edward Bishop, age 37, and son Joseph Slavik, age 28, as contingent beneficiaries.

In April 1991 Mary died. Mr. Slavik signed a new beneficiary designation form[2] on July 12, 1991, and executed a will on July 22, 1991. On August 21, 1991, Mr. Slavik committed suicide. On the basis of these facts, the probate judge found that:

> [T]he only reasonable interpretation to the Court seems to me to be that the co-executors of the estate was simply to help to identify who these men were and not to designate that it would go to the estate by those words.

I believe the trial court's conclusion was clearly against the preponderance of the evidence for several reasons. First, if it was Mr. Slavik's intention that the insurance proceeds be paid to Joseph and Edward, personally, and not in their capacity as co-executors, it was unnecessary that Mr. Slavik make a new bene-

---

[1]A copy of the form executed in 1979 is reproduced at the end of this dissenting opinion.

[2]A copy of the relevant portion of this form is reproduced at the end of the majority opinion.

ficiary designation. The designation which he made in 1979 provided that the proceeds would be payable to them, individually, if Mary predeceased. While the majority opines that there is no evidence that Mr. Slavik was doing anything more than merely "updating" his insurance policy as the result of Mary's death, I suggest that there is likewise no evidence that he was doing anything less than intentionally changing the capacity in which Joseph and Edward were to receive the insurance proceeds.

Secondly, Mr. Slavik reflected his relationship to Edward and Joseph in his 1979 beneficiary designation form as "stepson" and "son," respectively. He also set forth their respective ages and addresses. This contrasts with the new designation form which he signed on July 12, 1991, where he reflected his relationship to Joseph and Edward to be "co-executors of estate," and did not list their birth dates or ages, nor their addresses, although the form provided space for this information. The address given in this form for the beneficiaries is that of the decedent, Mr. Slavik.

Finally, the trial court and the majority of this court rely most heavily on the words following "co-executors of estate" in holding that Mr. Slavik intended for the proceeds to pass to Joseph and Edward as individuals. The 1991 designation contained this provision following "co-executors of estate":

> or in the alternative the Estate of Insured, Rt. 4, Box 263, Mtn. Home, AR 72653

The majority opinion states that if Mr. Slavik had wanted the proceeds to go to Joseph and Edward in their representative capacities, there would obviously be no need for this additional language. However, an equally reasonable, and perhaps more logical, explanation for this language requires reference to Mr. Slavik's will. The fifth paragraph of the will provides:

> FIFTH: I hereby appoint JOSEPH SLAVIK AND EDWARD BISHOP as Co-Executors of this Will and request that no bond be required of either of them in that capacity. If either of them does not so act, I appoint first, WILLIAM MICHAEL SLAVIK to act in his stead; then, ROBERT SLAVIK, BONNIE A. TETTER, and DAVID RICHARD SLAVIK, in succession. I request that no bond

be required of any executor of this Will.

In this paragraph Mr. Slavik nominated Joseph and Edward as co-executors. He further provided for alternate co-executors in the event either Joseph or Edward would not or could not serve. The order of succession of these alternates is set forth. Rather than attempt to list the names of these four alternate co-executors in the limited space provided in the beneficiary designation form, Mr. Slavik simply listed his estate in the alternative. It is notable that this "in the alternative" provision was not entered in the space designated for contingent beneficiaries, but rather was included in the space designated for the primary beneficiary.

The majority cites *Carter* v. *Hochman*, 269 Cal. App. 2d 28, 74 Cal. Rptr. 667 (1969), as the only case it found with similar facts, and notes that the appellate court affirmed the trial court's finding that the deceased insured intended for the beneficiary to receive the insurance proceeds in her own right. The designation in that case listed a Mrs. Hochman as beneficiary and in the space under a heading entitled "Related to me as," the insured entered "administrator and executrix of my will." A significant distinction between that case and the case at bar is that in Carter v. Hochman the beneficiary, Mrs. Hochman, was not appointed either "administrator" or "executrix" of the insured's estate, nor was she nominated as such in the decedent's will. In the case at bar, Joseph and Edward were in fact nominated by Mr. Slavik's will and appointed by the probate court to serve as co-executors.

For the foregoing reasons I believe the trial court was clearly erroneous in its decision. I would reverse.

MAYFIELD, J., joins in this dissent.

[redacted]

JOINT EXHIBIT

2

20860
Employees Payroll Number

320-18-2543
Employees Social Security Number

Series W
TEL-12
(5-70)

The Equitable Life Assurance Society of the United States

(Name of Insurance Company)

Designation of Beneficiary and Contingent Beneficiary

(Before Completing This Form, See the Reverse Side.)

In accordance with the conditions of Group Policy No. 12450, I hereby revoke any previous designations of beneficiary and contingent beneficiary (if any) and make the following designations of beneficiary and contingent beneficiaries:

I hereby designate as beneficiary, in the event of my death, in Certificate No. 320-18-2543

Name MARY A. SLAVIK
(First) (Middle) (Last)

Relationship WIFE Age 60

Residing at RR#2 BOX 044
(Number) (Street)

City GASSVILLE State ARK Zip Code 72635

In the event said Beneficiary predeceases me, I designate as contingent beneficiaries,

1. Name EDWARD E. BISHOP
(First) (Middle) (Last)

Relationship STEP SON Age 37

Residing at 2700 N CLARK ST.
(Number) (Street)

City CHICAGO State IL Zip Code 60614

2. Name JOSEPH H. SLAVIK
(First) (Middle) (Last)

Relationship SON Age 28

Residing at 7315 S. WHIPPLE
(Number) (Street)

City CHICAGO State ILL Zip Code 60629

3. Name
(First) (Middle) (Last)

Relationship Age

Residing at
(Number) (Street)

City State Zip Code

In equal shares, or to the survivors in equal shares, or all to the survivor. The right to change the beneficiary and contingent beneficiary or beneficiaries hereby designated, without their consent is reserved.

Witnesses: Sherie Allen

Witnesses: Joan Jackson

Witnesses: Beneficiary

Witnesses: Witness

(Signature of Witness) (Full Signature of Employee)

(Department) (Location)

DO NOT ATTEMPT TO ERASE OR MAKE ANY CORRECTION; USE A NEW FORM.

FOR OFFICE USE

CAN BE ISSUED IN DUPLICATE AND SUBMITTED WITH YOUR CERTIFICATE.

Leonard KAY *v.* STATE of Arkansas

CA CR 93-576 · 877 S.W.2d 957

Court of Appeals of Arkansas
En Banc
Opinion delivered June 15, 1994
[Rehearing denied August 17, 1994.*]

James Dunham, for appellant.

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

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

JOHN MAUZY PITTMAN, Judge. Leonard Kay appeals from his conviction at a bench trial of driving while intoxicated, second offense. He contends that the trial court erred in admitting into evidence the results of a breathalyzer test given at the direction of the arresting officer. We affirm.

Prior to his trial, appellant moved to exclude evidence of the breathalyzer test on grounds that the officer had failed to advise appellant of his right to an additional test and to assist him in obtaining such a test as required by Ark. Code Ann. § 5-65-204(e) (Repl. 1993). That section provides:

> 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.

Appellant's motion was denied after a hearing, and the results of the breathalyzer test were admitted against appellant at trial.

At the hearing on appellant's motion, Officer Ben Cross of the Russellville Police Department testified that he stopped appellant's vehicle at approximately 7:00 p.m. on February 21, 1992. After administering several field sobriety tests, Officer Cross arrested appellant for DWI and took him to the police department for a breathalyzer test. Officer Cross testified that he read appellant his rights regarding the administration of the test from a standard rights form. The form specifically included appellant's right to have, at his own expense, a physician, qualified technician, registered nurse, or other qualified person of appellant's choice administer a separate blood, breath, or urine test.

It also stated that the Russellville Police Department would assist appellant in obtaining the additional test. Appellant signed the rights form, acknowledging his understanding of the rights, and agreed to take the breathalyzer. The test results showed appellant's blood-alcohol level to be .218 percent.

Appellant then asserted his right to an additional test. Officer Cross testified that he told appellant that St. Mary's Hospital would perform the test for approximately $400.00. The officer testified that St. Mary's was readily accessible and, to the best of his knowledge, the only facility within his jurisdiction available to perform the blood test. Appellant told the officer that he did not have $400.00 in cash, but insisted that he had checks, that he had an account at St. Mary's, and that the hospital would accept his check. Officer Cross told appellant that, as far as he knew, the hospital had a cash-only policy regarding DWI blood tests. Due to appellant's insistence, Officer Cross telephoned the emergency room at St. Mary's, informed hospital personnel that he had appellant in custody, and asked whether appellant's check would be accepted. The officer testified that he was told that the hospital would accept cash only, payable before performance of the test. Officer Cross testified that appellant, who appeared extremely intoxicated, became very argumentative, saying over and over, "I've got checks. I can pay for it." The officer did not recall appellant saying anything about credit cards. Nor did the officer recall appellant asking to be taken to any other facility, mentioning any other type of test (breath or urine), or requesting any other form of assistance. Because appellant did not have the necessary funds, the officer refused to take appellant to St. Mary's.

On cross-examination, Officer Cross admitted that he had heard that St. Mary's was a very expensive hospital. He denied, however, knowing the prices charged for blood tests by other facilities. He also denied that St. Mary's was the only facility to which he would take a person for an additional test, stating that he would take a suspect to see the qualified person the suspect desired to see.

Appellant also testified at the hearing on his motion. He admitted that Officer Cross informed him of his rights by reading the rights form to him. Appellant testified that he asserted his

right to a blood test as his additional test. He testified that he told the officer that he had with him $200.00 in cash, a couple of checks, and credit cards. Appellant stated that Officer Cross told him that he could not have a blood test unless he had $400.00 in cash. Appellant testified that, subsequent to the date of his arrest, he learned of two or three area medical clinics that perform blood-alcohol tests, including the clinic with which appellant's personal physician is associated. Appellant also testified that his doctor's clinic would accept checks and credit cards. Appellant did not know the accepted methods of payment at the other facilities to which he referred. Nor was there any proof as to the cost of a blood alcohol test at any of the clinics. Moreover, appellant admitted that he never mentioned or asked to be taken to any facility other than St. Mary's. Appellant also admitted that he never asked to telephone a friend or relative who might bring him money for the test. Appellant concluded his testimony by stating that what he found unreasonable was Officer Cross's failure to "take[] me to St. Mary's where I could have made arrangements for payment and gotten my test."

The parties stipulated that a phone call was placed to St. Mary's on the day of the hearing (October 19, 1992) and that hospital personnel stated that credit cards would be accepted for DWI blood-alcohol tests. However, the stipulation did not touch on how long that had been hospital policy. Nor did it touch on whether checks would be accepted.

We note that appellant's motion was not one to "suppress" evidence under Ark. R. Crim. P. 16.2. *Scalco* v. *State*, 42 Ark. App. 134, 856 S.W.2d 23 (1993). Nevertheless, when a defendant moves to exclude a test pursuant to § 5-65-204(e)(2), the State bears the burden of proving by a preponderance of the evidence that the defendant was advised of his right to have an additional test performed and that he was assisted in obtaining a test. *See McEntire* v. *State*, 305 Ark. 470, 472, 808 S.W.2d 762, 763-64 (1991). Substantial compliance with the statutory provision about the advice that must be given is all that is required. *Hegler* v. *State*, 286 Ark. 215, 691 S.W.2d 129 (1985). Furthermore, the officer must provide only such assistance in obtaining an additional test as is reasonable under the circumstances presented. *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985). Whether the assistance provided was reasonable under the cir-

cumstances is ordinarily a fact question for the trial court to decide. *Girdner* v. *State*, 285 Ark. 70, 684 S.W.2d 808 (1985); *Fiegel* v. *City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989). It is for the trial court to weigh the evidence and resolve the credibility of the witnesses. *Girdner* v. *State, supra.*

From our review of the record, we cannot conclude that the trial court erred in denying appellant's motion. According to the testimony of both Officer Cross and appellant, the officer's advice concerning appellant's right to an additional test by the person of his choice literally complied with the statute. And, in light of all of the circumstances in this case, we cannot say that the trial court's finding of reasonable assistance to obtain another test is clearly against the preponderance of the evidence.

Affirmed.

COOPER and ROBBINS, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I cannot agree that the Russellville Police Department provided the appellant with reasonable assistance in obtaining an additional test, as required by Ark. Code Ann. § 5-65-204 (Repl. 1993). That statute provides that, if a breathalyzer test is administered to a DWI suspect by police authorities:

> (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).

We found that reasonable assistance was rendered in *Hudson* v. *State*, 43 Ark. App. 190, 863 S.W.2d 323 (1993). However,

in that case police officers transported the appellant to a local hospital, where the appellant declined to have a blood specimen taken for a blood alcohol test. In the case at bar, the appellant never had the opportunity to have such a test administered because the police officer refused to take him to St. Mary's hospital after informing him that this was the only facility within his jurisdiction which was available to perform the blood test.

Clearly, the "assistance" offered the appellant focused his efforts to obtain an additional test on one particular facility which, Officer Cross admitted, was known to him to be a "very expensive" hospital. This is certainly borne out by the $400.00 price charged for the test. Perhaps the level of assistance offered would have been reasonable had the police officer transported the appellant to the hospital to allow him to make arrangements with the staff regarding available tests and payment options. However, to focus the appellant's efforts to obtain an additional test on a hospital known to be very expensive which requires payment in cash, and then to refuse to transport him to that facility because he, predictably, does not have sufficient funds on his person, is no assistance whatsoever. I believe that the "assistance" offered the appellant actually had a chilling effect on his right to have an additional test, and that more actual assistance would have been rendered by merely providing the appellant with a telephone and a local directory.

I respectfully dissent.

ROBBINS, J., joins in this dissent.

Winston BRYANT, Attorney General *v.*
ARKANSAS PUBLIC SERVICE COMMISSION

CA 93-291 877 S.W.2d 594

Court of Appeals of Arkansas
En Banc
Opinion delivered June 15, 1994

[redacted]

[redacted]

Winston Bryant, Att'y Gen., by: *Shirley E. Guntharp*, Deputy Att'y Gen., for appellant.

Kathleen D. Gardner, and *Wright, Lindsey & Jennings*, by: *N.M. Norton, Jr.*, and *J. Mark Davis* for appellee Arkansas Louisiana Gas Company.

Kirkland & Ellis, by: *James D. Senger* and *Mitchell F. Hertz*; and *The Rose Law Firm, A Professional Association*, by: *Herbert C. Rule III* and *Stephen N. Joiner*, for appellee Arkansas Gas Consumers.

Kenny W. Henderson, for appellee Arkansas Public Service Commission.

JAMES R. COOPER, Judge. In 1992, Arkansas Louisiana Gas Company (ALG) requested a $23 million rate increase from the Arkansas Public Service Commission (Commission). It also sought permission to reallocate its rates among its different classes of customers, including a 15.13% rate increase for its residential customers and a 53% rate decrease for its larger industrial customers. ALG claimed that the costs for providing residential services were being subsidized by its larger industrial customers and that, unless these subsidies were eliminated, ALG was in danger of losing its large industrial customers to bypass.[1] Arkansas Gas Consumers (AGC), a group of industrial and agricultural companies, the Consumer Utilities Rate Advocacy Division of the Attorney General's Office, and the general staff of the Arkansas

---

[1]Bypass occurs when large customers arrange direct access to a pipeline supplier; in addition to diminished contribution to fixed costs, bypass can adversely affect remaining customers by reducing the economies of scale achieved by local distribution companies. Mary Nagelhout, Courts and Commissions, *"Antibypass" Discounts: Load Preservation Without Rate Discrimination*, PUBLIC UTILITIES FORTNIGHTLY, Feb. 1, 1991 at 45-47. "The bypass of a regulated utility may result in stranded investment, duplicative facilities, and higher rates for remaining customers." *Re Transportation, Bypass and Standby Service in the Natural Gas Industry*, 84 PUR 4th 646 (Ark. P.S.C. 1987).

Public Service Commission (Staff) were also parties to this proceeding.

Pursuant to a procedural schedule set by order of the Commission, the various parties filed direct, rebuttal, and surrebuttal testimony in support of their positions on various issues. The Staff conducted extensive discovery of ALG, including an on-premises audit, and afterwards, ALG reduced its requested rate increase to $17.4 million. Staff responded that its audit showed ALG was only entitled to an $11.1 million increase in rates.

A hearing on ALG's rate application was scheduled for November 2, 1992. Approximately four days prior to the hearing, ALG and Staff began discussing settlement of the issues contained in ALG's application. Although invited to participate, the Attorney General declined to participate in the negotiations but was kept informed of the parties' progress. On November 2, the Commission convened for the hearing on ALG's rate application, at which time ALG's attorney notified the Commission that Staff and ALG had reached agreement on the issues involved and asked that the Commission recess the hearing so that a joint proposed stipulation could be filed with the Commission. Staff and AGC joined in ALG's motion; AGC stated that it anticipated it would join in the stipulation. The Attorney General objected to both the Commission's consideration of the stipulation and the granting of a recess. The Commission heard the parties' opening statements, obtained public comments, and admitted the prefiled testimony into evidence before it recessed. The Commission reconvened the following morning and announced it would hear testimony for and against the Joint Proposed Stipulation (JPS). The Attorney General again objected to the Commission's consideration of the JPS but did not request a continuance. ALG, AGC, and Staff then presented testimony in support of the JPS. The Attorney General was allowed to cross-examine these witnesses as well as any other witnesses of the parties on the JPS or ALG's application for a rate increase. The Attorney General also presented testimony in opposition to the adoption of the JPS. At the end of the hearing, the Commission allowed the parties to file briefs supporting or opposing the JPS.

In Order No. 13, entered on December 18, 1992, the Commission approved the JPS. The Commission, in a thirty-five-page order, found that the JPS produced "rates which were just and rea-

sonable for all classes of ALG's customers" and therefore concluded that "the JPS is in the public interest. . . ." It noted that ALG had requested a rate increase of $17.4 million, that Staff had recommended an increase of $11.1 million, and that the $13.5 million increase included in the JPS represented a blending of the parties' relative positions. The Commission also found that the Attorney General was given a full opportunity to be heard on the merits of both the JPS and ALG's application and that the Commission had the authority to consider and adopt the JPS without the approval of the Attorney General. The Commission further found that the statutory requirements set forth in Ark. Code Ann. § 23-4-101 (1987) had been followed and there was no violation of the Attorney General's due process rights. After making extensive findings of fact as to why the Commission found the JPS to be in the public interest and supported by substantial evidence, the Commission concluded:

> Accordingly, the Commission finds and orders as follows:
>
> 1. The Commission has the jurisdiction and authority to consider the JPS as a reasonable resolution of all issues pending in this proceeding. The AG's objection to the JPS does not bar the Commission from considering and approving the JPS within the context of this proceeding if the Commission finds that the JPS is supported by substantial evidence and is just and reasonable.
>
> 2. The JPS is supported by substantial evidence and produces rates that are just and reasonable for all classes of ALG's customers. Therefore, the JPS is in the public interest and is hereby approved.
>
> 3. ALG is hereby authorized to prepare and file in this docket proposed tariffs designed to properly reflect the terms of the JPS.

On January 19, 1993, the Attorney General petitioned for rehearing of Order No. 13, and when its petition was deemed denied, the Attorney General filed his notice of appeal.

We first address the Attorney General's argument that the Commission did not have the authority to approve the JPS over the objection of the Attorney General. Arkansas Code Annotated

§ 23-2-301 (1987) vests the Commission with the power and jurisdiction, and makes it the Commission's duty, "to supervise and regulate every public utility defined in § 23-1-101 and to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty." The Commission was created to act for the General Assembly, and it has the same powers that body would have when acting within the powers conferred upon it by legislative act. *Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 557-59, 593 S.W.2d 434, 440 (1980).

The Attorney General contends that he is the sole party to the proceeding representing the interests of the Arkansas ratepayers and that no authority exists giving the Commission permission to approve a stipulation over the ratepayers' objections. The fact that Ark. Code Ann. § 23-4-303 (1987) gives the Attorney General the power to represent all classes of utility ratepayers before the Commission does not mean that the Attorney General has veto power over the methodology employed by the Commission in setting rates. The Commission has broad discretion in choosing an approach to rate regulation and is free, within its statutory authority, to make any reasonable adjustments which may be called for under particular circumstances. *Associated Natural Gas Co.* v. *Arkansas Pub. Serv. Comm'n*, 25 Ark. App. 115, 118, 752 S.W.2d 766, 767 (1988). "Authority to advocate a position on behalf of small businesses and residential consumers is not equivalent to authority to decide what is in the public's best interest." *City of El Paso* v. *Public Util. Comm'n*, 839 S.W.2d 895, 905 (Tex. Ct. App. 1992).

The Attorney General also contends that the Commission is bound by the same limitations that courts of law are in accepting settlements of the parties. This argument, however, ignores the distinction between settlements in the administrative law setting from settlements in civil actions:

> It is well to note at the outset that "settlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. As we shall see later, in agency proceedings settlements are frequently suggested by some,

> but not necessarily all, of the parties; if on examination they are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all the parties, even though not all are in accord as to the result. This is in effect a "summary judgment" granted on "motion" by the litigants where there is no issue of fact.
>
> This difference in procedure between the courts and regulatory agencies stems from the different roles each is empowered to play: the court must passively await the appearance of a litigant before it; once the court's process has been invoked, the litigant is entitled to play out the contest, unless he and the other litigant reach a mutually agreed settlement or one of several summary disposition procedures is successfully invoked by his adversary. On the other hand, the regulatory agency is charged with a duty to move on its own initiative where and when it deems appropriate; it need await the appearance of no litigant nor the filing of any complaint; once the administrative process is begun it may responsibly exercise its initiative by terminating the proceedings at virtually any stage on such terms as its judgment on the evidence before it deems fair, just, and equitable, provided of course the procedural requirements of the statute are observed. Only by exercising such "summary judgment" or "administrative settlement" procedures when called for can the usual interminable length of regulatory agency proceedings be brought within the bounds of reason and the agencies' competence to deal with them.
>
> Whether the summary action of any agency in a particular case is fair, just, equitable, and in accord with the procedure required by law is a matter for judicial review, as in the case at bar.

Pennsylvania Gas and Water Co. v. *Federal Power Comm'n*, 463 F.2d 1242, 1246 (D.C. Cir. 1972).

The Attorney General also argues that Rule 3.10 of the Commission's Rules of Practice and Procedure supports his argument that the Commission could not adopt a non-unanimous stipulation. This rule provides:

> All parties to any proceeding or investigation before the Commission may, by written stipulation filed with the Commission or entered in the record, agree upon the facts or any portion thereof involved in the controversy, which stipulation shall be regarded and used as evidence at the hearing. It is desirable that the facts be thus agreed upon whenever practicable. The Commission may, in such cases, require and introduce such additional evidence as it may deem necessary.

The Attorney General construes this rule to require all parties to consent to a stipulation before it can be considered by the Commission. The Commission, however, interprets this rule to urge the Commission to consider a stipulation of the parties and not to mandate that all parties must consent to a stipulation before it can be considered. An agency's or department's interpretation of its own rules and regulations is not binding upon the courts but is nevertheless highly persuasive; the agency's interpretations of its own rules is controlling unless plainly erroneous or inconsistent. General Tel. Co. of the Southwest v. Arkansas Pub. Serv. Comm'n, 23 Ark. App. 73, 87, 744 S.W.2d 392, 400 (1988), aff'd 295 Ark. 595, 751 S.W.2d 1 (1988). We cannot say the Commission's interpretation is clearly erroneous.

Moreover, the situation here is not a first occurrence which may be regarded as unique. The Attorney General has participated in non-unanimous stipulations in past proceedings before the Commission. *See Arkansas Electric Energy Consumers* v. *Arkansas Public Service Commission*, 35 Ark. App. 47, 813 S.W.2d 263 (1991), where this Court affirmed the Commission's approval of a stipulation which had been entered into by AP&L, the Attorney General, and Staff, but not by Arkansas Energy Consumers. Although the question of whether a stipulation required unanimous support of the parties was not raised on appeal in that case, the appellant, AEEC, did argue that the Attorney General, by supporting the settlement, failed to provide effective and aggressive representation for the people of Arkansas. This Court held, however, that throughout the agreement were recitations as to why the public interest would be served by its adoption and that the Attorney General was attempting to fulfill his mandate by signing it.

The adoption of non-unanimous stipulations has also been approved in other jurisdictions. In *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283, 312-14 (1974), the Supreme Court held that the Federal Power Commission has the authority to adopt as a rate order a settlement proposal which lacked unanimous agreement of the parties to the proceeding and that the choice of an appropriate structure for the rate order is a matter of Commission discretion, to be tested by its effects; the choice is not the less appropriate because the Commission did not conceive of the structure independently. *See also Attorney General of New Mexico* v. *New Mexico Pub. Serv. Comm'n*, 111 N.M. 636, 808 P.2d 606, 610-11 (1991). *See also Cities of Abilene* v. *Public Util. Comm'n of Texas*, 854 S.W.2d 932, 939 (Tex. Ct. App. 1993); *City of El Paso* v. *Public Util. Comm'n*, 839 S.W.2d at 903.

We hold that the Commission's statutory authority is clearly broad enough to allow the Commission to *consider* stipulations entered into by some of the parties to a proceeding in approaching rate regulation. Of course, the Commission must afford a non-stipulating party adequate opportunity to be heard on the merits of the rate application and the stipulation agreed to by some of the parties, and the Commission must make an independent finding, supported by substantial evidence, that the stipulation resolves the issues in dispute in a way which is fair, just and reasonable, and in the public interest. *See Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. at 312-14; *Attorney General of New Mexico* v. *New Mexico Pub. Serv. Comm'n*, 808 P.2d at 610; *accord Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. at 65-73, 813 S.W.2d at 274.[2]

The Attorney General also argues that, at the hearing held on November 2, the Commission erroneously shifted the burden of proof from ALG to the Attorney General. The burden of justifying any change in rates is on the party seeking the change. *See General Tele. Co. of the Southwest* v. *Arkansas Pub.*

---

[2]Nothing in this opinion, however, should be read to suggest that a settlement, even if it enjoys unanimous consent of the parties, can be approved by the Commission absent an independent finding by the Commission, supported by substantial evidence, in the record, that the settlement resolves the matters in dispute in a way that is fair, just and reasonable, and in the public interest.

Serv. Comm'n, 23 Ark. App. at 82, 744 S.W.2d at 397. The Attorney General contends that, by considering the JPS before it considered whether ALG was entitled to a rate increase, the Commission shifted the burden to the Attorney General to prove that the JPS was not in the public interest rather than requiring ALG to justify its need for an increase in rates. In support of this contention, the Attorney General contends that the Commission only conducted a summary hearing for the sole purpose of considering the JPS; that neither ALG, Staff, nor AGC put on any witnesses on the rate case and instead relied on "unsworn, prefiled testimony," and that, at the end of the hearing, the Commission only requested briefs on whether the stipulation was in the public interest and whether it could be approved over the objection of the Attorney General but did not request briefs on ALG's rate increase.

The Attorney General's argument, however, disregards over 1,500 pages of prepared testimony and 886 pages of accompanying exhibits which were introduced into evidence at the hearing before the Commission ever considered the JPS. The Attorney General does not argue that this "unsworn testimony," which was admitted into evidence without objection, was not sufficient to meet ALG's burden, nor has he cited any authority for his suggestion that it is not credible evidence. From this evidence alone, the Commission could have found that ALG had met its burden of proving it was entitled to a rate increase. Moreover, in addition to this substantial prefiled evidence, four witnesses testified at the hearing in support of the JPS which included increased rates for ALG. This testimony not only addressed the merits of the JPS but also ALG's underlying request for a rate increase and reallocation.

The Attorney General complains that ALG did not carry its burden because it did not orally present the testimony of every witness who had submitted prefiled testimony in this docket, although these witnesses were present at the hearing. The Attorney General also complains that Staff did not choose to cross-examine any of ALG's witnesses and therefore this burden then fell on the Attorney General. While the Attorney General may have been relying on Staff to carry the burden of disputing ALG's evidence, Staff's refusal to cross-examine does not mean that ALG did not carry its burden of proving it was entitled to a rate increase.

Furthermore, contrary to the Attorney General's allegation, Staff witness Donna Campbell testified at the hearing in support of ALG's rate increase. From our review, we cannot say that the Commission shifted the burden of proof or that ALG failed to meet its burden of proof.

For his third point, the Attorney General argues that he was denied due process because his right to a hearing on ALG's rate application was denied. The Attorney General contends that, because at the beginning of the hearing on ALG's rate application the Commission announced that it would hear testimony in support of and opposition to the JPS, a hearing was not conducted on ALG's rate application thereby denying him his right to a full and fair hearing.

A fundamental requirement of due process in matters of public utility regulation is a full and fair hearing, and the basic elements of a full and fair hearing are that all those whose rights are involved have the opportunity to be heard, to submit evidence and testimony, to examine witnesses and present evidence or testimony in rebuttal to adverse positions. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. at 64, 813 S.W.2d at 273. The Attorney General, in attacking the procedure before the Commission as a denial of due process, has the burden of proving its invalidity. *Id.* at 64-65, 813 S.W.2d at 273.

All the parties' witnesses were present at the hearing. The Attorney General had the opportunity to cross-examine any witness with reference to their view on both the JPS and ALG's rate request. In fact, the Commission, during the course of the hearing, advised the Attorney General that this was his opportunity to cross-examine any of the witnesses on any matters concerning ALG's rate application and the JPS. The fact that the Commission chose to hear testimony regarding the JPS at the hearing on ALG's rate application does not mean that the Commission proceedings were limited to consideration of the JPS.

The rates and proposals included in the JPS are clearly within the parameters of testimony filed by ALG and Staff and are equivalent to testimony in support of ALG's need for a rate increase. As such, it was not improper for the Commission to consider it at the beginning of the hearing. The Commission is not bound to consider the evidence before it in any par-

ticular order. The Commission has wide discretion in choosing its approach to rate regulation, and it is not our function to advise the Commission as to how to make its findings or exercise its discretion. *See Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 24 Ark. App. 142, 144, 751 S.W.2d 8, 9 (1988). As trier of fact in rate cases, it is within the province of the Commission to decide on the credibility of witnesses, the reliability of their opinions, and the weight to be given their evidence. *Associated Natural Gas Co.* v. *Arkansas Pub. Serv. Comm'n*, 25 Ark. App. at 124, 752 S.W.2d at 771. The Attorney General was afforded every opportunity to participate in the proceedings below, and we cannot agree that he was denied a full and fair hearing on ALG's rate application or the JPS.

The Attorney General also contends that he was not provided proper notice of the rates established by the JPS or the hearing on the JPS. Although the Attorney General acknowledges that proper notice was given of the hearing on ALG's application for a rate increase, he contends that separate notice was required for the Commission's consideration of the JPS because it contains rates different than those requested in ALG's original application. The Attorney General cites several statutes and Commission rules in support of this argument; however, we do not agree they would require separate notice in the situation at bar. The rates included in the JPS are lower than those sought by ALG in their application and prefiled testimony and higher than those recommended originally by Staff; therefore, the Attorney General and other interested parties had notice of the range of rates likely to be involved at the hearing. The Attorney General was also aware of the negotiations between the parties because he was invited to take part in them, although he declined to do so. Therefore, he cannot claim surprise. More importantly, although the Attorney General objected to the Commission's consideration of the JPS, he failed to raise the issue of lack of proper notice at the hearing and, therefore, has not preserved this issue for appeal. Arguments raised for the first time on appeal are not considered. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. at 66, 813 S.W.2d at 274.

For his final point, the Attorney General challenges the sufficiency of the evidence supporting the rate increase granted to ALG, which is the amount suggested in the JPS. The Attorney

General argues that the JPS is merely a summary of the blended positions of ALG, AGC, and Staff and that nowhere either in the "unsworn prefiled testimony" or the "summary" proceeding before the Commission is there substantial evidence to support the JPS. Specifically, the Attorney General contends that the $13.5 million revenue deficiency, the 9% pre-tax rate of return, the allocation of LUFG[3] in rates, the customer charge, the method and numbers on the cost allocation, the class allocation methodology, and the pre-tax return on the Cast Iron Gas Main Replacement Program (CIGMRP) proposal are not supported by any evidence in the record.

Our review of appeals from the Public Service Commission is limited by the provisions of Ark. Code Ann. § 23-2-423(c)(3), (4), and (5) (Supp. 1993), which defines our standard of review as determining whether the Commission's findings of fact are supported by substantial evidence, whether the Commission has regularly pursued its authority, and whether the order under review violated any right of the appellant under the laws or the Constitutions of the State of Arkansas or the United States. *Associated Natural Gas Co.* v. *Arkansas Pub. Serv. Comm'n*, 25 Ark. App. 115, 118, 752 S.W.2d 766, 767 (1988). If an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then the appellate court must affirm the Commission action. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 76, 813 S.W.2d 263, 277 (1991). The appellate court views only the evidence most favorable to the appellee in cases presenting questions of substantial evidence, *id.*, and the burden is on the appellant to show a lack of substantial evidence to support an administrative agency's decision. *See City of El Paso* v. *Public Util. Comm'n of Texas*, 839 S.W.2d 895, 906 (Tex. Ct. App. 1992).

In reviewing the sufficiency of the evidence to support Order No. 13, it is appropriate for this Court to consider the JPS; as it is the functional equivalent of testimony in support of the rates it establishes by the parties proposing it. The JPS is therefore evidence that the rates included in it are just and rea-

---

[3]LUFG is the difference between the total volume of gas purchased from all sources and the volume delivered and billed to customers.

sonable. *See Cities of Abilene* v. *Public Util. Comm'n of Texas*, 854 S.W.2d 932, 938-39 (Tex. Ct. App. 1993).

The Attorney General argues that the Commission merely rubber-stamped the JPS and made no independent findings that the rates established by the JPS are just and reasonable. The Attorney General contends that Staff's agreement to allow ALG an increase of $13.5 million in additional rates, which is a $2.5 million increase over the $11.1 million Staff recommended in its prefiled testimony, is without evidentiary support. Although the Attorney General acknowledges that there is evidence in the record that supports rates higher and lower than those included in the JPS, he claims that, because there is no evidence in the record that supports the exact figures adopted by the JPS, it is not supported by substantial evidence. This argument is without merit.

The JPS represents a compromise of the parties' relative positions on different issues. As the Commission correctly noted, it could have adjudicated a result similar to the JPS had there not been a proposed settlement. To hold that the Commission could not adopt the JPS because no party in the prefiled testimony testified in support of the exact same terms as those included in the JPS would effectively eliminate the Commission's power to set rates which it finds are just and reasonable. The Commission is never compelled to accept the opinion of any witness on any issue before it, nor is it bound to accept one or the other of any conflicting views, opinions, or methodologies. *General Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 23 Ark. App. at 83, 751 S.W.2d at 397-98.

We also note that, in arguing that the JPS is not supported by substantial evidence, the Attorney General challenges individual elements of the JPS rather than its effect as a whole. However, if the total effect of a rate order cannot be said to be unjust, unreasonable, unlawful, or discriminatory, judicial inquiry is concluded. *Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 568, 593 S.W.2d 434, 445 (1980).

The Commission had for its consideration the voluminous prefiled testimony and exhibits which were admitted into evidence at the beginning of the hearing without objection. Throughout Order No. 13, the Commission not only makes numerous fac-

tual findings but also refers to specific pages in the prefiled testimony of various witnesses in support of ALG's entitlement to a rate increase and reallocation of its rates among its various classes of customers. It is evident from reading Order No. 13 that the Commission relied on the prefiled testimony to find that the result suggested by the JPS was in the public interest. Furthermore, Staff witness Donna Campbell testified at the hearing specifically in support of the rates included in the JPS. She testified that she addressed cost allocation and rate design in her direct and surrebuttal prefiled testimony and that, in the negotiation of these issues, Staff considered the cost of service, consumer impact, customer impact, and also potential bypass. She testified that the present revenue requirement charged residentials is $143,787,440.00 and that the revenue requirement under the JPS for residentials will be $160,924,311.00, which is an increase of 11.92% and that this increase would have resulted in approximately a $17.1 million increase, but that Staff and ALG settled on a revenue deficiency of approximately $13.5 million with the $4 million differential being made up by an increase for GS-1 and GS-2 customers. She also testified that the revenue requirement for residential customers which is suggested in the JPS is the same figure for that class which was developed in her surrebuttal testimony and that this figure did not change during negotiations. Attorney General witness Basil Copeland, on being questioned by the Commission, admitted that results, similar to those reached in the JPS, could have been reached by the Commission from the parties' prefiled testimony.

The evidence on which the Commission relied in finding the rates suggested in the JPS is supported by substantial evidence and that adoption of the JPS is in the public interest is reviewed in detail in Order No. 13, and for this Court to do so also is unnecessary and would unduly lengthen this opinion. Suffice it to say that we have reviewed the evidence and find that Order No. 13 is supported by substantial evidence and is not unjust, arbitrary, unreasonable, unlawful, or discriminatory, and therefore, we affirm.

Affirmed.

MAYFIELD, J., concurs.

Renard D. CHROBAK *v.* EDWARD D. JONES & CO., Ray Raley, and William Nichols

CA 93-664 878 S.W.2d 760

Court of Appeals of Arkansas
Division II
Opinion delivered June 15, 1994

Donald J. Adams and *John Putman*, for appellant.

Shults, Ray & Kurrus, by: *Steve Shults*, for appellees.

JAMES R. COOPER, Judge. The appellant filed a complaint seeking to vacate an unfavorable award granted by an arbitration panel. The trial judge declined to vacate the arbitration award, finding that the appellant failed to raise a substantive issue sufficient to avoid the arbitration procedure and the finality of the award. From that decision, comes this appeal.

For reversal, the appellant contends that the court erred in dismissing his motion to vacate the arbitration award without first allowing him to engage in discovery proceedings or giving him an evidentiary hearing. We find no error and affirm.

In 1982, the appellant made an investment with the appellees. The appellant's investment was eventually lost, and he sought damages through arbitration in the amount of $75,655.00, contending wrongful conduct on the part of the appellees. An arbitration panel comprised of Harvey Bell, Garland Binns, and Mr. Harkins (hereinafter referred to as "Panel 1") was formed to decide the appellant's claim, and Binns was elected chairman. At Panel 1's hearing of the claim, the appellant appeared pro se and was allowed to present testimony and to introduce documentary evidence. After the hearing was concluded, but before a decision was handed down, arbitrator Harvey Bell questioned the role of the National Association of Security Dealers (NASD) in the selection of Panel 1. He contended that Chairman Binns, who had been appointed as a public arbitrator, should have been classified as a securities industry arbitrator. Mr. Bell also alleged that Binns had made evidentiary decisions without a two-thirds

vote of the panel. Because of Mr. Bell's allegations, which could have resulted in questions being raised after a decision by Panel 1, the arbitrators of Panel 1 resigned without making an award and decided the matter should be referred to a newly-constituted panel (hereinafter referred to as "Panel 2.") By a letter dated August 10, 1989, NASD attorney John Barlow informed the parties of the alleged problems with Panel 1 and the need for the appellant's claim to be reheard by a second panel. Among other things, his letter advised the parties that Harvey Bell had questioned Mr. Binns' status as a public arbitrator and that Mr. Bell felt that the entire panel did not participate in the evidentiary decisions as required by the Code of Arbitration Procedure.

In response to this letter, the appellant wrote to Mr. Barlow and suggested that the second panel review the exhibits and taped recordings from the first hearing held before Panel 1 rather than hold another hearing. Mr. Barlow then sent the parties a second letter which advised them of the appellant's suggestion.

The parties were later advised of the names of the arbitrators who were to comprise Panel 2. There being no objection, Panel 2 met and reviewed the tapes and exhibits from the first hearing, determined they were adequate for a decision, and that there was no reason to see the parties in person or request further testimony. Panel 2 then rendered its decision dismissing the appellant's claim.

The appellant filed a complaint in the Boone County Circuit Court, seeking to vacate Panel 2's award, obtain a full evidentiary hearing with regard to the conduct of the arbitration proceedings in Cause No. 88-00359, and after such hearing, for his cause to be remanded for arbitration in a fair, just, and impartial manner. The appellant alleged that he had proceeded with arbitration in front of Panel 1 with the true bias, prejudice, and the background of the panel members hidden and camouflaged from him; that such bias and prejudice had impacted the conduct of the entire proceedings, including but not limited to the introduction and rejection of evidence as well as the deliberations of the panel; that Harvey Bell had informed the NASD that the appellant had not received a fair and impartial hearing but that such information was not divulged to the appellant; and that he was merely informed that there had been procedural irregulari-

ties in the formation of Panel 1 and they had therefore resigned without rendering an award.

The appellant also filed an affidavit which was considered by the court in making its determination. The affidavit repeats the allegations in the appellant's complaint to vacate and adds that, since the rendition of his award, he, along with Harvey Bell, had been interviewed for the ABC program "20/20," and, in the course of that interview, he learned that Bell had filed a dissent in connection with the hearing held by Panel 1 and had made a statement to the "20/20" interviewer that the appellant had not received a fair hearing.

In his affidavit, the appellant also states that the "20/20" video program was shown in June 1990. It is clear from the video that Harvey Bell was not aware that the appellant had been given a second hearing at the time he was interviewed. On March 11, 1993, the trial court entered its order denying the appellant's motion for an evidentiary hearing and confirming the arbitration award.

On appeal, the appellant asserts that the trial court erred in dismissing his motion to vacate without allowing him to engage in discovery or giving him an evidentiary hearing. Judicial review of an arbitration award is more limited than appellate review of a trial court's decision; whenever possible, a court must construe an award so as to uphold its validity. *Arkansas Dep't of Parks and Tourism* v. *Resort Managers, Inc.*, 294 Ark. 255, 260, 743 S.W.2d 389 (1988).

> The fact that parties agree to submit their disputes to arbitration implies an agreement to be bound by the arbitration board's decision, and every reasonable intendment and presumption is in favor of the award; it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or misfeasance or malfeasance. Unless the illegality of the decision appears on the face of the award, courts will not interfere merely because the arbitrators have mistaken the law, or decided contrary to the rule of established practice as observed by courts of law and equity. *Alexander* v. *Fletcher*, 206 Ark. 906, 175 S.W.2d 196 (1943); *Kirsten* v. *Spears*, 44 Ark. 166 (1884).

McLeroy v. *Waller*, 21 Ark. App. 292, 294, 731 S.W.2d 789 (1987). Generally, Arkansas follows other states' courts in discouraging setting aside arbitration awards. *See Department of Parks* v. *Resort Managers*, 294 Ark. at 260. Arkansas Code Annotated § 16-108-212(a) (1987) provides in part:

> (a) Upon application of a party, the court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud, or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;. . .

In *Arkansas Department of Parks & Tourism* v. *Resort Managers, supra*, the Court explained "undue means":

> *[U]ndue means* . . . means something akin to fraud and corruption. "Undue means" goes beyond the mere inappropriate or inadequate nature of the evidence and refers to some aspect of the arbitrator's decision or decision-making process which was obtained in some manner which was unfair and beyond the normal process contemplated by the arbitration act.

Id. at 260 (quoting *Seither & Cherry Co.* v. *Illinois Bank Bldg. Corp.*, 95 Ill. App. 3d 191, 419 N.E.2d 940 (1981)).

Although the appellant makes no contention that Panel 2 was biased or prejudiced against him, he argues that he was not given a fair hearing because Panel 2's decision was based on the record made in the first hearing; however, it is well established that the interest, partiality, or bias which will overturn an arbitration award must be certain and direct, and not remote, uncertain or speculative, and the party attempting to set aside the award bears the burden of proof to establish partiality. *Dean Witter Reynolds, Inc.* v. *Deislinger*, 289 Ark. 248, 251, 711 S.W.2d 771 (1986). The trial court found that the appellant failed to demonstrate a factual nexus between Panel 1 and Panel 2, stating that:

> It is axiomatic that if Plaintiff is to prevail that he must show and legally demonstrate a factual nexus between

the second arbitration panel and the first arbitration panel of such a character as to taint the entire arbitration procedure. Indeed the factual nexus must prove such abuse, prejudice or pervasive misconduct that the decision of the second panel would be nullity.

. . . .

However, contrary to the factual assertions by the Plaintiff and conceding the propriety of the second panel by both parties, the Court finds the following to be shown by the record — specifically the decision by the second panel of arbitrators:

1. That Plaintiff initiated the second proceeding and specifically recommended the procedure of reliance on the exhibits and cassette tapes by the second panel; and

2. That the Plaintiff was certainly placed on notice of problems of potential issues with respect to the initial panel, but chose not to require any further explanation; and

3. That the new panel independently considered the evidence and considered the submitted evidence to be adequate and no further testimony was needed.

Defects in proceedings prior to or during arbitration may be waived if a party acquiesces to the arbitration with knowledge of the defects; moreover, if the impeaching party's own action contributes to a variance from the prescribed procedure, such party may be estopped to complain of the variance. *Gibbons* v. *United Transportation Union*, 462 F. Supp. 838, 842 (E.D. Ill. 1978). When the reasons supporting an objection are known beforehand, failure to object will not be excused. *Apperson* v. *Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). The successful party in a grievance may not rely on the failure to object for bias, however, unless all the facts now argued as to the alleged bias were known as the time the joint committee heard their grievances. *Id.* at 1358-59. We hold that the trial court did not err in holding that the appellant failed to establish a factual nexus between Panels 1 and 2.

Nor do we think the chancellor erred in refusing to allow the appellant an evidentiary hearing. The appellant has failed to show how deposing Harvey Bell would show any bias or prejudice on the part of the second panel. A court is not required to permit discovery in order to allow a party seeking to vacate an arbitration award to determine whether arbitrators disregard the law in reaching an award. *See O.R. Securities, Inc.* v. *Professional Planning Assoc., Inc.*, 857 F.2d 742, 748-49 (11th Cir. 1988). If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record that the arbitrator knew the law and expressly disregarded it; a party seeking to vacate an arbitration award on the ground of manifest disregard of the law may not proceed by merely objecting to the results of the arbitration. *Id.* at 747.

In denying the appellant's request for an evidentiary hearing, the trial court stated:

> The proper conduct of review in this case requires that the issue of the demand for an evidentiary hearing be resolved preliminarily. Under the factual content it is readily apparent that the limited focus of an evidentiary hearing would be to discover or to explore the issue of bias or prejudice by the original arbitrators. Such a hearing would then be premised upon the existence of a pervasive taint originating in the first hearing and its having adversely impacted the second hearing. The court finds from a complete and concerned review of all things — pleadings, exhibits, arbitration award, affidavit of Plaintiff, letters of arbitration panel, and the dissenting opinion of Harvey L. Bell, Arbitrator — that the single factual component is the statement in the latter opinion that, "Mr. Binns, as Chairman, ruled on the introduction or rejection of evidence without the formal vote of two-thirds of the panel." The Court so holds, being mindful of blanket statements of bias and prejudice, but the Court cannot and the Plaintiff has not, shown how any other issue of taint could transfer itself from one hearing to another.

The appellant cites *Legion Insurance Co.* v. *Insurance General Agency, Inc.*, 822 F.2d 541 (5th Cir. 1987), for the proposition that evidentiary hearings are required where a party's motion

challenges the misconduct or bias of an arbitrator. In that case, the appellant claimed the district court's failure to take evidence other than that submitted in the motion severely prejudiced its ability to present the merits of its claim. Although the court affirmed the district court's denial of a hearing, it stated in dictum: "We recognize that some motions challenging arbitration awards may require evidentiary hearings outside the scope of the pleadings and arbitration record. . . . Such matters as misconduct or bias of the arbitrators cannot be gauged on the face of the arbitral record alone." 822 F.2d at 542-43. The court went on to state:

> The error in Appellant's argument with respect to its case is exposed by the remedy it would adopt. Although it asserts no fact sought to be proved if we were to remand for evidentiary development, appellant suggests it would depose "anyone present" at the arbitration proceeding, including the arbitrators, to "recreate the evidence presented as completely as possible." Appellant's bases for vacating or modifying the arbitration award amounted, however, to evidentiary challenges and unsupported assertions that the arbitrators impermissibly calculated the award. Courts have repeatedly condemned efforts to depose members of an arbitration panel to impeach or clarify their awards. To permit time-consuming, costly discovery simply to replicate the substance of the arbitration would thwart its goal. The statutory bases for overturning an arbitral tribunal are precisely and narrowly drawn to prohibit such complete de novo review of the substance of the award, as distinguished from gross calculation errors or inadequacies in the makeup of the tribunal itself. The district court was well within its discretion to dispose of the issues before it on the record submitted by the parties.
>
> Arbitration proceedings are summary in nature to effectuate the national policy favoring arbitration, and they require "expeditious and summary hearing, with only restricted inquiry into factual issues." This case posed no factual issues that required the court, pursuant to the Arbitration Act, to delve beyond the documentary record of the arbitration and the award rendered. Discovery of the sort desired by IGAI would result in the court's reviewing the factual and legal accuracy of the award, a task this circuit has foreclosed.

Id. at 543 (citations omitted).

[redacted] The appellant also relies on *Andros Compania Maritima* v. *Marc Rich & Co.*, 579 F.2d 691 (1978), in which the appellant moved to vacate an arbitration award and sought an evidentiary hearing. In affirming the district court's denial of an evidentiary hearing, the appellant Marc Rich claimed that one of the arbitrators had failed to disclose information that might have created an impression of bias and that the district court denied him an adequate opportunity to present his claim that the arbitrator had not made a full and fair disclosure. The court noted, however, that the appellant in that case had not demonstrated that the arbitration award should be set aside, but only that it was denied a chance to show why it should be done.

> Judge Brieant obviously regarded Marc Rich's petition as a classic example of a losing party seizing upon "a pretext for invalidating the [arbitration] award." *Commonwealth Coatings*, supra, 393 U.S. at 151, 89 S.Ct. at 340 (White, J., concurring). We believe that the judge properly denied discovery on this issue and was justified in refusing to explore it further.
>
> In so deciding, we do not dispute the authorities maintaining that the discovery procedures of the Federal Rules of Civil Procedure are generally applicable to Title 9 proceedings. But in the special context of what are in effect post hoc efforts to induce arbitrators to undermine the finality of their own awards, we agree with the district court that any questioning of arbitrators should be handled pursuant to judicial supervision and limited to situations where clear evidence of impropriety has been presented.

Id. at 702-03 (citations omitted). Given the absence of clear evidence of impropriety with respect to Panel 2, we cannot say that the trial judge erred in denying the appellant's request for an evidentiary hearing.

Affirmed.

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

ARKANSAS DEPARTMENT OF HUMAN SERVICES
Child Support Enforcement Unit *v.* Nathaniel FORTE

CA 93-745 877 S.W.2d 949

Court of Appeals of Arkansas
Division II
Opinion delivered June 15, 1994

Mark Woodville, for appellant.

Rodney McDaniel and *Rick C. Schumaker*, for appellee.

JOHN B. ROBBINS, Judge. This appeal is from a judgment of the Little River County Chancery Court which awarded current and back child support in a paternity action. Appellant, the Department of Human Services, contends the chancellor erred in considering appellee's other illegitimate children in setting support for the child involved in this action and that the chancellor's award of past child support is deficient. For the reasons hereinafter explained, we affirm the award of back child support but reverse the chancellor's award of current support and remand for further consideration.

U.T. was born out of wedlock on March 10, 1976, to Barbara Trotter. On April 16, 1992, appellant, as assignee of Ms. Trotter, filed a complaint against appellee, Nathaniel Forte, alleging that he is the biological father of U.T. and seeking both prospective and retrospective child support. Blood tests were ordered by the court, but prior to trial appellee stipulated that he is U.T.'s father. A hearing was then held on the amount of child support to be awarded.

At trial, appellee testified that he has worked for Weyerhaeuser for the past fifteen years and that his usual take-home pay is between $250.00 and $260.00 per week after taxes, a $20.00

credit union fee, and health insurance are deducted. He testified that he pays rent of $150.00 per month, drives a 1978 Chevrolet Malibu automobile, and currently has $10.00 in savings and $20.00 to $30.00 in a checking account. He further testified that he has two other illegitimate children, three-year-old twins, by another woman. He stated that he helps support these children, although they do not live with him and he is not under a court order to do so. He stated that he could not put a dollar figure on the support he provides them but gets them whatever they need.

In reference to U.T., appellee testified that he has been providing support for him since he was born based on what Ms. Trotter has requested and U.T.'s needs. He stated that the reason Ms. Trotter has never needed public assistance in the past is because he pitched in at times when she needed extra help.

Barbara Trotter testified that she makes $10,000.00 to $11,000.00 annually, has been continuously employed since U.T.'s birth, and has always supported him. She stated that appellee has paid her less than $100.00 in the past year for U.T.'s support and that he has never paid her over $300.00 in any year. She testified that she has been threatening to file a paternity action against appellee for years but did not because she thought she would be able to work things out with him.

At the conclusion of the hearing, the chancellor awarded appellant current child support of $35.00 per week, although the child support chart provides $57.00 per week for one dependent at appellee's income level. The chancellor stated that he was not following the chart because of appellee's other two children and the fact that a paternity action would probably be brought on their behalf in the future. The order entered by the court did not give any reason for the chancellor's decision not to follow the chart.

Arkansas Code Annotated § 9-12-312(a)(2) (Repl. 1991) provides:

> 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.

At the time of the hearing, the applicable family support chart was set out in the supreme court's per curiam *In Re: Guidelines for Child Support Enforcement*, 305 Ark. 613 (1991). In this per curiam, the supreme court also listed the factors the court should consider in determining whether an amount specified by the chart is unjust or inappropriate. Payments made to support other children were not included in this list; however, these payments were specified in the per curiam's definition of income.

> Income refers to the definition in the federal income tax laws, less proper deductions for:
>
> 1. Federal and state income tax;
> 2. Social security (FICA) or railroad retirement equivalent;
> 3. Medical insurance paid for dependent children; and
> 4. Presently paid support for other dependents by Court order.

Id. at 615.

Appellant first argues that the chancellor abused his discretion in considering appellee's other two illegitimate children as justification for deviating from the child support chart. Appellant contends that the child support guidelines allow the chancellor to consider only those children that appellee is under a court order to support as justification for not ordering the amount set by the chart.

A chancellor, however, is not prohibited from considering other matters in addition to the child support chart in setting the amount of support. *Clark* v. *Tabor*, 38 Ark. App. 131, 135, 830 S.W.2d 873, 875 (1992). The child support chart and the criteria used for deviating from it are not conclusive, and there

may be other matters in addition to the child support chart that have a strong bearing upon determining the amount of support. *Stewart* v. *Winfrey*, 308 Ark. 277, 280, 824 S.W.2d 373, 377 (1992).

In *Waldon* v. *Waldon*, 34 Ark. App. 118, 123-24, 806 S.W.2d 387, 390 (1991), this Court recognized that a payor spouse's children by his present marriage could be considered by a chancellor in determining financial ability to support another child. This holding was again recognized in *Clark* v. *Tabor*, 38 Ark. App. at 135, 830 S.W.2d at 875, where this Court stated that a payor spouse's other children, even if not supported under a court order, may be considered in determining the financial ability to support another child.

In the case at bar, there was evidence from which the chancellor could have found that appellee contributes to his other children's support. Therefore, we cannot say the chancellor's consideration of these children in setting support is in error. Nevertheless, we must reverse and remand this award to the chancellor because the method the chancellor employed in determining appellee's child support obligation is not appropriate.

It appears that the chancellor applied appellee's income figure of $270.00 to the chart under the column for three dependents, which showed support of $101.00, and then divided that figure by three, to arrive at support for U.T. of $35.00. In *Waldon* v. *Waldon, supra*, this Court held that the chart should be applied to the child that is before the court and that it is improper for the chancellor to have applied the chart based on three dependents and then divide that amount by three. "The result of applying the chart as the chancellor did here is that the amount of support for the one child was diluted, as the chart is structured so that the amount of support per child decreases in proportion to the number of added dependents." 34 Ark. App. at 123, 806 S.W.2d at 390. Therefore, we must remand this decision to the chancellor with instructions to apply the chart based on the one child that is before it and then, if the chancellor finds this amount unjust or inequitable, to make such adjustments as he considers necessary supported by written findings.

Appellant for its second point contends the trial court erred in awarding only $6,000.00 for past support. In making

this award, the chancellor stated that, based upon the equities of the case, the length of time Ms. Trotter waited in bringing the action, "everything considered," arrearage would be awarded in the amount of $6,000.00. The grant or denial of an award of back child support in a paternity action rests upon the equities of a particular case, and in order to find that the chancellor committed reversible error, the appellate court would have to hold that his findings in this regard are against the preponderance of the evidence. *Arkansas Dep't of Human Servs.* v. *Hardy*, 316 Ark. 119, 126-27, 871 S.W.2d 352, 357 (1994); *Green* v. *Bell*, 308 Ark. 473, 479-80, 826 S.W.2d 226, 230 (1992); and *Ryan* v. *Baxter*, 253 Ark. 821, 824-25, 489 S.W.2d 241, 244 (1973). In *Arkansas Department of Human Services* v. *Hardy*, the supreme court refused to reverse a chancellor's denial of back support in a paternity action, stating that the question is simply what is fair. 316 Ark. at 126, 352 S.W.2d at 357.

Under the circumstances of this case, we cannot say the chancellor's determination of what is fair is clearly against the preponderance of the evidence. Appellee testified that he has been providing support for U.T. since his birth. Although Ms. Trotter testified that appellee never paid over $300.00 in any year, she waited until U.T. was seventeen before bringing an action for support. Accordingly, we affirm the $6,000.00 award of back support and, on the issue of current support, reverse and remand for entry of an order consistent with this opinion.

Affirmed in part; reversed and remanded in part.

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

Robert William GADBERRY, Jr. *v.* STATE of Arkansas

CA CR 93-926 877 S.W.2d 941

Court of Appeals of Arkansas
Division II
Opinion delivered June 15, 1994

Christopher O'Hara Carter, P.A., by: *Christopher O'Hara Carter*, for appellant.

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

JOHN B. ROBBINS, Judge. On February 4, 1993, appellant Robert Gadberry was found guilty before a jury of sexual abuse in the first degree and was sentenced to five years in the Arkansas Department of Correction. On appeal it is argued that the court erred in: (1) allowing the state to introduce testimony from the criminal investigator concerning statements made by the victim; (2) allowing a social worker to stand next to the victim while she testified; (3) allowing into evidence testimony about other acts allegedly committed by the appellant; (4) denying appellant's motion for a directed verdict; and, (5) allowing two counts of sexual abuse to go before the jury.

The fourth argument raised in appellant's brief is that the trial court erred in denying his motion for a directed verdict based on insufficiency of the evidence. Under the rationale of *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992), we review the sufficiency of the evidence prior to a review of trial errors. In a challenge to the sufficiency of the evidence we must determine whether there is substantial evidence to support the verdict; substantial evidence must be forceful enough to compel a conclusion one way or the other passing beyond suspicion and conjecture. Id. In determining whether there is substantial evidence to support the jury's verdict, it is permissible to consider only that testimony which tends to support the verdict of guilt. *Winters* v. *State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993).

In this case appellant was charged with violating Ark. Code Ann. § 5-14-108(a)(3) (1987), which provides:

> (a) A person commits sexual abuse in the first degree if:
>
> * * *
>
> (3) Being eighteen (18) years old or older, he engages in sexual contact with a person not his spouse who is less than fourteen (14) years old.

Arkansas Code Annotated § 5-14-101(8) defines sexual contact as any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female.

The seven-year-old victim in this case testified that appellant touched her on her privates through her clothing. The victim testified that she asked appellant to stop but he would not leave her alone. She further testified that appellant had "tickled" her before, but this touching was different from the tickling.

Jim Carr, a criminal investigator with the Marion County Sheriff's Department, testified that he interviewed the victim after the alleged incidents. Carr testified that the victim stated appellant touched her in her private area on two occasions. When asked what her private area was, the victim indicated to him that it was her crotch area.

During the course of the investigation Investigator Carr took a statement from the appellant after he signed a rights form and initialed beside each listed right. In the statement appellant admitted rubbing the victim's "back part" for a "few minutes." In the statement appellant admitted to touching both the seven-year-old victim and her younger sister on their "private parts." Based on the above, we find that there was sufficient evidence for the jury to convict appellant of sexual abuse in the first degree.

As his first argument appellant contends that "the trial court erred in conducting a hearing pursuant to Rule 804(b)(7) of the Arkansas Rules of Evidence without the child testifying although she was in the courthouse and by not allowing the [appellant] to put on any witnesses concerning the child's truthfulness." Appellant contends that it was error to allow the criminal investigator, Mr. Jim Carr, to testify at trial as to statements made by the victim because the Rule 804(b)(7)(A) hearing was improperly con-

ducted and because Rule 804(b)(7) was inapplicable inasmuch as the child-victim was available and in fact testified at the trial.

The Rule in question, Rule 804(b)(7) of the Arkansas Rules of Evidence, provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (7) Child hearsay in criminal cases. A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:
>
> (A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.
>
> 1. The spontaneity of the statement.
>
> 2. The lack of time to fabricate.
>
> 3. The consistency and repetition of the statement and whether the child has recanted the statement.
>
> 4. The mental state of the child.
>
> 5. The competency of the child to testify.
>
> 6. The child's use of terminology unexpected of a child of similar age.
>
> 7. The lack of a motive by the child to fabricate the statement.

8. The lack of bias by the child.

9. Whether it is an embarrassing event the child would not normally relate.

10. The credibility of the person testifying to the statement.

11. Suggestiveness created by leading questions.

12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence. [Amended by Per Curiam dated May 11, 1992.]

At the pretrial hearing on this matter the state alleged that the child victim was unable to remember everything which occurred in the same detail as when she spoke to Investigator Carr. The victim did not testify during the pretrial hearing. Although it would have been well had the child testified at this pretrial hearing, the rule does not require it. Mr. Carr testified to the trustworthiness of her statement. He testified that the child's answers were spontaneous, "there was not hesitation in her answer." Other factors to which Carr testified indicating trustworthiness included: no difficulty in remembering; no bias against appellant; no leading questions were asked; and the terminology used to indicate the area appellant touched.

Appellant contends that the pretrial hearing was improperly conducted because he was not permitted to call the child-victim's mother as a witness. When appellant advised the court that he wished to call the mother to testify the court inquired as to what her testimony would be. Appellant responded that the mother would testify that the victim talked to her about a single pinching incident and never related anything about something hap-

pening to her brother or sister. The court stated that such testimony would not affect its decision because the fact that the alleged victim only made a limited statement initially is typical in cases of sexual abuse of children. The appellant did not then attempt to call the mother to testify.

Appellant's additional argument under this point is that the Rule 804(b)(7) hearsay exception is inapplicable because Rule 804 exceptions only apply if the declarant is "unavailable." Here, not only was the child-victim/declarant available to testify, the child actually testified. However, Rule 804(a)(3) defines "unavailability as a witness" to include a declarant who testifies to a lack of memory of the subject matter of his statement. *See David* v. *State*, 269 Ark. 498, 601 S.W.2d 864 (1980). The child-victim testified that appellant touched her privates through her clothing on two occasions but could not recall when this occurred, nor the details of the second touching. Investigator Carr testified that the victim related to him that these two incidents occurred once in appellant's home and once in the victim's home, and that these events occurred sometime after Christmas, 1991.

If a witness has only a partial recollection, the witness may be partially unavailable. In *McCormick on Evidence*, 4th ed., § 253, p. 130-131 (1992) it is stated:

> Preliminarily it may be observed that while the rather general practice is to speak loosely of unavailability of the witness, the crucial factor is actually the unavailability of his testimony. As will be seen, the witness may be physically present in court but his testimony nevertheless unavailable.

McCormick goes on to provide that if the forgetfulness is only partial, the appropriate solution would be resort to present memory to the extent of recollection, supplementing with the hearsay testimony to the extent required. *Id.* at 133.

We conclude that the victim was partially "unavailable" due to her lack of memory. The trial court found the victim's statement introduced through Investigator Carr was trustworthy and met the requirements of Rule 804(b)(7). A trial court's rulings on matters pertaining to the admission of evidence is within the judge's discretion. His rulings will not be set aside absent an

abuse of discretion. *Roleson* v. *State*, 277 Ark. 148, 640 S.W.2d 113 (1982). As pointed out in *Duvall* v. *State*, 41 Ark. App. 148, 852 S.W.2d 144 (1993), the danger of the admission of hearsay statements without the opportunity to question the reliability of the assertion is alleviated by the opportunity to cross-examine the declarant. *Citing Idaho* v. *Wright*, 110 S. Ct. 3139 (1990). The victim/declarant was subject to cross-examination in this case. Furthermore, the hearsay testimony, although more specific, was duplicative of the victim's testimony as well as the appellant's confession, and could be considered harmless error under *Vann* v. *State*, 309 Ark. 303, 831 S.W.2d 126 (1992). We cannot say that the trial judge abused his discretion in allowing investigator Carr to testify as to statements made by the victim.

Appellant alleges for his second point on appeal that the trial court erred in allowing a Department of Human Services social worker to stand next to the victim while she testified. The court overruled appellant's objection, stating:

> The Court has already seen the witness in this case, and can tell how upset and distraught the witness was simply coming into the courthouse. So the Court, just from my own subjective impressions, realizes that this child needs emotional support, certainly as does any victim, but probably more than the typical victim in a case such as this. So I'm going to allow the DHS worker to stand there beside the witness chair.

Arkansas Rules of Evidence Rule 616 states:

> *Rule 616. Right of victim to be present at hearing.* — Notwithstanding any provision to the contrary, in any criminal prosecution, the victim of a crime, and in the event that the victim of a crime is a minor child under eighteen (18) years of age, that minor victim's parents, guardian, custodian or other person with custody of the alleged minor victim shall have the right to be present during any hearing, deposition, or trial of the offense.

The Department of Human Services had custody of the victim at the time of appellant's trial and had the right to have its representative present in the courtroom during the trial under the above rule. In the case of *Wallace* v. *State*, 314 Ark. 247, 862 S.W.2d

235 (1993), the mother of a victim was allowed to accompany her child to the witness stand. As in *Wallace*, the social worker accompanying the victim to the witness stand is of no consequence since appellant has not shown that any prejudice resulted. Prejudice will not be presumed and we do not reverse absent a showing of prejudice. *Id.*

Several other jurisdictions have allowed similar seating arrangements in cases involving minor victims who testify about sexual abuse. *See Boatwright* v. *State*, 385 S.E.2d 298 (Ga. App. 1989)(defendant's rights not violated when foster parent of child victims allowed to stand behind children during their testimony); *Stranger* v. *State*, 545 N.E.2d 1105 (Ind. App. 1 Dist. 1989)(presence of silent supportive adult seated behind child witnesses was not inherently prejudicial and did not violate due process rights); *State* v. *Rogers*, 692 P.2d 2 (Mont. 1984)(no prejudice shown where child witness permitted to testify while sitting on the prosecuting attorney's lap); *State* v. *Johnson*, 528 N.E.2d 567 (Ohio App. 1986), *cert. denied*, 498 U.S. 826 (1990)(trial judge did not err in permitting eight-year-old victim to testify while sitting on aunt's lap); *State* v. *Dempier*, 764 P.2d 979 (Or. App. 1988)(trial court entitled to permit child victim to testify while sitting on foster mother's lap); *Commonwealth* v. *Pankray*, 554 A.2d 974 (Pa. Super. 1989)(trial court did not abuse its discretion by permitting child witness to sit in grandmother's lap while testifying — no prejudice shown); *Mosby* v. *State*, 703 S.W.2d 714 (Tex. App. 13 Dist. 1985)(a guardian ad litem who was seated behind child witness during child's testimony did not affect jury's assessment of the witnesses' credibility); *State* v. *Hoyt*, 806 P.2d 204 (Utah App. 1991)(witness of tender years may be accompanied to witness stand by an adult to ease the inherent emotional turmoil of testifying); *State* v. *Jones*, 362 S.E.2d 330 (W.Va. 1987)(no prejudice shown in allowing seven-year-old victim to testify while sitting on foster mother's lap).

Appellant's third point on appeal is that the trial court erred in denying his motion in limine and allowing into evidence testimony concerning other acts allegedly committed by the appellant. During the trial the victim and Investigator Carr testified about appellant improperly touching the victim's siblings. This testimony was admissible under the rationale of *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987), where the supreme court stated:

> [W]e will allow such testimony to show similar acts with the same child or other children in the same household when it is helpful in showing 'a proclivity toward a specific act with a person or class of persons with whom the accused has a intimate relationship.'

Id. at 71, *quoting White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986). Appellant's third point is without merit.

Appellant's final point on appeal is that the trial court erred in allowing two counts of sexual abuse to go to the jury when there was insufficient evidence to support one of the charges. Again, appellant alleges prejudice but fails to identify it. Appellant also fails to cite any authority for this alleged error. We do not consider assignments of error that are unsupported by convincing argument or authority. *Womack* v. *State*, 36 Ark. App. 133, 819 S.W.2d 306 (1991).

Affirmed.

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

Dino PALAZZOLO *v.* NELMS CHEVROLET

CA 93-877 877 S.W.2d 938

Court of Appeals of Arkansas
Division II
Opinion delivered June 15, 1994
[Rehearing denied August 17, 1994.]

Tolley & Brooks, P.A., by: *Jay N. Tolley*, for appellant.

Walter A. Murray, for appellee.

JOHN B. ROBBINS, Judge. Appellant Dino Palazzolo filed a workers' compensation claim, alleging that he suffered an injury while working for Nelms Chevrolet on September 23, 1991. He sought temporary total disability benefits, medical expenses, and attorneys fees. The Administrative Law Judge found that Mr. Palazzolo sustained a compensable injury, but denied temporary total disability benefits because the law judge found that he refused employment suitable to his capacity to work. The Administrative Law Judge (ALJ) did, however, award temporary partial disability benefits. Both parties appealed and the Workers' Compensation Commission found that Mr. Palazzolo sustained a compensable injury, but that he failed to prove that he was entitled to temporary total disability benefits. The Commission vacated the ALJ's award of temporary partial disability benefits because Mr. Palazzolo had not sought temporary partial disability benefits. Mr. Palazzolo now appeals, arguing that substantial evidence does not support the Commission's finding that he failed to prove that he is entitled to temporary total disability benefits. Alternatively, Mr. Palazzolo contends that the Commission erred as a matter of law in reversing the ALJ's award of temporary partial disability benefits. He also asserts that the Commission erred in allowing into evidence the deposition of Dr. James McKenzie.

The evidence shows that Mr. Palazzolo sustained a work-related back injury when he slipped and fell on September 23, 1991. He immediately reported the accident to his employer and

sought medical treatment. He was x-rayed and prescribed a cervical collar and physical therapy. In December of 1991, Mr. Palazzolo was released by Dr. James McKenzie to return to light duty work. He returned to work for Nelms Chevrolet on a part-time basis performing duties such as sweeping floors. Mr. Palazzolo testified that three weeks after returning to work, his supervisor told him not to come back until he was capable of performing his regular full-time duties.

Mr. Palazzolo now argues that the Commission erred in determining that he failed to prove by a preponderance of the evidence that he is temporarily totally disabled. In order to be entitled to temporary total disability compensation, the claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway and Transportation Department* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). On appeal, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's finding and affirm if supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

We find that substantial evidence supports the Commission's determination that Mr. Palazzolo failed to prove that he suffered a total incapacity to earn wages and therefore was ineligible for temporary total disability benefits. Prior to releasing Mr. Palazzolo back to work, Dr. McKenzie relied on surveillance video tapes of appellant washing cars. These videos show movements inconsistent with Mr. Palazzolo's testimony regarding his limitations. He is shown rotating his neck and back, squatting, extending his arms in continuous movements, and engaging in other physical activities. Moreover, the evidence indicates that after being released to work, Mr. Palazzolo was able to sweep and perform other light duty. In addition, he admitted that he worked without pay at his step-father's church and was able to sweep,

mop, and take out the trash. There is also evidence that Mr. Palazzolo was able to do yard work. Evidence of these activities supports the Commission's finding that Mr. Palazzolo was not totally incapacitated for employment purposes.

Mr. Palazzolo further contends that the Commission erred in vacating the ALJ's award of temporary partial disability benefits. Citing *Arkansas Louisiana Gas Co.* v. *Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983), the Commission vacated the award. It ruled that, although Mr. Palazzolo submitted the issue of temporary total disability, the ALJ erred in considering temporary partial disability because this issue was not presented by either party. In *Grooms*, we held that it was error for the ALJ and Commission to consider an issue which was not presented by either party, and we stated:

> It is also clear from the statements of counsel in the record and the contentions of the parties as recited by the Administrative Law Judge that the case was submitted on an agreement that it would be determined on a finding as to whether the Statute of Limitations was tolled by the payment of Dr. Carter's medical expenses within the two years preceding the date of filing the claim. Whether the statute was tolled because of the latent nature of the injury and appellee's lack of awareness of the extent and nature of it was not an issue and was not developed at the hearing. With the clear statement of counsel that the issue to be presented was whether the Statute of Limitations had been tolled by the payment of compensation within the statutory period, the decision by the Administrative Law Judge based upon a finding of fact on an issue not submitted or developed by either party effectively denied the employer the right to be heard on that issue . . . .

10 Ark. App. at 100, 661 S.W.2d at 438.

It is true that Mr. Palazzolo did not raise temporary partial disability as an issue. However, unlike in *Grooms*, this issue was developed by the evidence in the case. The issues presented by the claim for temporary total disability included whether Mr. Palazzolo had reached his maximum healing period and whether he suffered wage loss disability as a result of his injury.

These are the same issues that the Commission would need decide in addressing temporary partial disability. The appellee employer was not denied the right to be heard on temporary partial disability because it was aware that temporary total disability was being claimed and its defense to total disability benefits would be substantially the same as its defense to partial disability benefits. Furthermore, when a claimant alleges that he is temporarily totally disabled, an employer should expect that the claimant may be eligible in the alternative to temporary partial disability benefits.

In *Grooms*, we stated that "[h]ad the issue of latent injury been fully developed by the parties despite the stipulations narrowing the issues a different question would be presented." This indicates that, even if the parties have not presented an issue to the Commission, the Commission may consider the issue if it is fully developed during the proceedings. In this case, we have an issue which was not presented but was fully developed, and we think the ALJ was correct in considering that issue. Therefore, we reverse and remand to the Commission to determine whether Mr. Palazzolo is entitled to an award of temporary partial disability benefits.

Mr. Palazzolo's remaining argument is that the Commission erroneously allowed into evidence the deposition of Dr. James McKenzie. He contends that Dr. McKenzie had seen the videos prior to being deposed by the appellee, that he did not know the doctor had seen the videos, and he was thus denied a fair cross-examination of the witness. This argument is without merit because the ALJ granted a continuance and gave Mr. Palazzolo the opportunity to view the videos and redepose Dr. McKenzie at the appellee's expense. Mr. Palazzolo refused to redepose Dr. McKenzie. Therefore, he cannot now successfully argue that he was denied an opportunity to cross-examine when it is clear that he was afforded such an opportunity but declined to exercise it.

For the above reasons, we affirm the Commission's finding that Mr. Palazzolo failed to prove his entitlement to temporary total disability benefits. We reverse and remand only as to the issue of whether Mr. Palazzolo is entitled to temporary partial disability benefits.

Affirmed in part, reversed and remanded in part.

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

Troy Lee ROGERS *v.* Laura Jane ROGERS a/k/a Villines

CA 93-931 877 S.W.2d 936

Court of Appeals of Arkansas
Division II
Opinion delivered June 15, 1994

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

Davis & Goldie, by: *James E. Goldie*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Troy Rogers appeals from an order of the Boone County Chancery Court in a child custody proceeding which denied in part his request to consider evidence of events which pre-dated a previous child custody hearing and order. Mr. Rogers contends on appeal that the chancellor erred in refusing to consider this proof in determining the best interest of the child and deciding his petition for a change of custody. We find no error and affirm.

The history of this case shows that Mr. Rogers and appellee Laura Villines were divorced by decree on June 27, 1984. By agreement in 1985, Ms. Villines was given custody of the parties' minor child, now approximately twelve years old. In 1989, Mr. Rogers was denied a change of custody. In July of 1990, he was awarded custody of the parties' minor child upon a finding by the court that a change in circumstances had occurred and that it was in the child's best interest that custody be placed with Mr. Rogers. However, in August of 1991 following a full evidentiary hearing the chancellor again awarded custody of the child to Ms. Villines. Then in June of 1992, Mr. Rogers filed another petition for change of custody, again alleging that a change in circumstances existed which warranted such change.

In March of 1993 a pretrial hearing was held in which Mr. Rogers sought to introduce certain depositions and affidavits which contained evidence of conduct and events which occurred

prior to the August 1991 hearing and order. Mr. Rogers contended that this evidence should have been admitted to show that it was in the child's best interest to change custody because of the mother's life style. The trial court ruled, after reviewing all of the depositions and affidavits in question, that some of the evidence pertaining to events pre-dating the 1991 hearing was admissible but the balance was not admissible because the portions ruled inadmissible were "not of such importance that the child's welfare requires they be admitted." The trial court cited to proper authority that "under some circumstances evidence which was not presented before [the] court [could] not be asserted at a later hearing." *Swindle* v. *Swindle*, 242 Ark. 790, 415 S.W.2d 564 (1967).

Mr. Rogers contends on appeal that all of the matter contained in these depositions and affidavits should have been admitted because the best interest and welfare of the child so required that it be considered.

On appeal from chancery court cases, this court considers the evidence de novo, and the chancellor's decision will not be reversed unless it is shown that his decision is clearly against a preponderance of the evidence. *Thigpen* v. *Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). As stated in *Greening* v. *Newman*, 6 Ark. App. 261, 263, 640 S.W.2d 463, 465 (1982), the general rule regarding evidence is that if a litigant fails to develop his case fully when it is first heard upon its merits the law does not afford him a second chance by permitting him to bring in additional proof which might have been offered in the first instance. This court, as well as the supreme court, has held that although the best interest of the child is the controlling issue in custody cases, when a parent fails to produce evidence available to him at one hearing, he cannot rely upon that evidence in a later effort to win a change of custody. *Swindle, supra; Greening, supra.* A decree fixing the custody of a child is a final adjudication on conditions then existing and should not be changed afterwards unless on altered conditions after the decree was rendered or on material facts existing at the time of the decree, but unknown to the court, and then only if the welfare of child so requires. *Henkell* v. *Henkell*, 224 Ark. 366, 273 S.W.2d 402 (1954); *Phelps* v. *Phelps*, 209 Ark. 44, 189 S.W.2d 617 (1945); *Thigpen* v. *Carpenter, supra; Carter* v. *Carter*, 19 Ark. App. 242,

719 S.W.2d 704 (1986); *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986).

In this case the chancellor reviewed the depositions and affidavits in question and ruled that portions of them were inadmissible. The trial court, citing *Thigpen* v. *Carpenter, supra*, found that some of the evidence in the depositions pertaining to conduct which pre-dated the August 1991 hearing and order was inadmissible because it was not of such importance that the child's welfare required its admission. After carefully reviewing the record and the excluded evidence in question, we are unable to say the chancellor abused his discretion in the evidentiary ruling, nor that his decision is clearly against the preponderance of the evidence.

Ms. Villines argues on appeal that the issues involved in the present appeal are moot because the chancellor transferred jurisdiction to Florida. However, she fails to cite us to any argument or authority that the Arkansas Court of Appeals lacks jurisdiction to hear the present appeal. Assignments of error unsupported by convincing argument or authority will not be considered on appeal. *Smith* v. *Smith,* 41 Ark. App. 29, 848 S.W.2d 428 (1993). *See also;* Ark. R. App. P. 2; Ark. Sup. Ct. R. 1-2; *see generally, Blosser* v. *Blosser*, 2 Ark. App. 37, 616 S.W.2d 29 (1981).

Affirmed.

PITTMAN and MAYFIELD, JJ., agree.

Diane HARRIS *v.* HANSON INDUSTRIES and
Travelers Insurance Company

CA 93-466 878 S.W.2d 1

Court of Appeals of Arkansas
En Banc
Opinion delivered June 15, 1994

Denver L. Thornton, for appellant.

Michael E. Ryburn, for appellees.

MELVIN MAYFIELD, Judge. This is an appeal from the Arkansas Workers' Compensation Commission.

At a hearing before an administrative law judge on January 22, 1992, it was stipulated that appellant suffered a compensable injury on February 6, 1989, that appellee paid temporary disability through August 1, 1990, and that appellee paid a 12 percent rating to the body subsequent to that date. The appellant contended that she was entitled to continued total disability benefits for an indefinite period of time and to treatment by Dr. John Yocum. The appellees contended appellant was not entitled to additional permanent disability benefits and that the treatment which had been rendered by Dr. Yocum was an unauthorized change of physician. This appeal involves only the treatment rendered by Dr. Yocum up to the date of the law judge's opinion.

The appellant testified that she fell on ice while at work, hitting her shoulder and hip. She was treated first in the emergency room at Warner Brown Hospital in El Dorado and subsequently by El Dorado doctors Gary Bevill (her family physician), J.C. Callaway and Robert S. Bell (orthopedic surgeons), and Dr. David L. Reding (a Little Rock neurosurgeon). Appellant testified that she got no better under the treatment of any of these physicians and that there was nothing comfortable that she could do. On March 17, 1989, appellant signed an A-29 form.

On July 5, 1989, Dr. Bevill released appellant to return to work. She went back and tried to work, but had to go home after approximately two hours. Appellant testified that she returned to Dr. Bevill who really did not know what her problem was, and he said he could refer her to another physician if she liked. Appellant said she first asked about Dr. Grimes (a Little Rock orthopedic surgeon); that Dr. Bevill said it would take a long time to get an appointment with him but maybe he could get her an appointment with another physician in the same suite of offices; that Dr. John Yocum's name then came up and she said "fine." Appellant testified that Dr. Bevill made the call to Dr. Yocum and made her first appointment.

Appellant was first seen by Dr. Yocum on July 12, 1989, and on that same day, Dr. Yocum wrote Dr. Bevill it was his impression that appellant was developing a frozen shoulder.

On July 13, 1989, Dr. Bevill wrote to appellee Travelers Insurance Company (appellee's insurance carrier) that appellant continues to have pain and has requested a second opinion by an out-of-town orthopedic doctor, and "this is being arranged at the present time."

The medical records show that on January 15, 1990, Dr. Yocum reported in a letter to Travelers that he had performed arthroscopy on appellant's left shoulder, and she was admitted post-operatively to the Baptist Medical Center and discharged on January 16, 1990. The record also shows that after Dr. Bevill wrote Travelers on July 13, 1989, that appellant "has requested a second opinion by another out-of-town orthopedic doctor" and that "this is being arranged at the present time," Dr. Yocum wrote to Travelers during the period of August 9, 1989, through Novem-

ber 29, 1991, some 21 letters informing them of appellant's progress. These letters show that after Dr. Yocum had treated appellant for a long period of time, keeping Travelers informed of these treatments, he wrote them on January 11, 1990, that he thought "arthroscopic acromioplasty is now warranted" and that "I will schedule her for this at Baptist Medical Center." The appellees even admitted paying part of Dr. Yocum's bill, but said this was done by mistake.

The law judge issued an opinion which held that appellant was not entitled to total disability for an indefinite period, and the treatment of Dr. Yocum was unauthorized; however, he appointed Dr. Yocum "as claimant's authorized treating physician." The full Commission also found Dr. Yocum's past treatment to be unauthorized. The Commission stated:

> In summary, claimant knew the procedure to be followed in order to change physicians and was represented by an attorney. If she had wanted to change physicians to Dr. Yocum, her attorney could have filed a petition for a change and this current problem admittedly would not have arisen. However, claimant did not follow that procedure; therefore, respondent is not liable for Dr. Yocum's treatment.

On appeal, appellant contends Dr. Yocum's treatment was a referral and a written request for change of physician was not required; that Travelers Insurance Company waived its right to object to Dr. Yocum's treatment by paying his bills; and that Travelers Insurance Company is estopped to deny benefits because appellant relied upon Travelers' position that it would accept Dr. Yocum and did not file a change of physician form. Appellant argues that the carrier knew that a formal request for a change of physician had not been filed, but did not demand it or object, and that she relied in good faith on the carrier's conduct and changed her position to her detriment. Appellant asserts that the issue of waiver was raised before the law judge and that the issue of estoppel was raised in her brief before the Commission. She states that in a brief to the Commission she argued as follows:

> The crux of this case is this: If the carrier wanted to dispute the treatment and care by Dr. John H. Yocum, they

> should have done so early on and not paid the bill. I could have then come into court, got a change of physician to Dr. Yocum, and this problem would never have arisen. Therefore, they should have waived the right to contest the change of physician and should be estopped to deny it. It is even more interesting that the ALJ has now appointed Dr. Yocum as the treating physician.
>
> The remainder of Dr. Yocum's bill should be ordered paid.

This brief is not in the record before this court, but the Commission's opinion refers to appellant's brief to the Commission in the discussion of its holding that Dr. Yocum's treatment was unauthorized. The law judge's opinion refers to appellant's contention of waiver, but the Commission's opinion makes no finding as to whether the carrier had waived the right to contest the change of physician or was estopped from denying it. Because these issues appear to have been before the Commission, and have been argued by both parties in this court, we find that this matter should be remanded to the Commission for a finding on the issues of waiver and estoppel.

We, therefore, defer final ruling in this appeal until the Commission files with this court a copy of its opinion ruling on the issues of waiver and estoppel. No additional evidence should be taken by the Commission, and we leave to it the question of whether it should have additional briefs from the parties.

Remanded.

COOPER, J., dissents.

JAMES R. COOPER, dissenting. I dissent because I believe that there is no substantial evidence to support the Commission's finding that Dr. Yocum's treatment resulted from an unauthorized change of physician. In my view, reasonable minds could, on this record, conclude only that Dr. Yocum's treatment followed a valid referral.

We have held that a request for a referral from a treating physician does not constitute a change of physician so long as the request does not result from "doctor shopping." *TEC* v. *Underwood*, 33 Ark. App. 116, 802 S.W.2d 481 (1991). Furthermore, in *White* v. *Lair Oil Co.*, 20 Ark. App. 136, 725 S.W.2d 10 (1987),

we reversed the Commission's finding of a change-of-physician where the treating physician sent the claimant to a specialist, holding that this constituted a referral which the Commission erroneously characterized as a change of physician.

In the case at bar, the appellant continued to suffer from a condition which Dr. Bevill was unable to cure or diagnose. Given this background, no legitimate inference of "doctor shopping" can be drawn on the basis of the appellant's request for a referral, especially in light of her willingness to accept a referral to a physician other than the one she suggested. Furthermore, the referral was from the appellant's family physician to an orthopedic specialist. I submit that, under these circumstances and the authorities cited *supra*, reasonable minds could only conclude that Dr. Yocum's treatment resulted from a valid referral. I would reverse and remand with directions to award benefits.

I respectfully dissent.

Gregory LEDGUIES *v.* STATE of Arkansas

CA CR 93-175 877 S.W.2d 946

Court of Appeals of Arkansas
Division I
Opinion delivered June 15, 1994

Paul Johnson, for appellants.

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

MELVIN MAYFIELD, Judge. Appellant, Gregory Ledguies, was charged pursuant to Ark. Code Ann. § 5-3-201 (1987) with criminal attempt to commit capital felony murder by shooting at two police officers. He was found guilty by a jury of aggravated assault as to one officer and of criminal attempt to commit capital murder of the other officer, and he was sentenced to four years and eight years, respectively, in the Arkansas Department of Correction, to be served consecutively. Appellant's only argument on appeal is directed against the conviction for attempt to commit capital murder and contends that the trial court erred in allowing the State to amend the information charging that offense after the State had rested its case in chief.

At trial Little Rock Police Officer Mark Smith testified that on September 4, 1991, he was called to a disturbance at 1524 College Street. While he was there he heard several gunshots. He walked south through the alley and located the person who was doing the shooting. As he neared a house at 1624 College a man, identified as appellant, came out of the house and started shooting at him. Officer Smith said he called for assistance and several units responded. The officer said he and the other officers were in uniform and identified themselves as policemen, but appellant refused to drop the weapon. Officer Smith testified that he saw one flash from the muzzle of a weapon directed at him.

He said he did not see any other muzzle flashes because he was running to take cover, but he heard more than six shots directed toward him. According to the officer, appellant would come out on the porch, shoot several times, go back inside the house, come outside again and shoot some more; there were several different episodes of shooting and the entire incident lasted approximately one hour.

Officer Tommy Hudson testified that he responded to the call for back up and blocked off a nearby intersection with his patrol car. He identified appellant as the man who was doing the shooting. Officer Hudson said when appellant saw him, appellant pointed the gun in his direction and started firing. He said he saw one muzzle flash and when he heard two bullets "zing" right by his head, he hit the ground, got behind his patrol car and stayed there. Other officers converged on the scene, including the SWAT team, and Officer Hudson said he used that opportunity to run behind a building.

Officer Everette Davis testified that when he arrived on the scene appellant had gone out the back door and was firing toward the back. Appellant then went back into the house and came out on the front porch again. Officer Davis said appellant had a gun in his right hand and a bottle in his left; appellant sat down on the front porch with his feet on the ground and fired some shots toward a cemetery at the end of College Street; he then emptied the gun, threw the shells out in the yard and went back into the house, leaving his bottle on the porch. A few minutes later appellant came out again and reloaded the gun. According to Officer Davis, he heard a female in the house arguing with appellant, saying that if he didn't quit acting stupid and quit shooting, she was going to leave the house. He said he then heard appellant tell her, "No. You're not going to leave the house. If you try to leave the house, I'll kill you. If the police try to take you, I'll kill them, too." Officer Davis said that when the patrol car arrived and blocked the intersection, appellant pointed the gun directly at the car and fired nine rounds. Davis also testified that, aside from threatening the female inside the house, appellant made several statements about killing police officers if they tried to do anything to take her away or tried to help her. The incident ended when the SWAT team took control of the situation and put gas in the house which forced appellant and the woman out.

When the State rested, counsel for appellant made a motion for dismissal of the two counts of attempt to commit capital felony murder. He argued there was absolutely nothing to show that appellant had any premeditated or deliberate purpose of harming the officers. The court explained that to commit capital felony murder the State had to prove appellant was in the process of committing or attempting to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary or escape in the first degree. The State argued that there was evidence that Mae Ellen Randall, the woman in the house, was being held against her will by the appellant. The judge held that there was inadequate proof from which the court could find beyond a reasonable doubt that there was a kidnapping.

The judge then read both counts of the information which charged appellant with purposely engaging in conduct that constituted a substantial step in the commission of the offense of "capital felony murder" of Officer Tommy Hudson and Officer Mark Smith. The judge then asked, "So, is the State moving to amend at this time on Counts I and II to delete the words felony?" The prosecutor replied that it was. Counsel for appellant said he did not understand the court allowing the State to amend the information after the defense had moved for dismissal. The judge replied that the information can be amended to conform to the proof and that there was no great surprise to counsel. He reasoned that the information, although stating the charge as attempted "capital felony murder," actually described attempted "capital murder," and that there was not any great variance between the charges and the proof. The trial judge held that there was no prejudice to the appellant and allowed the State to strike the word "felony" from each information. At this point counsel for appellant again made a motion for dismissal for lack of a showing of premeditation or deliberation. Again, the motion was denied.

Arkansas Code Annotated Section 5-10-101(a)(1)–(3) (Supp. 1991), in effect at the time the incident here involved occurred, provided in pertinent part that a person commits capital murder if:

> (1) Acting alone or with one (1) or more persons, he commits or attempts to commit rape, kidnapping, vehicular piracy, robbery, burglary, a felony violation of the Uniform Controlled Substances Act, §§ 5-64-101 – 5-64-608,

> involving an actual delivery of a controlled substance, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or
>
> . . . .
>
> (3) With the premeditated and deliberate purpose of causing death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in the line of duty, he causes the death of any person[.]

Appellant's argument is that the trial judge should not have allowed the State to amend the information because it changed the nature of the underlying charge. In support of this argument he cites *Bell* v. *State*, 296 Ark. 458, 757 S.W.2d 937 (1988), and *Thomas* v. *State*, 2 Ark. App. 238, 620 S.W.2d 300 (1981). In *Bell* the Arkansas Supreme Court held that it was error to allow the State to amend the information five days before the trial to charge capital murder in the perpetration of aggravated robbery instead of first degree murder. It said that capital murder and first degree murder are not crimes of the same degree; that although capital murder includes the lesser offense of first degree murder, first degree murder does not include capital murder. The conviction was not reversed, however, because the issue had not been preserved for appeal. And in *Thomas* this court said that an amendment to an information adding a charge under the Habitual Offender Act did not change the nature or degree of the crime charged but simply allowed evidence on which the punishment could be enhanced in the event of a conviction on the basic charge.

In the present case, allowing the State to strike the word "felony" from each information did not cause any real change in the nature or degree of the charges against the appellant. Although, the term "capital felony murder" has been used in some reported cases, we are not aware of a statute which contains that specific phrase. Ark. Code Ann. § 5-10-101(a) (Supp. 1991) simply pro-

vides that "a person commits capital murder if" and several subsections complete the definition. Subsection (1), as quoted above in this opinion, does provide that capital murder is committed when the death of a person is caused by one who commits, or attempts to commit, certain named felonies. However, capital murder is also committed when death is caused under the circumstances set out in subsection (3). As the only effect of the amendment made in this case was to remove the word "felony" from the information, it is obvious that the amendment did not inject anything new into the case. The amendment did not even change the penalty as all capital murders are Class Y felonies. *See* Ark. Code Ann. § 5-10-101(c).

The State may amend an information to conform to the proof so long as the amendment does not change the nature or degree of the offense charged. *Mitchell* v. *State*, 306 Ark. 464, 470, 816 S.W.2d 566, 569 (1991). If the defendant is not surprised, an information may be amended after the jury has been sworn, but before the case has been submitted to the jury, so long as the amendment does not change the nature or degree of the crime charged. *Smith* v. *State*, 310 Ark. 247, 837 S.W.2d 279 (1992); *Wilson* v. *State*, 286 Ark. 430, 692 S.W.2d 620 (1985).

Here, the amendment occurred before the case was submitted to the jury, and it did not change the nature or degree of the crime charged. The only change made by the amendment was to eliminate the allegation that the appellant had committed, or attempted to commit, another felony in addition to the attempt to kill the two law enforcement officers. The appellant was not prejudiced or surprised by the amendment as shown by the fact that, before the amendment was made, defense counsel made a motion for dismissal of the charges and, using the exact language of Ark. Code Ann. § 5-10-101(a)(3), stated that there was no evidence that appellant "had any premeditated or deliberate purpose of doing anything towards these officers." Clearly, appellant knew the basis of the charges for which he was being tried, and he did not move for a continuance. Under these circumstances, the trial court did not err in allowing the amendment.

Because the appellant was convicted of a lesser included offense on Count I, his argument here can only refer to his conviction on Count II.

Affirmed.

COOPER and ROBBINS, JJ., agree.

Ray PRYOR and Stephanie Pryor *v.* George RAPER and Mildred Raper

CA 93-136 877 S.W.2d 952

Court of Appeals of Arkansas
Division I
Opinion delivered June 15, 1994
[Rehearing denied August 17, 1994.]

Rose Law Firm, A Professional Association, by *Richard T. Donovan*, for appellants.

Webb & Doerpinghaus, by: *Doyle L. Webb II*, for appellees.

MELVIN MAYFIELD, Judge. The appellant's brief states that the history of this case has as many "twists and turns as an Ozark mountain highway." The judgment appealed from names the defendants as Raymond and Vester Pryor and Ray and Stephanie Pryor. However, the notice of appeal names only Ray and Stephanie as appellants; therefore, we regard Ray and Stephanie as the appellants and will refer to them as "the Pryors." They appeal from a judgment of the Hot Spring County Chancery Court which restrained them from interfering with appellees' (the Rapers) use of certain property and which established the "correct legal description" of that property.

This case started in Saline County Circuit Court as an action for ejectment. In a judgment entered on September 3, 1986, Circuit Judge John Cole found that the Rapers had obtained by adverse possession a strip of land south of the Hot Spring/Saline County line, that included their driveway and a portion of their garden plot. The judgment stated that "The section line separating the properties of these parties and by stipulation, establishing the county line between Saline and Hot Spring Counties, is as indicated by the survey of Larry Harper." However, the judgment stated that the exact dimensions of this strip of land were to be determined later, and on February 7, 1987, an order describing the property was entered. Thereafter, on March 12, 1987, a supplemental order correcting a "clerical mistake" in the description was also entered. We now know that both of these descriptions were in fact erroneous because they described land north, rather than south, of the section and county line.

In an unpublished opinion handed down November 25, 1987, this court affirmed the judgment of the Saline County Circuit

Court. Our decision held that the trial court's finding that the Rapers had obtained title to the disputed strip by adverse possession was not clearly against a preponderance of the evidence. The exact description of the land involved was not an issue on appeal, but we noted that while the strip of land subject to adverse possession lay in Hot Spring County, it was a piece of the Rapers' property — most of which lay in Saline County. Therefore, we held that under Ark. Code Ann. § 16-60-101 (1987) the suit could be brought in either county. *See also Adkisson* v. *Starr*, 221 Ark. 331, 260 S.W.2d 956 (1953).

After our decision in November of 1987, the Pryors (in March of 1989) filed a petition to quiet title in Hot Spring County Chancery Court. On September 20, 1989, that court dismissed the petition holding "proper jurisdiction is in the Circuit Court which previously had jurisdiction in the matter."

The Pryors then returned to Saline County Circuit Court and filed a "Motion to Correct or Amend Judgment." They alleged that a clerical error existed in the description of the property awarded the Rapers and asked the circuit court to "take whatever steps it deems appropriate to ascertain the actual metes and bounds description of the 'driveway and portion of garden plot'" awarded to the Rapers in the court's previous orders. On January 22, 1990, that court held it was without jurisdiction to redetermine or restructure its previous orders.

On March 26, 1990, the Rapers filed the present action (Petition to Correct Legal Description, Petition for Injunction and Petition for Damages) in Hot Spring County Chancery Court. Count I of the Rapers' petition alleged that an error existed in the description of the property awarded them in the adverse possession suit in Saline Circuit Court and sought "the equitable powers of Chancery Court to correct the misdescription in the property in order to provide the Plaintiffs with a correct description to their property as originally provided for in the judgment of the Circuit Court." Count II of the petition alleged the Pryors had "caused numerous bolders [sic] and rocks to be dumped" on the property awarded the Rapers and that the Rapers were unable to use their driveway due to the rocks and boulders and "due to the Defendants having caused a deep trench to be dug in the driveway by a backhoe." The Rapers asked for a permanent restrain-

ing order to prohibit the Pryors from interfering with or damaging the Rapers' property.

On April 12, 1990, the Pryors filed a motion to dismiss, and it was denied by the chancellor. The Pryors then filed a petition for writ of prohibition in the Arkansas Supreme Court, and that petition was denied by an opinion dated November 19, 1990. *See Pryor* v. *Hot Spring Chancery Court*, 303 Ark. 630, 799 S.W.2d 524 (1990).

On May 19, 1992, a hearing on the present action was held in Hot Spring County Chancery Court. At the hearing Judge Cole testified that he recalled the decision in the original case in the Saline Circuit Court, at which he presided, and that the Rapers acquired by adverse possession that property which constituted the driveway to their home and most of the garden plot which they had been using for years. He said this property was south of the Hot Spring/Saline County line; that it was determined by a surveyor to be a rectangular shaped strip of property 450 feet on the north and south sides, and 23 feet on the east and west ends; that it was bordered on the north by the county line; and that the 450 feet began running at the east right-of-way line of U.S. Highway 67.

Appellee George Raper testified that appellant Raymond Pryor had placed rocks on the strip of land awarded to the Rapers by the circuit court and that this prevented Raper from driving his car on the strip of land and using it as a driveway. Mrs. Raper testified that she walks up the driveway several times a day and that Mr. Raper is not able to walk through the area because he walks with a cane and there are "ditches through there." She testified further she must carry groceries and laundry in a wheelbarrow from the highway.

On appeal, the Pryors argue that the trial court did not have jurisdiction to correct the judgment of the Saline County Circuit Court and that the doctrine of *res judicata* prevented the correction.

First, we note that both parties agree that the description in the judgment of the Saline Circuit Court is incorrect. Judge Cole testified that he held in that case that the Rapers had acquired title by adverse possession to a strip of land south of the county line.

His judgment entered on September 3, 1986, held that the section line separating the properties of the parties was the same as the county line separating the two counties, but both of the two subsequent orders that the judge signed in an attempt to fix and correct the description of the land acquired by the Rapers by adverse possession placed the land *north* instead of *south* of the section and county line.

Second, we note that both parties have attempted to get a judicial correction of the description of the property awarded to the Rapers by adverse possession. Indeed, a trial brief filed by the Pryors in the trial court in the case now on appeal points out that after the Saline Circuit Court had entered its last order attempting to correct the description of the land awarded to the Rapers by adverse possession, the Pryors "initiated their own cause of action" in the Chancery Court of Hot Spring County in an attempt "to remove the cloud from the title of the lands in question effected by the error in the legal description supplied by [the Rapers] to the original trial court." The trial brief then points out that "Judge Shirron, as the presiding judge of the Chancery Court of Hot Spring County dismissed the cause of action as being a matter of *res judicata.*" Introduced into evidence in the case now on appeal (as defendant's exhibit 3) is a copy of Judge Shirron's order, and it states that the suit filed by the Pryors is dismissed because "proper jurisdiction is in the Circuit Court which previously had jurisdiction of this matter." Moreover, the trial brief filed by the Pryors in the case now on appeal points out that the Rapers have also — prior to the present case — "attempted to correct the erroneous description." The brief refers to the "Motion to Correct or Amend Judgment" filed by the Pryors in the Saline County Circuit Court which was dismissed by that court by an order ("exhibit 4" in the transcript) entered on January 22, 1990. The order finds "both parties agree that the previous orders of this Court contain an error" but the court "is without jurisdiction to redetermine or restructure the previous orders entered herein without agreement of both parties."

Under the circumstances existing in this case, we think the Hot Spring Chancery Court was correct in correcting the legal description of the property awarded the Rapers by adverse possession and restraining the Pryors from interfering with the Rapers' use of that property. Rule 60(k) of the Arkansas

Rules of Civil Procedure contains a provision which abolishes certain writs previously used to obtain relief from a judgment or decree and states that the procedure "for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules *or by independent action*." (Emphasis added.) The Reporter's Notes to Rule 60(k) contains this statement:

> 5. Subsection (k) follows Section (b) of FRCP 60 by permitting a court to entertain an independent action to relieve a party from a judgment. *Bankers Mortgage Co.* v. *United States*, 423 F.2d 73 (C.C.A. 5th, 1970), cert. den., 90 S.Ct. 2242. Arkansas has previously recognized the power of an equity court to review a judgment from a court of law, although such power is severely limited. *Cotton* v. *Hamblin*, 233 Ark. 65, 342 S.W.2d 478 (1961).

The case of *Cotton* v. *Hamblin, supra*, states that "a chancery court has limited power to set aside the judgment of a law court, but it must be shown that there is no adequate remedy at law." This subject was discussed by the Arkansas Court of Appeals in *Taggart* v. *Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983), where we said:

> In the development of the English common law, courts of equity obtained the power to restrain the enforcement of judgments at law which were procured by fraudulent and inequitable conduct. This power arose at a time when law courts had little or no authority over their final judgments or power to stay enforcement of unjust ones. This equitable power was limited to those cases where judgments were entered by extrinsic fraud, mistake or accident and where the defendant had a valid legal defense on the merits but was prevented from maintaining it by such fraud. It was based on equity's general jurisdiction over all inequitable and fraudulent conduct and its inherent power to grant relief where there is no adequate remedy at law.

8 Ark. App. at 163, 650 S.W.2d at 592.

The appellants (Pryors) argue that under the *Taggart* decision the Hot Spring Chancery Court was wrong in the present case to correct the property description contained in the judgment of the Saline Circuit Court. This is true, according to the

appellants' brief, because *Taggart* "tells us unequivocally that no such jurisdiction exists." Appellants' argument is based on the fact that *Taggart* held that equity will not vacate or modify a law court judgment where "there is an adequate remedy at law." Although that is clearly what *Taggart* held, the appellants do not explain how there was an adequate remedy at law at the time the Hot Spring Chancery Court corrected the property description in the present case. It must be remembered — as we have noted — that both parties in this case admit that the description in the circuit court judgment is incorrect. Even the circuit judge affirmed this fact in his testimony in this case. It must also be remembered that the *appellants* filed a motion in the Saline Circuit Court to correct the description in that court's judgment and that court held it was without jurisdiction to redetermine or restructure its prior judgment. Thus, it seems obvious that there was no adequate remedy at law to correct the circuit court judgment at the time the Hot Spring Chancery Court granted the petition filed by the appellees (Rapers) in which they asked that court to exercise its "equitable powers . . . to correct the misdescription in the property" and to issue a permanent restraining order to prohibit the appellants from interfering with the appellees' use of their property. We, of course, recognize that the chancery court agreed with the appellees' contention as to what description was correct — and not with the appellants' contention in that regard — but the appellants do not question the correctness of the chancery court's description, only its power to make that correction.

Under the circumstances in this case, we think it is clear that the chancery court had the power and the right to correct the circuit court's property description in this case. Certainly it had the power and right to issue an injunction, and that issue was decided by the Arkansas Supreme Court in the opinion denying the writ of prohibition in this case. *Pryor* v. *Hot Spring Chancery Court, supra.* Also, our supreme court has held that "the remedial processes of equity are quite flexible, and where there is a manifest right clearly recognized, in equity jurisprudence they cast about for some fit mode of enforcing it, if no exact precedent may be found applicable to the case." *Riddick* v. *Streett*, 313 Ark. 706, 711, 858 S.W.2d 62, 64 (1993). Moreover, as our supreme court said in *Cotton* v. *Hamblin, supra*, and as the court of appeals said in *Taggart, supra*, Arkansas has recog-

nized the equitable power to set aside or modify a law court judgment (when there is no adequate remedy at law) where the judgment resulted from extrinsic fraud, mistake, or accident. Our Rule of Civil Procedure 60(k) does not eliminate this authority. Such authority is allowed by the Federal Rules of Civil Procedure, *see* discussion in 11 Wright and Miller, *Federal Practice and Procedure, Civil* § 2868 (1973), and, at least, in some state courts, *see* discussion in *Nevada Industrial Development, Inc.* v. *Benedetti*, 741 P.2d 802 (Nev. 1987).

Our view of this case, as explained above, makes it unnecessary to discuss other points raised by each side. For example, we do not have to decide whether the error in the circuit court's judgment was a clerical error. The appellees cite *Luckes* v. *Luckes*, 262 Ark. 770, 561 S.W.2d 300 (1978), and say the error here did not arise from the exercise of the court's judicial discretion and was therefore a clerical error. The appellants do not agree. Furthermore, they argue that the error was the result of appellees' counsel "not knowing the exact dimensions of the strip of land." Appellants say, "that is a proof problem, not a typographical error." There is, however, no evidence abstracted by appellants to show that the incorrectness of the property description resulted from appellees' negligence or inattention any more than from that of the appellants. The chancery court's decree simply states that the circuit court judgment "contained a clerical error in the description of the property." Even if that description was not a clerical error, we review chancery cases de novo and affirm if we find the result reached by the chancellor was correct for any reason. *American Investors Life Insurance Co.* v. *TCB Transportation*, 312 Ark. 343, 345, 849 S.W.2d 509, 511 (1993); *Moore* v. *City of Blytheville*, 1 Ark. App. 35, 39, 612 S.W.2d 327, 331 (1981). We find that the chancellor's decision in this case was correct.

Affirmed.

ROBBINS and COOPER, JJ., agree.

Obert M. UNDEM *v.* FIRST NATIONAL BANK,
Springdale, Arkansas

CA 93-423 879 S.W.2d 451

Court of Appeals of Arkansas
En Banc
Opinion delivered June 15, 1994

Everett, Stills & Gunderson, by: *David Stills* and *John C. Everett*, for appellant.

Cypert, Crouch, Clark & Harwell, by: *Charles L. Harwell*, for appellee.

JUDITH ROGERS, Judge. Obert M. Undem appeals from a summary judgment for appellee, First National Bank of Springdale, in an action on a promissory note. We agree with appellant that genuine issues of material fact remained to be tried, and reverse and remand.

On May 22, 1989, Joe B. Morris, Sr., C. Thomas Pearson, Jr., Floyd Harris, George Williams, Marjorie Niblock, Vincent Morris, and appellant signed a promissory note in the amount of $250,000.00 to appellee. This note stated that the loan's purpose was to benefit the holding company of Northwest National Bank and had a maturity date of August 22, 1990. On May 31, 1989, Madelyn Harris, Walter Niblock, Marjorie Niblock, Susan Morris, and Delores Williams signed guaranties for this debt.

On August 22, 1990, George Williams, Marjorie Niblock, C. Thomas Pearson, Jr., Floyd Harris, Vincent Morris, and Joe Morris signed extension agreements for the unpaid balance on the note. Appellant did not sign an extension agreement.

On February 28, 1992, appellee sued the parties to the note, guaranties, and extension agreements for the remaining balance due on the note. In his answer to the complaint, appellant admitted signing the note but stated that he had done so

in reliance on the representations of Virginia T. Morris, whom he characterized as appellee's agent. He stated that he had signed the note on Virginia Morris' assurances and representations that appellant's liability on the note would be totally eliminated upon the termination of his membership on the board of directors of Northwest National Bank and its holding company, Northwest Bancorporation of Arkansas, Inc. He alleged that Virginia Morris had agreed to provide documentation of this agreement but did not do so. Appellant stated that he had not been re-elected as a director of Northwest National Bank or Northwest Bancorporation at their respective annual meetings in March 1990. Appellant argued that the renewal of the note on August 22, 1990, without his signature released him from liability on the note. Appellant also claimed fraud and argued that appellee should be estopped from asserting its claim against him.

Appellee moved for summary judgment and, in support, filed the affidavit of Jack Erisman, appellee's vice president, who had handled the transaction involved in this lawsuit. In his affidavit, Mr. Erisman stated that appellee had not given appellant any written or oral release of liability on the note. In response, appellant argued that genuine issues of material fact regarding release, waiver, estoppel, and agency remained for trial. Appellant also filed an affidavit in which he stated:

> 3. That on or about May 22, 1989, and specifically prior to my execution of the promissory note that is the subject of this cause of action, Virginia Morris stated to me that the plaintiff, First National Bank, had engaged her personally to obtain the signatures of each defendant on the promissory note, and that the various documents presented to me by Virginia Morris contained both the name and logo of the First National Bank, and appeared to have been prepared by the plaintiff.
>
> 4. That prior to my execution of the promissory note and after having stated to me that she had been engaged by the plaintiff, to obtain my signature on the promissory note, Virginia Morris, as an agent of the plaintiff, First National Bank, represented directly to me that my liability on the promissory note would be nominal

only, that I would be relieved from any liability on the promissory note in the event my membership on the Board of Directors of Northwest National Bank and its holding company, Northwest Bancorporation of Arkansas, Inc., was terminated; and that the plaintiff, First National Bank, would not hold me liable on the promissory note thereafter.

5. That in January of 1990, I was not nominated for re-election as a member of the Board of Directors of First National Bank, and its holding company, Northwest Bancorporation of Arkansas, Inc. at the request of Virginia T. Morris since I had not agreed to increase my small investment in stock of either of these corporations.

On February 3, 1993, appellee filed a satisfaction of judgment, stating that it had received $275,977.80. On February 11, 1993, the circuit court granted summary judgment to appellee in the amount of $275,977.80 against the defendants, jointly and severally. The court also found that the total amount of the judgment had been paid to appellee by fewer than all of the defendants and that those defendants who had contributed toward satisfaction of the judgment desired an order of contribution against those who had not contributed a pro rata share. The court held that, contribution being a matter cognizable in equity, the action would be transferred to the Washington County Chancery Court for the purpose of determining the rights of contribution among the defendants. It is from the entry of this summary judgment for appellee that appellant has appealed.

Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Watts* v. *Life Ins. Co. of Ark.*, 30 Ark. App. 39, 41, 782 S.W.2d 47 (1990). When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Wyatt* v. *St. Paul Fire & Marine Ins. Co.*, 315 Ark. 547, 551, 868 S.W.2d 505 (1994). In appeals from the granting of summary judgment, we review facts in a light most favorable to the appellant and resolve any doubt against the moving party. *Wilson* v. *Gen. Elec. Capital Auto Lease, Inc.*, 311

Ark. 84, 86-87, 841 S.W.2d 619 (1992); *Thomas* v. *Sessions*, 307 Ark. 203, 205, 818 S.W.2d 940 (1991).

Appellant argues that a genuine issue of material fact remained in regard to fraud, misrepresentation, agency, and estoppel. In short, appellant argues that the bank's purported agent, Virginia Morris, fraudulently induced appellant to sign the promissory note. Appellant also argues that appellee should be estopped because it had made it possible for Mrs. Morris to perpetrate fraud against appellant.

Appellant's fraudulent inducement argument regarding the execution of the note rests upon Mrs. Morris' status as an agent for appellee. The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents to so act. *First Commercial Bank* v. *McGaughey Bros., Inc.*, 30 Ark. App. 174, 177, 785 S.W.2d 236 (1990). Ordinarily, agency is a question of fact to be determined by the jury; but where the facts are undisputed, and only one inference can be reasonably drawn from them, it becomes a question of law. *Id.*

Additionally, whether an agent is acting within the scope of his actual or apparent authority is a question of fact for the jury to determine. *Henry* v. *Gaines-Derden Enters., Inc.*, 314 Ark. 542, 551, 863 S.W.2d 828 (1993). In *Hawthorne* v. *Davis*, 268 Ark. 131, 133, 594 S.W.2d 844 (1980), the supreme court stated that circumstantial evidence may be sufficient to establish agency, and the declarations of the purported agent may be used to corroborate other evidence of agency.

The dissent argues that appellant has produced insufficient facts of agency to withstand summary judgment and bases this argument on the rule of law that apparent agency cannot be founded solely on assertions made by the alleged agent; there must be some form of holding out or representation by the alleged principal. *See Arkansas Poultry Fed'n Ins. Trust* v. *Lawrence*, 34 Ark. App. 45, 805 S.W.2d 653 (1991). The dissent analogizes this case to *First Commercial Bank* v. *McGaughey Brothers, Inc.*, 30 Ark. App. 174, 785 S.W.2d 236 (1990). In that case, we held that the trial court had erred in submitting the issue of agency to

the jury. At trial, in *First Commercial Bank*, the guarantor presented no evidence of agency; he only testified to his assumption that the representations of the borrower seeking his signature were acting as agents of the bank. We held that that issue should have been determined as a matter of law because the evidence was insufficient to create a question of fact. *Id.* at 186. We noted that courts have held that, when a bank directs a borrower to obtain the signature of another on a personal guaranty as a condition of making a loan, the act of the borrower in obtaining the signature is one for his own benefit, and the borrower is not the agent of the bank. *Id.* at 177.

First Commercial Bank v. *McGaughey Brothers* is distinguishable from this case, however. First, the question on appeal is not whether sufficient evidence was presented at trial to go to the jury; instead, we are asked to decide whether the appellant will even have the opportunity to present his defenses at a trial. Second, the parties seeking the guarantor's signature in *First Commercial Bank* v. *McGaughey Brothers* were commissioners of the debtor improvement district. Here, we do not know who Virginia Morris is or the precise nature of her relationship to appellant or the bank. Appellant has, however, stated in his affidavit that she acted as the bank's agent in obtaining his signature.

We hold that, in his affidavit, appellant adequately demonstrated the existence of a genuine issue of material fact regarding Mrs. Morris' status as an agent of appellee. As explained below, we also believe appellant sufficiently demonstrated that issues of fact regarding fraudulent inducement and estoppel should be tried.

In order to avoid a contract on the basis of fraudulent misrepresentation, the party asserting this defense must prove that false representations were made and that these representations were material to the contract. *Wilson* v. *Allen*, 305 Ark. 582, 583-84, 810 S.W.2d 42 (1991).

Appellee argues that the parol evidence rule should apply. We disagree. It has often been held that the rule forbidding the addition, alteration, or contradiction of a written instrument by parol testimony of antecedent and contemporaneous

negotiations does not apply where there is an issue of fraud in the procurement of the writing. *Hamburg Bank* v. *Jones*, 202 Ark. 622, 624, 151 S.W.2d 990 (1941).

Appellee also argues that representations relating solely to future events, or which are promissory in nature, do not afford a basis for actionable fraud. Appellee argues that fraud must relate to a present or pre-existing fact and cannot ordinarily be predicated on promises or statements as to what will be done in the future. In *Anthony* v. *First National Bank of Magnolia*, 244 Ark. 1015, 1028, 431 S.W.2d 267 (1968), the supreme court stated that representations that are promissory in nature or of facts that will exist in the future, though false, do not support an action for fraud. The court went on to state, however, that this rule would not apply if the party making the false promise knew at the time that it would not be kept. *Id. See also Pierce* v. *Sicard*, 176 Ark. 511, 3 S.W.2d 337 (1928). It has often been held that the issue of intent is a question of fact. *See Elkins* v. *Arkla, Inc.*, 312 Ark. 280, 281, 849 S.W.2d 489 (1993).

With regard to appellant's estoppel argument, appellant states in his brief that, by providing the promissory note to Virginia Morris with instructions to obtain appellant's and the other debtors' signatures, appellee made it possible for Mrs. Morris to perpetrate fraud. Appellant argues that, where one of two innocent persons must suffer because of the fraud of a third, the one who, by his own conduct and neglect, made the fraud possible or facilitated its perpetration is the one who must bear the loss.

Estoppel is a doctrine which involves both, not just one, of the parties; the party claiming estoppel must prove he relied in good faith on some act or failure to act by the other party and that, in reliance on that act, he changed his position to his detriment. *Worth* v. *Civil Serv. Comm'n*, 294 Ark. 643, 646, 746 S.W.2d 364 (1988). 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. *Beard* v. *Ford Motor Credit Co.*, 41 Ark. App. 174, 185,

850 S.W.2d 23 (1993). Estoppel *in pais* is the doctrine by which a person may be precluded by his acts or conduct, or by failure to act or speak under circumstances where he should do so, from asserting a right which he otherwise would have had. *Daves* v. *Hartford Accident and Indem. Co.*, 302 Ark. 242, 247, 788 S.W.2d 733 (1990). Estoppel *in pais* or equitable estoppel may be pled in both courts of equity and courts of law. *Northwestern Nat'l Life Ins. Co.* v. *Heslip*, 302 Ark. 310, 312, 790 S.W.2d 152 (1990). In *Dickson* v. *Delhi Seed Co.*, 26 Ark. App. 83, 93, 760 S.W.2d 382 (1988), this Court stated: "It is well settled that whether estoppel is applicable is an issue of fact to be decided by the trier of fact."

Based upon the facts set forth in appellant's affidavit and the legal principles discussed above, we believe that appellant adequately demonstrated the existence of genuine issues of material fact regarding agency, fraudulent inducement, and estoppel. Accordingly, we hold that the circuit court erred in awarding summary judgment to appellee.

Reversed and remanded.

COOPER, J., dissents.

JENNINGS, C.J., not participating.

JAMES R. COOPER, Judge, dissenting. The appellant's entire case hinges upon his allegations that Virginia Morris was the actual agent of First National Bank, or that apparent agency existed because Ms. Morris had possession of the promissory note bearing the bank's letterhead. I dissent because I am convinced that the appellant failed to present proof of Ms. Morris' agency, an essential element of his claim, and that the appellee was thus entitled to judgment as a matter of law. *See Short* v. *Little Rock Dodge, Inc.*, 297 Ark. 104, 759 S.W.2d 553 (1988).

The majority cites no facts to support the allegation of actual agency. With regard to apparent agency, the only fact relied upon is that Ms. Morris possessed the loan documents. However, we have recently said that:

> [W]hen a bank directs a borrower to obtain the signature of another on a personal guarantee as a condition of making a loan, the act of the borrower in obtaining the signa-

> ture is one for his own benefit and *the borrower is not the agent of the bank.*

First Commercial Bank v. *McGaughey Brothers, Inc.*, 30 Ark. App. 174, 785 S.W.2d 236 (1990) (emphasis supplied). It is black-letter law that apparent authority can exist only to the extent that a reasonably prudent person, using diligence and discretion, would naturally suppose the agent to possess in view of the principal's conduct. *Arkansas Poultry Federation Ins. Trust* v. *Lawrence*, 34 Ark. App. 45, 805 S.W.2d 653 (1991). In my view, the agency issue in this case can be summarized as follows: evidence of actual agency is absent, as the majority concedes when it notes that "we do not know who Virginia Morris is or the precise nature of her relationship to the appellant or the bank," and the only conduct of the alleged principal relied upon to show agency, i.e., providing Ms. Morris with the loan documents, has been held to be insufficient to show implied agency as a matter of law. *First Commercial Bank* v. *McGaughey Brothers, Inc., supra.*

It should be pointed out that I do not disagree with the majority's view of the facts of this case, or with its statements concerning the substantive law of agency. Instead, the difference of opinion in the case at bar stems from divergent views regarding the standard to be applied to appeals from summary judgments. This is understandable in light of the rapid development of this area of the law in recent years. The majority presumably embraces the "scintilla of evidence" rule whereby the court considering summary judgment, resolving all credibility issues in favor of the non-movant, determines whether there are any facts from which a jury could reasonably *infer* ultimate facts upon which a claim depends; if there is a scintilla of evidence supporting the non-moving party, summary judgment will be denied under this rule. Some support for the applicability of this rule in Arkansas is found in *Thomas* v. *Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991).

I believe, however, that our Supreme Court has adopted the standard enunciated in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), whereby the question is whether, on the basis of the summary judgment record, a reasonable jury could find in favor of the non-moving party at trial. *See generally* J. Watkins, *Summary*

Judgment Practice in Arkansas: Celotex, the Scintilla Rule, and Other Matters, 15 UALR L.J. 1 (1992). My view is supported by *Short* v. *Little Rock Dodge, Inc., supra*, where our Supreme Court said that:

> It is proper to grant a summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ark. R. Civ. P. 56(c). In *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), the Supreme Court interpreted F.R.C.P. 56, which is identical to our rule in every material respect, as permitting a summary judgment when a plaintiff cannot offer proof of a material element of the claim. We agree with the Supreme Court's rationale that when a party cannot present proof on an essential element of her claim there is no remaining genuine issue of material fact, and the party moving for a summary judgment is entitled to judgment as a matter of law.

It would appear under the rule enunciated in *Short, supra*, that the test on appeals from summary judgments would be analogous to that applied to directed verdicts. *See Watkins, supra; see also Short, supra* (Glaze, J., dissenting). I submit that this is the applicable standard, and that we should therefore affirm because a reasonable jury could not have found for the appellant on the basis of the summary judgment record in the case at bar.

Finally, it should be noted that the precise issue upon which this dissent is based will soon be before the Arkansas Supreme Court. We recently granted a motion to transfer to the Supreme Court in *Dodds* v. *Hanover Insurance Co.*, CA 93-1152. The issue requiring transfer was the interpretation of Ark. R. Civ. P. 56 to determine whether the *Celotex* rule, as followed by the Arkansas Supreme Court in *Short, supra*, is applicable where there was a failure of proof concerning agency. The *Dodds* case is scheduled for oral argument before the Supreme Court on July 5, 1994, and will hopefully resolve the issue giving rise to this dissent.

I respectfully dissent.

Billy Joe COOK *v.* STATE of Arkansas

CA CR 93-740 878 S.W.2d 765

Court of Appeals of Arkansas
En Banc
Opinion delivered June 22, 1994

Robert P. Remet, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Appellant, Billy Joe Cook, was charged in Arkansas County Circuit Court with the commission of rape, a class Y felony. After a non-jury trial Cook was found guilty and sentenced by the court to a term of twelve years with eight years suspended. The sole argument on appeal is that the evidence was insufficient to support the verdict. We affirm.

In determining the sufficiency of the evidence, we

view it in the light most favorable to the State. *Cleveland* v. *State*, 315 Ark. 91, 865 S.W.2d 285 (1993). If the decision of the court or jury is supported by substantial evidence, we will affirm. *Paige* v. *State*, 45 Ark. App. 13, 870 S.W.2d 771 (1994). Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion. *Edwards* v. *State*, 40 Ark. App. 114, 842 S.W.2d 459 (1992).

At trial the victim testified, with sufficient clarity, that the appellant had raped her. Although the defendant testified to the contrary, decisions as to the credibility of the witnesses are to be made by the trier of fact. *Smith* v. *State*, 314 Ark. 448, 863 S.W.2d 563 (1993). Although there was other corroborating evidence here, the testimony of the victim, standing alone, may constitute substantial evidence. *Fox* v. *State*, 314 Ark. 523, 863 S.W.2d 568 (1993). We hold that the appellant's conviction is supported by substantial evidence.

While the State neither appealed nor cross-appealed, it suggests in its brief that we correct an "illegal sentence" imposed by the trial court. The State says:

> The trial court sentenced appellant to twelve years in prison, but suspended eight years of the sentence. This sentence is not authorized by law and, although not objected to below, may be raised on appeal. *Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989). The State respectfully requests that the case be remanded to the trial court only to correct this sentence in accordance with law and that the conviction be in all respects affirmed.

The State correctly notes that rape is a class Y felony, carrying a minimum sentence of ten years imprisonment. Ark. Code Ann. § 5-4-401(a)(1) (1987). Arkansas Code Annotated section 5-4-301(a)(1)(C) (Supp. 1991) provides that the court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for a class Y felony.

While we agree with the State at the outset that the sentence given was below the statutory minimum, and therefore was error, we do not agree that this is an issue the State may raise in the absence of an appeal.

We must begin with the rule that sentencing is entirely a matter of statute. *Eberlein* v. *State*, 315 Ark. 591, 869 S.W.2d 12 (1994); *State* v. *Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993); *State* v. *Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993); *Richards* v. *State*, 309 Ark. 133, 827 S.W.2d 155 (1992). The sentence the court imposed was clearly "illegal" in the sense that it was below the statutory minimum. The question for decision, however, is whether we should reverse the trial court, either on our own motion or on suggestion by the State, absent an appeal.

This is not truly an issue of subject matter jurisdiction. As Chief Judge Cracraft explained in *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987):

> The rule of almost universal application is that there is a distinction between want of jurisdiction to adjudicate a matter and a determination of whether the jurisdiction should be exercised. Jurisdiction of the subject matter is power lawfully conferred on a court to adjudge matters concerning the general question in controversy. It is power to act on the general cause of action alleged and to determine whether the particular facts call for the exercise of that power. Subject matter jurisdiction does not depend on a correct exercise of that power in any particular case. If the court errs in its decision or proceeds irregularly within its assigned jurisdiction, the remedy is by appeal or direct action in the erring court. If it was within the court's jurisdiction to act upon the subject matter, that action is binding until reversed or set aside. This distinction has also been recognized and applied in our courts.
>
> In Arkansas, a circuit court has subject matter jurisdiction to hear and determine cases involving violations of criminal statutes. It is also empowered with authority to impose or suspend sentences, and to revoke those suspended sentences. The statutes conferring this authority prescribe the method the court should follow in exercising its assigned jurisdiction, but the failure of the court to properly pursue those statutes is an entirely different matter from its jurisdiction to determine whether to exercise that power or not. Failure to follow the statutory procedure in the exercise of its power constitutes reversible error

> but does not oust the jurisdiction of the court. [Citations omitted.]

Nevertheless, allegations of "void or illegal sentences" may be treated by the appellate court as similar to problems of subject matter jurisdiction, in that the court will review the allegations even in the absence of an objection in the trial court. *Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989).

The supreme court has said that an illegal sentence may be corrected by the appellate courts sua sponte, *see Harmon* v. *State*, 317 Ark. 47, 876 S.W.2d 240 (1994); and that an "illegal sentence" means "a sentence illegal on its face." *Lovelace* v. *State*, 301 Ark. 519, 785 S.W.2d 212 (1990). The decision from which these statements are derived is *Abdullah* v. *State*, 290 Ark. 537, 720 S.W.2d 902 (1986). There the court said:

> Abdullah contends that because the manner of imposing the suspended sentence was illegal, it is subject to being corrected at any time, citing Ark. Stat. Ann. § 43-2314 (Supp. 1985). That statute provides that a circuit court may, upon receipt of a petition by an aggrieved party, take certain corrective action. The statute refers to an "illegal sentence," which may be corrected at any time, and to a sentence illegally imposed, which may be corrected within 120 days after it was imposed or within 120 days after specified action has been taken by an appellate court. The reference to an illegal sentence *evidently* means a sentence illegal on its face. [Emphasis ours.]

Arkansas Statute Annotated section 43-2314 is now Ark. Code Ann. § 16-90-111 entitled "Fixing punishment - Correction of illegal sentence - Reduction of sentence." Its text remains unchanged. Subsection (a) provides:

> Any circuit court, upon receipt of petition by the aggrieved party for relief and after notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.

It is this statute that the supreme court referred to in *Abdullah*.

The statute quite clearly provides for relief to a defendant when the sentence imposed has been excessive. In such cases, it makes good sense for the appellate court to decide the issue "sua sponte" in the interest of judicial economy, as the sentencing circuit court could do so "at any time." The statute does not contemplate an application by the prosecuting attorney to increase the defendant's sentence "at any time."

We do not view the statute as unfair to the State. At time of sentencing the State presumably knows the range of punishment for the offense it charged. If the trial court sentences the defendant to less than the term authorized by statute, the State has a remedy by way of appeal. *State* v. *Galyean*, 315 Ark. 699, 870 S.W.2d 706 (1994); *State* v. *Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994); *State* v. *Whale*, 314 Ark. 576, 863 S.W.2d 290 (1993); *State* v. *Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

Neither *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985), nor *Eberlein* v. *State*, 315 Ark. 591, 869 S.W.2d 12 (1994), are in point. *Lambert* addressed whether the trial court had lost jurisdiction after erroneously suspending the defendant's sentences. While the court in *Lambert* characterized the issue as one of subject matter jurisdiction, later decisions of the supreme court recognize that this is not so. *Bangs* v. *State*, 310 Ark. 235, 835 S.W.2d 294 (1992). The court in *Lambert* relied in part on *In Re Bonner*, 151 U.S. 242 (1893). In *Bonner* the Court said:

> If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is *void for the excess.*
>
> . . .
>
> The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized. [Emphasis ours.]

Eberlein is also distinguishable. There the defendant-appellant, for reasons not clear, argued that the trial court lacked authority to suspend his sentence and the supreme court agreed. The issue was raised by the defendant on direct appeal.

The State's argument must be that the inadequate sentence in the case at bar was "unauthorized," therefore "illegal," and

thus can be corrected "at any time," not only by the trial court but also by this court. Can it be possible that long after a defendant's release from prison, having served his sentence for a crime, he can be brought back into court and resentenced to an additional term?

While we do not decide whether the State must object in the trial court to a sentence it regards as inadequate, we hold that the issue may not be raised absent an appeal or cross-appeal.

ROGERS and PITTMAN, JJ., concur.

COOPER and ROBBINS, JJ., concur in part; dissent in part.

JUDITH ROGERS, Judge, concurring. I am in full agreement with the result reached in the opinion authored by Chief Judge Jennings; however, I write separately to express my view as to the reason that we do not, and cannot, address the State's argument requesting the correction of the illegal sentence.

As pointed out by Judge Jennings, when a trial court imposes an illegal sentence, one that is not authorized by statute, it is treated as a matter similar to that of subject matter jurisdiction. *Jones* v. *State*, 27 Ark. App. 44, 765 S.W.2d 15 (1989). In keeping with the standards applicable to a question of subject matter jurisdiction, we, as an appellate court, will address the appealing party's argument alleging that such an illegal sentence has been imposed, despite the absence of an objection below, and also we, as an appellate court, may raise the issue on our own, *sua sponte. Id.* This state of affairs exists because, as stated, the imposition of such an illegal sentence is akin to the question of the trial court's subject matter jurisdiction. However, as the majority recognizes, in this instance it is not truly an issue of subject matter jurisdiction. *Cf., e.g., Harmon* v. *State*, 317 Ark. 47, 876 S.W.2d 240 (1994); *Coones* v. *State*, 280 Ark. 321, 657 S.W.2d 553 (1983) (where the trial court loses jurisdiction to the executive branch upon the execution of a valid sentence).

The dissent maintains that we should redress the State's claim of error in this case because we can raise the issue of an illegal sentence *sua sponte*, or address such arguments when made for the first time on appeal. The fundamental distinction to be made here, however, is that we, in this court, must first pos-

sess the authority to act in order to review the action of the trial court. In other words, this court must first have jurisdiction before we can raise an issue on our own or review this claim of error when no objection has been made. Because the State did not appeal from the judgment, we have no jurisdiction to redress the State's argument, and without jurisdiction the standards relied upon by the dissent simply do not come into play.

As is noted in Judge Jennings' opinion, the State can appeal from a judgment imposing a sentence which is less than the term authorized by statute. *See State* v. *Whale*, 314 Ark. 576, 863 S.W.2d 290 (1993); *State* v. *Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993); Ark. R. Crim. P. 36.10. Thus, in light of the appellant's direct appeal, the State might have contested the admittedly illegal sentence by pursuing a cross-appeal from the judgment. Significantly, however, it did not choose that avenue of relief. As a consequence, the issue is simply not properly before us because, in the absence of a cross-appeal, we are without jurisdiction to entertain the argument.

It is necessary for an appellee to file a cross-appeal from a trial court's order when the appellee is seeking affirmative relief, something more than it received in the lower court. *Hasha* v. *City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993); *Independence Federal Savings & Loan Ass'n.* v. *Davis*, 278 Ark. 387, 646 S.W.2d 336 (1983); *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979). Since the State here, as appellee, is seeking affirmative relief, it was required to file a cross-appeal from the judgment. It is a matter of routine appellate procedure that we do not address issues raised by an appellee when no cross-appeal has been filed. *City of Marion* v. *Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993); *Edwards* v. *Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993); *Pledger* v. *Illinois Tool Works, Inc.*, 306 Ark. 134, 812 S.W.2d 101 (1991); *Hasha* v. *City of Fayetteville, supra*; *Brown* v. *Minor*, 305 Ark. 556, 810 S.W.2d 334 (1991); *Egg City of Arkansas* v. *Rushing*, 304 Ark. 562, 803 S.W.2d 920 (1991); *Independence Federal Savings & Loan Ass'n.* v. *Davis, supra*; *Elcare, Inc.* v. *Gocio*, 267 Ark. 605, 593 S.W.2d 159 (1980); *Tim Wargo & Sons* v. *Equitable Life Ass. Soc'y.*, 34 Ark. App. 216, 809 S.W.2d 375 (1991); *Broadhead* v. *McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986). This is so because we are without jurisdiction to do so. *Brown* v. *Minor*, 305 Ark. 134, 812 S.W.2d 101 (1991).

Since we lack jurisdiction, our declination to address the issue is unquestionably not a matter of favoring appellants in criminal cases over the interests of the State. When a criminal defendant has appealed from the judgment of the lower court, he or she has invoked the jurisdiction of this court which thereby enables us to grant affirmative relief. We are then at liberty to review the question of an illegal sentence imposed to his or her detriment, by raising the issue on our own and without an objection below. Had the State taken a cross-appeal from the judgment in this case, we would then be in a position to address the argument, regardless of whether it was being raised for the first time on appeal. Unfortunately, the State has not availed itself of a remedy before this court, and we are not able to reach the issue. I am in agreement, therefore, with the holding that, absent an appeal, we cannot address the issue of the illegal sentence raised by the State in its brief.

Although I, as a judge on this court, am in no position to interpret the statute, it appears that the State is not left without a remedy as it might pursue relief under Ark. Code Ann. § 16-90-111 (Supp. 1991). I am in agreement with the dissenting view that any questions concerning the meaning of the words contained in the statute, "at any time," are of no concern to us in the instant case.

I am authorized to state that Judge John Mauzy Pittman joins in this opinion.

JAMES R. COOPER, Judge, concurring in part, dissenting in part. Today the majority travels a narrow, tortuous path to get to the wrong result, avoiding the correction of an illegal sentence. What is worse, the path they have chosen to get there is a path this Court has no authority to travel: the path of statutory construction or interpretation of Court Rules which is, with few exceptions, forbidden to us under Rule 1-2(a)(3) of the Rules of the Supreme Court and Court of Appeals. Even if we had the authority to engage in the analysis employed by the majority to reach its result, we should not do so, because the result they reach is legally incorrect, logically unsound, wasteful of the limited resources available to trial courts, and contrary to the obvious and unambiguous intent of the legislature.

The majority's opinion is premised on the State's ability to appeal from an illegal sentence. As a general rule, the State has no right to appeal except as conferred by the constitution or rule of criminal procedure. *State* v. *Tipton*, 300 Ark. 211, 779 S.W.2d 138 (1989). Generally, appeals by the State under Rule 36.10, Arkansas Rules of Criminal Procedure, do not affect the pending litigation, but in recent years our Supreme Court has allowed appeals by the State under 36.10, and remanded for resentencing. No case, however, holds that such an appeal is required.

The essence of the majority's decision is this: the State may appeal, and therefore must appeal in order to have an illegal sentence corrected. But this is contrary to the long-established practice of this Court of correcting illegal sentences which, like the sentence in the case at bar, appear on the face of the record. *See, e.g., Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989). It is clear beyond question that we are authorized to correct illegal sentences *sua sponte. Harmon* v. *State*, 317 Ark. 47, 876 S.W.2d 240 (1994). The majority does not, and cannot, explain how we lose our authority to examine the legality of a sentence on our own motion simply because the illegality favors the defendant rather than the State. Resentencing on remand is not barred by former jeopardy considerations, *see State* v. *Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993), and no reasoned basis for this distinction is apparent. Instead, the majority has *sub silentio* interpreted Rule 36.10 of the Rules of Criminal Procedure as requiring an appeal by the State in order to correct a sentencing error favoring a defendant. No such requirement is stated, implied, or hinted at in the Rule, and such a construction is both outside our authority and incorrect.

I dissent and note that I agree with Judge Robbins' opinion.

ROBBINS, J., joins in this dissent.

JOHN B. ROBBINS, Judge, concurring in part, dissenting in part. While I agree that appellant's conviction for the crime of rape should be affirmed, I must respectfully, but strongly, dissent from the position taken on the sentencing issue by the majority of this court which today gives cause to the popular notion that our criminal justice system is weighted in favor of the criminal.

The appellant was convicted of rape, a class Y felony, and sentenced to a term of twelve years with eight years suspended. Appellant argued on appeal that the evidence was insufficient to support his conviction. I fully agree with the majority that appellant's contention has no merit and that his conviction should be affirmed.

My departure from the majority arises from its refusal to correct the illegal sentence given the appellant. Rape is a class Y felony for which the legislature has set a range of imprisonment at not less than ten years, and not more than forty years, or life. Ark. Code Ann. § 5-4-401(a)(1) (1993). Arkansas Code Annotated § 5-4-301(a)(1)(C) (1993) expressly provides that the court shall not suspend imposition of sentence as to a term of imprisonment for a class Y felony. *See Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985); *see also State* v. *Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993). Yet this is precisely what the trial court did when it suspended eight years of the appellant's twelve-year sentence.

The supreme court recently held in *Eberlein* v. *State*, 315 Ark. 591, 869 S.W.2d 12 (1994), that pursuant to a statute applicable to that case the trial court lacked authority to suspend imposition of a ten-year sentence. The defendant had been convicted of two prior felonies and his present conviction was for a drug related offense. The supreme court reversed and remanded for resentencing stating:

> There appears no dispute that the trial court exceeded its authority, and we concur that the trial court erred. This court has repeatedly held that sentencing is entirely a matter of statute. *State* v. *Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993). If the General Assembly sets a constitutional sentencing guide for an offense, *the trial court has no authority to suspend it. Id.*
>
> *If the original sentence is illegal*, even though partially executed, *the sentencing court may correct it at any time. Bangs* v. *State*, 310 Ark. 235, 835 S.W.2d 294 (1992); *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985). Resentencing upon remand is not prohibited by former jeopardy considerations. *State* v. *Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

(Emphasis added.) 315 Ark. at 594, 869 S.W.2d at 14.

The majority acknowledges that the suspension of eight years of appellant's sentence was error, but holds that it may not consider this error because the state did not appeal the issue. However, we have held that:

> [W]hen a court has imposed an illegal sentence on a defendant, then we will review it regardless of whether an objection was raised below. An illegal sentence is one which is illegal "on its face." *Abdullah* v. *State*, 290 Ark. 537, 720 S.W.2d 902 (1986). Therefore, *we could raise the issue on our own.*

(Emphasis added.) *Jones* v. *State*, 27 Ark. App. 24, 27, 765 S.W.2d 15, 17 (1989).

The trial court's judgment of conviction recites on its face that appellant is found guilty of Y felony rape and imposes a twelve-year sentence with eight years suspended. This sentence is illegal on its face. The supreme court has discussed illegal or void sentences in terms of subject matter jurisdiction which may be reviewed on appeal whether or not an objection was made in the trial court. *Howard* v. *State*, 289 Ark. 587, 715 S.W.2d 440 (1986); *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985). In *Jones* v. *State, supra*, we expressed the view that illegal sentences, i.e., a sentence by a court acting in excess of its authority in sentencing, was actually not a matter of subject matter jurisdiction, however, it was an issue which we would review even if we had to raise it on our own. These respective viewpoints are not actually inconsistent because a lack of subject matter jurisdiction equates to a lack of authority or power in a court to act. *See*, e.g., *Ware* v. *Gardner*, 309 Ark. 148, 827 S.W.2d 657 (1992). Although a circuit court does have subject matter jurisdiction in the area of imposing sentences on convicted felons, it lacks the power or authority to impose a sentence outside the range provided by statute, or to suspend a sentence when the legislature has expressly prohibited suspension by statute.

The majority holds that we can correct an illegal sentence if the sentencing mistake runs in favor of the state and against the convicted felon even if the convicted felon does not appeal the issue; but if the illegal sentencing mistake runs in favor of

the convicted felon and against the state then we may not act to correct it unless the state appeals the issue. More specifically, it is the majority's position that if this convicted rapist had been illegally sentenced to 41 years, one year in excess of the permissible range, we would be obliged to correct the sentencing error, sua sponte, even though the appellant did not raise the issue. However, we may not correct an illegal sentence of 12 years with 8 years suspended, sua sponte, in the absence of the state appealing the error even though we have the case before us on appeal by the appellant. We have said that we could raise the issue on our own, *Jones* v. *State, supra,* and to hold that we can do so only when it will serve to benefit, not an accused, but a convicted rapist or other convicted felon, is illogical and offensive to most any non-felon's basic sense of fairness and justice.

Finally, the majority poses the question that, if an illegal sentence may be truly corrected "at any time," is it possible that long after a defendant has served his sentence and been released from prison, he could be brought back into court and resentenced to an additional term? The short answer is that this is not the situation before us. This case is before us on appeal from a judgment entered December 29, 1992; not long after appellant has served out an illegal sentence.

I concur with Judge Cooper's dissenting opinion that the state may only appeal a sentencing error by grace, and not by right. However, it is immaterial whether the state had the right to appeal the sentencing error or not, because we have held that we could raise the issue on our own. *Jones* v. *State, supra.*

I would affirm the appellant's conviction, but reverse and remand to the trial court for resentencing.

COOPER, J., joins in this dissent.

Byrones Eugene ZEILER *v.* STATE of Arkansas

CA CR 93-995 878 S.W.2d 417

Court of Appeals of Arkansas
Division II
Opinion delivered June 22, 1994

William M. Pearson, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Byrones Eugene Zeiler entered a conditional plea of guilty to possession of marijuana with intent to deliver, and was sentenced to five years with two suspended and fined $500.00. He brings this appeal pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure, arguing that the trial court erred in denying his motion to suppress evidence seized during a nighttime search of his residence. Because we agree that the affidavit for the search warrant contained an insufficient factual basis to justify the nighttime search, we reverse.

Greg Donaldson, a police officer for the city of Clarksville, testified at the suppression hearing about the circumstances leading up to his procurement of the search warrant. After a confidential informant indicated that he could buy marijuana from appellant, Donaldson supplied the informant with money, and the informant entered appellant's residence and returned with marijuana. Donaldson then prepared an affidavit and procured the warrant. He testified that the affidavit was the sole basis for the issuance of the warrant.

The affidavit describes a drug buy made by the informant from appellant at appellant's residence on the evening of December 27, 1992. It includes the recorded serial numbers of the currency used to make the purchase of marijuana. The affidavit then states:

> Because of the ease with which the dope can be disposed of and the fact that Zeiler is dealing it now and may get rid of what he has left or dispose of the money used in this buy, a nighttime search should be authorized.

The warrant issued that night recited that the affiant "has reasonable cause to believe and does believe" that at the described premises "there is now being concealed certain property to wit: marijuana and other controlled substance[.]" The warrant further states that "[d]ue to the danger of the immediate removal of the objects to be seized as described above in this warrant the issuing judicial officer authorizes execution of this writ at any time, day or night[.]"

In reviewing a trial court's ruling on a motion to suppress because of insufficiency of the affidavit, we make an independent determination based upon a totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Thompson* v. *State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993). An affidavit must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *See State* v. *Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980). The issuing judicial officer must have reasonable cause to believe that (i) the place to be searched is difficult of speedy access; or (ii) the objects to be seized are in danger of imminent removal; or (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy. Ark. R. Crim. P. 13.2(c); *State* v. *Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991). The affidavit should speak in factual, not merely conclusory, language. *State* v. *Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980).

In *State* v. *Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991), the supreme court affirmed the trial judge's granting of a motion to suppress. After quoting the language of Rule 13.2(c) regarding the circumstances that justify a nighttime search, the court said:

> The affidavit in this case does not set out facts showing reasonable cause for [the issuing judge] to have found that any of the three circumstances quoted above existed. The affidavit merely provides that four previous sales of marijuana had been made by Jesse Martinez to Officer Hanes, that controlled substances were believed to be stored at the Martinez residence, and that another purchase was scheduled to occur at the residence that day. The affidavit

> is silent with respect to anything regarding reasonable cause to believe the marijuana would be destroyed or removed before the next morning. Thus, we hold it was error for the nighttime search warrant to have been issued.
>
> Our holding is consistent with *Hall* v. *State*, 302 Ark. 341, 789 S.W.2d 456 (1990), and *State* v. *Broadway, supra.* Both *Hall* and *Broadway* have facts similar to the facts in the present case. In *Hall, supra*, we held that an affidavit reciting simply that illegal drugs were at appellant's residence and that a confidential informant had purchased marijuana there within the last seventy-two hours did not state facts sufficient to support the issuance of a nighttime search warrant. The *Hall* case is controlling of the present case in all respects.

Relying on *Martinez*, we held in *Ramey* v. *State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993):

> Neither the affidavit nor the sworn testimony set out facts showing reasonable cause for the issuing judge to have found that any of the required circumstances had been met for a nighttime search. A conclusory statement was made that the drugs to be seized were in danger of imminent removal, but no facts were stated to support this conclusion. The officers merely described the sales that had been observed thus far. We therefore hold that it was error for the nighttime search warrant to have been issued.

The affidavit in the case at bar speaks similarly in a conclusory statement about the necessity of a nighttime search. Officer Donaldson acknowledged on cross-examination that the affidavit was limited to the fact that marijuana was purchased that evening; it did not indicate whether more marijuana or other controlled substances were observed at appellant's residence; it did not state whether any drug paraphernalia or other equipment used to package or distribute marijuana was present; it did not recite any other indications of drug activity at the premises such as a steady stream of traffic coming and going. In short, there was no showing of any factual basis to support the conclusion that "[appellant] may get rid of what he has left or dispose of the money used in this buy."

While the search warrant was issued in violation of Rule 13.2(c), a motion to suppress will not be granted unless the violation is "substantial." Ark. R. Crim. P. 16.2(e). It is well established that the nighttime intrusion into a private home upon a warrant issued in violation of Rule 13.2(c) constitutes a substantial violation. *See Garner* v. *State*, 307 Ark. 353, 820 S.W.2d 446 (1991); *State* v. *Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991); *Hall* v. *State*, 302 Ark. 341, 789 S.W.2d 456 (1990); *Ramey* v. *State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993). Also, in accord with this line of authority, we do not find that the "good faith exception" applies to this case.

Reversed and remanded for the appellant to be allowed to withdraw his conditional plea.

Reversed and remanded.

COOPER and ROBBINS, JJ., agree.

Judith HANCOCK *v.* MODERN INDUSTRIAL LAUNDRY

CA 93-856 878 S.W.2d 416

Court of Appeals of Arkansas
Division II
Opinion delivered June 22, 1994

Robert B. Buckalew and *Gary Davis*, for appellant.

Walter A. Murray, for appellant.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case filed a claim for benefits alleging that she sustained chemical burns to her arms on September 4, 1990, during the course of her employment at Modern Industrial Laundry. The Commission concluded that her claim was one for an occupational disease which required her to prove a causal connection by clear and convincing evidence; employing this standard, the Commission found that the appellant failed to prove entitlement to benefits. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in concluding that her claim was one for an occupational disease requiring her to prove a causal connection by clear and convincing evidence. We agree, and we reverse and remand.

The record shows that, on the day of her injury, the appellant was employed at Modern Industrial Laundry removing sheets from a buggy, and helping another person pull the sheets taut so they could travel through a mangle iron. The appellant claimed that she noticed her arm turning red while pulling wet sheets out of a basket that day and sought medical treatment, subsequently undergoing grafts for burns to her forearm. In short, all the evidence in this case points to a single injurious exposure resulting in the injuries claimed by the appellant in the case at bar; although there was some evidence that the appellant sustained similar injuries while working for a different employer, the evidence in this case showed that those prior injuries were, for all practical purposes, healed by the time she sustained the injuries on which the case at bar is based.

Arkansas Code Annotated § 11-9-601(e)(1) (1987) defines "occupational disease" as any *disease* resulting in death or disability that arises out of or in the course of the occupation,

or naturally follows from an injury. Although our Act does not define the distinction between "accidental injury" and "disease," one widely accepted and salient distinction is that occupational diseases are generally gradual rather than sudden in onset. *See, e.g.*, 1B Arthur Larson, *Workmens' Compensation Law* § 41.31 (1992). Given that the evidence shows that the appellant's traumatic injury resulted from a single injurious exposure and was sudden in its onset, we hold that the Commission erred in characterizing it as an occupational disease rather than an injury.

The appellant also argues that the Commission erred in allowing a witness, Imogene Beavers, to testify by deposition. We do not address this question because the appellant has failed to include the challenged deposition in the record before us, and we are therefore unable to determine whether reversible error occurred. *See Death and Permanent Total Disability Trust Fund* v. *Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992).

Because of our resolution of the appellant's first point for reversal, we need not address the remainder of her arguments.

Reversed and remanded.

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

Gladys JOHNSON *v.* GENERAL DYNAMICS

CA 93-830 878 S.W.2d 411

Court of Appeals of Arkansas
En Banc
Opinion delivered June 22, 1994

Blackman Law Firm, by: *Keith Blackman*, for appellant.

Shackleford, Shackleford & Phillips, P.A., by: *Norwood Phillips*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision. The ALJ found that appellant had proven that she had sustained a compensable occupational disease which resulted in a period of temporary, total disability commencing on October 15, 1991, and extending until July 29, 1992; that appellant failed to prove that a violation of an Arkansas statute or official regulation caused in substantial part her occupational disease; and that appellant is not entitled to any permanent disability benefits. On appeal, appellant contends that she is entitled to permanent impairment benefits and wage loss disability benefits and that the Commission erred in failing to award benefits for violation of an Arkansas statute or official regulation. We reverse and remand in part, and affirm in part.

The record reflects that appellant had worked for appellee from September of 1975 until October of 1991, soldering computer component boards with the aid of a magnifying glass or microscope. The performance of this task produced fumes and smoke which were inhaled by appellant. Appellant began experiencing respiratory problems approximately six months prior to the time she quit work in October 1991. She sought medical treatment in August of 1991, and was diagnosed with obstructive pulmonary disease and hypertensive vascular disease. The Commission found that her condition was causally connected with her employment, and awarded appellant temporary total benefits. The Commission found, however, that appellant was not entitled to an award of permanent disability benefits. Appellant argues that there is no substantial evidence to support the Commission's denial of permanent disability benefits. The Commission found that appellant was not entitled to permanent anatom-

ical impairment benefits because the record did not contain a rating of permanent impairment. The Commission also concluded that appellant had suffered no wage loss disability as a result of her condition.

Appellant first argues that the Commission erred in finding that she had suffered no permanent, anatomical impairment as a result of her occupational disease. We agree. The dissent points out that appellant argues that she is permanently, totally disabled and not that she has "some degree" of permanent partial disability. However, it stands to reason that if one argues total disability a partial disability can be found in the alternative. *See* Cite.

Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine* v. *Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* In the case of *Wilson & Co.* v. *Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968), the supreme court stated that the Commission is "not limited, and never has been limited, to medical evidence only in arriving at its decision as to the *amount* or *extent* of permanent partial disability suffered by an injured employee as a result of injury." In fact, it is the duty of the Workers' Compensation Commission to translate the evidence on all issues before it into findings of fact. *Gencorp Polymer Products* v. *Lander*, 36 Ark. App. 190, 820 S.W.2d 475 (1991). It has also been said that nothing in our law does or should require precise evidence of the precise amount of disability. *Bibler Bros.* v. *Ingram*, 266 Ark. 969, 587 S.W.2d 841 (1979). It appears that the court in *Bibler* was referring to anatomical impairment and/or wage loss disability.

After reviewing the record it is clear that the Commission denied appellant benefits for permanent, partial, *anatomical* loss of the use of her body for the sole reason that there was no numerical rating assigned by a physician. However, the record contains evidence from which reasonable minds could conclude that appellant sustained some degree of permanent impairment.

Appellant testified that six months before she had to

cease working, she had been very tired, and had experienced shortness of breath and constant pain in her chest. The record discloses that appellant visited Dr. Bill Dedman on August 21, 1991. Dr. Dedman performed a lung test and found that appellant had a decreased and abnormal lung capacity. Dr. Dedman testified that testing revealed that appellant had a decrease in lung capacity as much as 47 percent. He referred appellant to Dr. James Adamson. Appellant was seen by Dr. Adamson on September 26, 1991, at which time he expressed the view that appellant's decrease in lung volume was largely caused by chronic obstructive pulmonary disease. Dr. Adamson felt that appellant's condition was due from exposure to the smoke and fumes produced from her job.

The record further reveals that appellant was instructed to use inhalers to help her condition. Dr. Dedman stated that appellant's exercise tolerance had increased, but he felt that this was brought about by the use of inhalers. He also testified that, as with any type of lung disease, there was a good chance that appellant's condition would worsen over the progression of time. Dr. Dedman felt that appellant was permanently disabled as a result of her illness.

The record also discloses that appellant was unable to perform activities she once could because of her diminished breathing capacity. Dr. Dedman testified that appellant could not ambulate any significant distance without chest discomfort and shortness of breath. Dr. Dedman stated that he did not believe this condition would get any better. Appellant testified that she was able to garden, perform yard work, carpentry work, and farming before she had this condition. She stated that as a result of her illness she was not able to do her housework.

Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Johnson* v. *American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992). We will reverse a decision of the Commission where convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Wade* v. *Mr. C. Cavenaugh's*, 25 Ark. App.

237, 756 S.W.2d 923 (1988). Based on the facts in this case, we find that the opinion of the Commission fails to display a substantial basis for the denial of relief. We are not convinced that fair-minded persons with the same facts presented in this case could reach the same conclusion as the Commission. The Commission had before it cogent evidence presented by appellant which could support a finding of permanent, anatomical impairment, and we note that there was no evidence in the record to rebut this strong evidence. Therefore, we reverse and remand on this issue. On remand of this case, it will be the function of the Commission to translate the evidence presented them into findings of fact. The dissent mischaracterizes this holding as awarding the appellant "some degree" of permanent, partial disability. To the contrary, we are holding that appellant is entitled to some degree of permanent, partial, *anatomical* impairment disability. The determination of the precise degree of impairment is the Commission's duty to determine under the law; therefore, we remand.

Appellant also argues that there is no substantial evidence to support the Commission's denial of wage loss disability benefits. We disagree.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Grimes* v. *North American Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993). Arkansas Code Annotated § 11-9-522(b) (1987) provides in part that if an employee, subsequent to her injury, "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", she shall not be entitled to wage loss disability benefits.

The Commission denied wage loss disability benefits based on evidence that the appellant had been offered employment within her restricted capacity.The Commission stated that a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time appellant last worked was tendered to her. Appellant contends that the work that was offered did not meet the work restrictions placed upon her by her doctors since she was still exposed to fumes at the plant.

Drs. Dedman and Adamson felt that appellant was

able to return to work. The record discloses that work limitations were placed on appellant's ability to perform a certain type of work. Dr. Dedman noted in a letter dated June 1, 1992, that appellant could continue to work in a sedentary position if the following conditions were met: 1. she is in a room where she is not exposed to solder fumes, 2. she should not be required to walk up stairs, 3. her maximum distance to walk at any time should not be more than 300 feet, 4. she should not be doing any significant repetitive lifting over 20 pounds, 5. she should not be in a position where she is having to do repetitive walking, bending or lifting, 6. she should not be in an area where she is required to wear a respiratory of any type. In a letter dated July 29, 1992, Mr. Norwood Phillips, stated that appellee had several positions open to appellant which comply with the restrictions placed upon her by Dr. Dedman. In that same letter, Mr. Phillips requested that appellant contact John McCroskey to get back to work. Appellant admitted that she was aware of the offer of employment, but she did not speak with Mr. McCroskey as requested. Mr. McCroskey testified that, had appellant reported back to work as scheduled, she would have earned the same wage that she was earning at the time of her departure.

After reviewing the evidence, we cannot say there is no substantial basis for the Commission's denial of wage loss benefits.

For her last point, appellant argues that the Commission erred in refusing to award benefits for a violation of an Arkansas statute or official regulation.

Arkansas Code Annotated § 11-9-503 (1987) provides that:

> Where established by clear and convincing evidence that an injury or a death is caused in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees, compensation provided for by § 11-9-501(a)–(d) shall be increased by 25 percent.

Appellant argues that under Ark. Code Ann. § 11-2-117 (1987) every employer is required to furnish employment which is safe for the employees and that every employer shall furnish safety devices and safeguards. According to appellant, the warehouse

in which she worked was not ventilated and masks were not provided. Other co-workers also testified that they were not aware of any ventilation nor the availability of masks. However, the appellee's safety director testified that there was ventilation and that the air in the plant was checked according to OSHA standards and was below the safety level required.

The Commission found that there was nothing in the record to indicate that the appellant's occupational disease was caused by a violation of an Arkansas statute or official regulation. In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *CDI Contractors* v. *McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993). Therefore, we cannot say that there is no substantial evidence to support the Commission's decision.

Reversed and remanded in part; affirmed in part.

JENNINGS, C.J., concurs in part, and dissents in part.

JOHN E. JENNINGS, Chief Judge, concurring in part, dissenting in part. The majority holds, as I understand it, that the Commission erred in not awarding to the appellant "some degree" of permanent partial disability. One problem with this holding is that this is not the appellant's contention. To the contrary, appellant argues that she "has proven that she is totally, permanently disabled." There is not the slightest suggestion by the appellant that the Commission, on its own, ought to have found "some degree" of permanent *partial* disability. The majority states that "it is clear that the Commission denied appellant benefits for permanent, partial anatomical, loss of the use of her body for the sole reason there was no numerical rating assigned by a physician." Even the appellant recognizes that this is not true:

> The Commission, in adopting the administrative law judge's decision, made the finding that the appellant was entitled to no permanent disability benefits for two reasons. First being that she was given no permanent partial physical impairment rating, and secondly, that the claimant was offered employment within her capacity, so that she would be limited to her anatomical impairment, pursuant to Ark. Code Ann. § 11-9-522(b). [Appellant's brief.]

The majority says, "The record contains evidence from which reasonable minds *could* conclude that appellant sustained *some* degree of permanent impairment." (Emphasis added.) While I do not disagree, this is not our standard of review and affords no basis for reversal.

Apart from the problem that the issue we reverse on is not urged by the appellant, none of the cases cited by the majority has any significant bearing on the case at bar. For instance the court in *Bibler Bros., Inc.* v. *Ingram*, 266 Ark. 969, 587 S.W.2d 841 (1979), says that nothing in the law requires precise evidence of the amount of "disability." The court clearly was referring to the combination of both anatomical disability and wage-loss disability. *See, generally, Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Arkansas Best Freight* v. *Brooks*, 244 Ark. 191, 424 S.W.2d 377 (1968). In *Brooks* the court said:

> The pronouncement in *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), settled the law with reference to non-scheduled injuries. "Loss of the use of the body as a whole" involves two factors. The first is the functional or anatomical loss. *That percentage is fixed by medical evidence.* Secondly, there is the wage-loss factor, that is, the degree to which the injury has effected claimant's ability to earn a livelihood. [Emphasis added.]

In determining permanent partial disability, factors such as the claimant's age, education, experience, and other matters affecting wage-loss, must be considered along with the medical evidence. Ark. Code Ann. § 11-9-522 (Supp. 1993); *Glass* v. *Edens, supra.* This is the reason that the court in *Wilson* v. *Christman*, cited by the majority, stated that the Commission is not limited to medical evidence only in arriving at its decision on permanent partial disability.

The practical difficulties in remanding this case to the Commission with instructions to fix, on this evidence, a certain degree of permanent partial disability, are overwhelming. Any finding of fact the Commission makes will simply be a guess.

The case at bar is one of those unusual workers' compensation cases in which the principle of the burden of proof has some bearing. While I agree with the majority that there is evi-

dence that the appellant sustained some degree of permanent partial impairment, it was the claimant's burden to offer some evidence as to the degree of that impairment. It is roughly analogous to the burden of a plaintiff in a tort action to produce evidence of the amount of her damages. The jury, like the Commission here, cannot simply be left to speculate. *Mine Creek Contractors, Inc.* v. *Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989).

Finally, the majority agrees with the Commission that there was evidence to support the Commission's finding that had the appellant returned to work "she would have earned the same wage that she was earning at the time of her departure." Ark. Code Ann. § 11-9-522(b) provides that under such circumstances she "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.) This was an alternative basis for the Commission's denial of permanent disability benefits and another reason why we err in reversing the decision in this case.

For the reasons stated, I respectfully dissent.

Robert BRIDGES *v.* STATE of Arkansas

CA CR 93-974 878 S.W.2d 781

Court of Appeals of Arkansas
En Banc
Opinion delivered June 29, 1994

William R. Simpson, Jr., Public Defender, by: *Phyllis A. Edwards*, Deputy Public Defender, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Robert Bridges was convicted by a jury of possession of cocaine with intent to deliver, possession of drug paraphernalia, maintaining a drug premises, and possession of a defaced firearm. He was sentenced to twenty years in the Arkansas Department of Correction for the cocaine charge, three years for possession of drug paraphernalia, three years for maintaining a drug premises, one year in the county jail for the firearms charge, and total fines of $6,245.00. The firearms charge, a misdemeanor, was merged with the felonies and all sentences were set to run concurrently.

On appeal, Bridges contends that the evidence was insufficient to support the conviction for possession of a controlled substance with intent to deliver, possession of drug paraphernalia, and maintaining a drug premises. We hold that the evidence was sufficient and affirm.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Bailey* v. *State*, 307 Ark. 448, 821 S.W.2d 28 (1991). We must affirm if there is substantial evidence to support the verdict. Substantial evidence is evidence that is forceful enough to compel a conclusion that goes beyond speculation or conjecture. *Hendrickson* v. *State* 316 Ark. 182, 871 S.W.2d 362 (1994). The issue of the sufficiency of the evidence is a question of law. *See Wooten* v. *State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990).

Appellant was standing on the porch at 1720 West 16th Street with several other men when detectives of the Little Rock Police Department arrived to execute a search warrant on July 29,

1992. An Intertech nine millimeter pistol was leaning against the wall directly in front of him and within his reach. The serial number was scratched off of the pistol, which contained nineteen live rounds of ammunition. A sawed-off twelve gauge pump shotgun with seven live rounds was standing against the porch wall farther away. A matchbox with white residue was lying on a porch windowsill. Appellant told officers he lived at the house.

In the living room a matchbox with cocaine residue was found under the couch, as was an empty Intertech box used to house a nine millimeter pistol. A plastic bag containing cocaine residue and a knife were on the fireplace mantel. A vase on the mantel held a small plastic bag containing several small pieces of crack cocaine. A plastic bag with marijuana residue was found behind the fireplace mantel.

Inside a dresser drawer in the middle bedroom were a marijuana pipe, paper, and residue. The pipe contained marijuana residue. A small plastic packet with cocaine residue was on top of the headboard. In a southeast bedroom dresser drawer were other plastic packets with cocaine residue. Various papers bearing the name of Willie Bridges and the address 1720 West 16th were found on top of the dresser. In the northeast bedroom were papers which belonged to Willie Bridges. Under the bed was a Guardian .32 caliber revolver.

Appellant testified that he had lived with his brother, Willie Bridges, from February 1, 1992, until the date of his arrest on July 29, except for a two-week period. He testified that he wanted to move back to El Dorado because he "got tired of being around drug dealers and gang banging and stuff like that. Crips." He said there were "fifteen or sixteen coming around every day, all through the night, all through the day." He testified that "all this drug activity had been going on while I was there." He denied any participation.

Appellant's argument in regard to the controlled substance and drug paraphernalia convictions is that since appellant was not in actual physical possession of either, the convictions may not stand. The argument is that appellant's possession was merely "constructive" and that when conviction is based on constructive possession, factors other than mere joint occupancy of a residence must be shown to link the accused to the contraband.

Neither exclusive nor actual physical possession of a controlled substance is necessary to sustain a conviction. *See Bailey* v *State*, 307 Ark. 448, 821 S.W.2d 28 (1991); *Johnson* v. *State*, 35 Ark. App. 143, 814 S.W.2d 915 (1991). Constructive possession is sufficient. *Bailey* v. *State, supra; Parette* v. *State*, 301 Ark. 607, 786 S.W.2d 817 (1990). Constructive possession can be inferred when the controlled substance is in the joint control of the accused and another. Hendrickson v. State, 316 Ark. 182, 871 S.W.2d 362 (1994). However, joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. *Bailey, supra; Hendrickson, supra.* The State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband. *Bailey, supra; Hendrickson, supra.*

Constructive possession is the control, or right to control, the contraband in question. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982); *Johnson* v. *State*, 35 Ark. App. 143, 814 S.W.2d 915 (1991). Such control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband. *Nichols* v. *State*, 306 Ark. 417, 815 S.W.2d 382 (1991); *Mosley* v. *State*, 40 Ark. App. 154, 844 S.W.2d 378 (1992).

Circumstantial evidence alone may be sufficient to support a conviction; indeed, the law makes no distinction between circumstantial and direct evidence. *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982), *cert. denied*, 493 U.S. 959 (1989). Whether the circumstantial evidence excludes every other reasonable hypothesis is ordinarily for the factfinder to determine. *See Sanders* v. *State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

It is important to remember that jurors do not and need not view each fact in isolation, but rather consider the evidence as a whole. The jury is entitled to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Shipley* v. *State*, 25 Ark. App. 262, 757 S.W.2d 178 (1988). Jurors are instructed that they are not to set aside their common sense. AMI Crim. 103. When joint occupancy is the basis for a conviction of possession of contraband there must be proof of both knowledge and control on the part of the accused. *See Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793

(1988). In the case at bar appellant's knowledge of the contraband and its sale from his home were admitted. Appellant's control, or right to control, the controlled substances and the drug paraphernalia could be inferred by the jury from the facts and circumstances of the case. For example, the jury might infer that appellant resided in the "middle bedroom" because papers belonging to his brother, Willie Bridges, were found in the other two bedrooms. It was in the middle bedroom that the marijuana pipe was found and cocaine residue was found in plain view.

Furthermore, a bag containing cocaine residue was in plain view on the mantel in the living room in the house. Appellant's possession of the Intertech pistol and the proximity of the Intertech box found under the couch in the living room to additional cocaine could be considered by the jury.

When all of the facts and circumstances of the case at bar are considered we cannot say that the evidence was insufficient to support the jury's finding of guilt on the charges of possession of cocaine with intent to deliver and possession of drug paraphernalia.

Appellant's final contention is that the evidence is insufficient to support his conviction on the charges of maintaining a drug house. The statute provides, in pertinent part, that it is unlawful for any person knowingly to keep or maintain any dwelling which is resorted to by persons for the purpose of using or obtaining controlled substances. Ark. Code Ann. § 5-64-402 (1987). We hold that the evidence was sufficient to support the conviction on this count.

Affirmed.

ROBBINS, J., concurs in part; dissents in part.

COOPER, J., dissents.

JOHN B. ROBBINS, Judge, concurring in part, dissenting in part. I concur with the majority in its affirmance of appellant's conviction for possession of drug paraphernalia. However, I dissent to its affirmance of appellant's convictions of possession of cocaine with intent to deliver and maintaining a drug premises because there is no substantial evidence in the record, direct or circumstantial, which supports these verdicts.

JAMES R. COOPER, Judge, dissenting. I dissent because I find that the evidence is insufficient to support the appellant's convictions. I concede that there was contraband in the residence in question and I concede that the appellant was a joint occupant of the premises. However, this will not sustain his conviction. In order to establish constructive possession, the State had to show, in addition to joint occupancy of the premises, some additional factor linking the appellant to the contraband. *Cerda* v. *State*, 303 Ark. 241, 795 S.W.2d 358 (1990). Under these circumstances, the State had to prove that the appellant exercised care, control, and management over the contraband and that he knew the matter possessed was contraband. *Embry* v. *State*, 302 Ark. 608, 792 S.W.2d 318 (1990). Control and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, the ownership of the property where the contraband is found, and the display of suspicious behavior before and during arrest. *See Nichols* v. *State*, 306 Ark. 417, 815 S.W. 2d 382 (1991); *Plotts* v. *State,* 297 Ark. 66, 759 S.W.2d 793 (1988).

Although the evidence supports the conclusion that the appellant was a joint occupant of the premises, there are no additional factors linking him to the contraband. The appellant stated that he was aware of the drug activity; however, mere knowledge is not enough. It was not shown that the appellant had a superior or equal right to the control of the house or the activities going on therein. There is no evidence connecting the appellant to any of the bedrooms in which contraband was found. The contraband was not found on the appellant's person nor in his immediate proximity. There was a matchbox found on the window sill of the porch where the appellant was standing along with several other men when the police arrived; however, it was not shown to contain any controlled substance. Moreover, the appellant did not exhibit any suspicious behavior, attempt to flee, or make any effort to dispose of any incriminating material. The majority opinion correctly states the law but refuses to follow it. The facts recited by the majority in support of its decision show only that contraband was found in the house and that the appellant stayed there. The evidence does not indicate any additional factors linking the appellant to the contraband.

Substantial evidence means that the jury could have reached

its conclusion without having to resort to speculation or conjecture. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982). In the case at bar, only by speculation and conjecture could the jury have found that the appellant possessed the controlled substances and drug paraphernalia found in the house.

I also find the evidence insufficient to support the appellant's conviction on the charge of maintaining a drug premises. There is no evidence indicating that the appellant was the lessee, paid the rent or utilities, or took part in the maintenance or upkeep of the residence. There is no evidence that he had any authority or right to control his brother's residence while he was staying there. The majority opinion merely states that it finds the evidence sufficient without stating any facts to support that conclusion, and if the evidence mentioned to support the other convictions is thought to be sufficient to support this conviction too, then I strongly disagree.

I respectfully dissent.

Tau CARTER and Marco Lamont Sanford *v.*
STATE of Arkansas

CA CR 93-549 878 S.W.2d 772

Court of Appeals of Arkansas
En Banc
Opinion delivered June 29, 1994

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

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

JOHN E. JENNINGS, Chief Judge. Tau Carter and Marco Lamont Sanford were found guilty of possession of a controlled substance with intent to deliver. Carter was sentenced to ten years in the Arkansas Department of Correction; Sanford was sentenced to fifteen years imprisonment and a fine of $15,000.00. Their sole point on appeal is that the evidence was insufficient because the State did not present testimony concerning intent. We find no error and affirm.

In determining the sufficiency of the evidence we consider all of the evidence, including that which may have been erroneously admitted. *Burkett* v. *State*, 40 Ark. App. 150, 842 S.W.2d 857 (1992). We review the evidence in the light most favorable to the State and affirm if there is any substantial evidence to support the trial court's judgment. Substantial evidence, whether direct or circumstantial, is evidence of such sufficient force and character that it will compel a conclusion one way or the other, without resorting to speculation or conjecture. *Turner* v. *State*, 24 Ark. App. 102, 749 S.W.2d 339 (1988). Intent, being a subjective matter, is ordinarily not susceptible of proof by direct evidence but usually must be established by circumstantial evidence. *Sumner* v. *State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

In the afternoon of September 1, 1992, a narcotics squad of the Little Rock Police Department went to 18th and Park Streets to investigate complaints of drug sales. Appellants Carter and Sanford were part of a group on the porch at 1722 South Park, described as a duplex or apartment with two front doors.

As the uniformed officers approached the residence, Carter pulled a small white box out of his pocket and turned toward one of the doors. He did not obey Officer Anthony Brainard's order to stop. Officer Brainard grabbed Carter and recovered the white dental floss container which Carter was placing in a mailbox just inside the door. Officer Robert Mourat retrieved a brown pill bottle and a clear Lifesavers tube which Sanford dropped into a mailbox outside the other door. The Lifesavers tube contained only a residue, but the pill bottle held twenty-eight rocks of crack cocaine.

The dental floss container held eight rocks of crack cocaine with a total weight of .87 grams. The weight of the twenty-eight rocks was 3.46 grams. In Arkansas possession of more than one gram of cocaine creates a rebuttable presumption that the person possesses it with intent to deliver. Ark. Code Ann. § 5-64-401(d) (Supp. 1991); *Johnson* v. *State*, 35 Ark. App. 143, 814 S.W.2d 915 (1991). Thus, the presumption of intent to deliver arose against Sanford and the jury was permitted to infer that he possessed 3.46 grams of cocaine with the intent to deliver it. We find that the evidence summarized above was sufficient to support his conviction.

The dental floss box which Carter took from his pocket held less than a gram of cocaine, so the statutory presumption of intent to deliver did not arise against him. Detective Austin Lynch testified that his work in the narcotics detail had included undercover buys as well as searches and seizures in crack houses. He testified that he had seen crack cocaine smoked in crack pipes. He said that typically only one rock would be smoked in a crack pipe unless the rocks were small, and that the eight rocks at issue were entirely too big to be placed in a crack pipe at one time. He stated that the street value of a single rock on September 1, 1992 was $20.00, and the eight rocks had an approximate value of $160.00.

The court qualified Detective Lynch as an expert witness for the limited subject of the suspected intent and use of narcotics. Detective Lynch stated that the number and total value of cocaine rocks affect his perception of how a person intends to use cocaine. Possession of one to three rocks would indicate to him possession for personal use. He testified that Carter's possession of the eight rocks here was "for the sole intent of sell-

ing it." The admissibility of this opinion evidence is not an issue on appeal.

Though the amount possessed was not enough to give rise to our statutory presumption, the jury could find from Detective Lynch's testimony that appellant possessed the drugs with intent to sell. The jury is the sole judge of the weight of the evidence and the credibility of the witness. AMI Crim. 104. Viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence to support appellant Carter's conviction.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. Although I agree to the affirmance of the conviction of appellant Sanford, I must dissent from the affirmance of appellant Carter's conviction for possession with intent to deliver. I would modify his conviction to simple possession.

The majority opinion points out that the amount possessed by Carter was not sufficient to give rise to the statutory presumption that it was possessed with intent to deliver. But the majority relies upon the opinion testimony of Detective Lynch who was allowed to testify that the eight rocks of cocaine found in the dental floss box that had been in appellant Carter's possession was, as the majority opinion puts it, "entirely too big to be placed in a crack pipe at one time," and "he thought that possession was for the 'sole intent of selling it.'" Except for this testimony and Lynch's testimony that the rocks had a street value of $20.00 each — a total value of $160.00 — there is no other evidence referred to in the majority opinion to support a finding that Carter possessed this cocaine with the "intent" to deliver it.

While the majority opinion does not mention "circumstantial" evidence, I do not think it could be seriously argued that evidence that Carter had in his possession eight rocks of cocaine worth $160.00 could constitute anything other than circumstantial evidence of his "intent" to deliver. Carter questions the sufficiency of this evidence to support his conviction, and the rule in this regard is well established:

> The general rule with respect to the sufficiency of the evidence is that the evidence to support a conviction, whether direct or circumstantial, must be of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. We will affirm the verdict of the trial court, if it is supported by substantial evidence, and circumstantial evidence may constitute substantial evidence.
>
> To be sufficient to sustain a conviction, the circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence. This becomes a question for the factfinder to determine. In determining whether there is substantial evidence, the court reviews the evidence in the light most favorable to the appellee. Guilt may be proved, even in the absence of eyewitness testimony, and evidence of guilt is no less substantial because it is circumstantial.

Lukach v. *State*, 310 Ark. 38, 42, 834 S.W.2d 642, 644 (1992) (citations omitted). This does not mean, however, that the issue is not subject to appellate review. In *Chism* v. *State*, 312 Ark. 559, 567, 853 S.W.2d 255, 259 (1993), the court in reversing a conviction for kidnapping, said:

> However, regardless of whether evidence is direct or circumstantial, it must still meet the requirement of substantiality — it must force the fact finder to reach a conclusion one way or the other without resorting to speculation or conjecture.

I think the issue here is analogous to the issue we have faced in several burglary cases. In *Tiller* v. *State*, 42 Ark. 64, 854 S.W.2d 730 (1993), we modified a conviction for attempted burglary to attempted criminal trespass because there was insufficient evidence to support a finding that the appellant, who attempted to force an apartment door open, intended to commit therein any offense punishable by imprisonment. There, we noted decisions by the Supreme Court of the United States which hold that the State is required to prove every element of the crime charged beyond a reasonable doubt. We also noted the case of *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1980), in which the Supreme Court of

Arkansas held that evidence of breaking into a house is not evidence of intent to commit a crime therein. And we noted the case of *Jimenez* v. *State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984), in which this court held that, contrary to other cases discussed where the State had proved only that the appellant was "merely present," there was in *Jimenez* evidence of "other facts and circumstances from which the trial court could infer that appellant had the requisite intent."

In the present case, the appellant Carter did not testify, and I think the evidence of his guilt is only sufficient to support a finding of *possession* of a controlled substance. Detective Lynch's testimony that the eight rocks could not be placed in a crack pipe at one time does not mean that the eight rocks could not be smoked one rock at a time. It was the State's burden to exclude every other reasonable hypothesis consistent with innocence of the charge of possession with intent to deliver. Clearly the State's evidence did not exclude the reasonable hypothesis that the eight rocks of cocaine could be smoked one rock at a time. The evidence that Carter discarded the box containing the cocaine and turned to leave the area is no more reasonably consistent with the crime of possession with intent to deliver than with the crime of simple possession. And the evidence that the eight rocks had a total street value of $160.00 does not add enough to the rest of the evidence to say that the State proved the element of intent beyond a reasonable doubt as the United States Supreme Court has required in *Patterson* v. *New York*, 432 U.S. 197 (1977) and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). Nor does that value evidence add enough to the other evidence to exclude the reasonable hypothesis that Carter had the cocaine for his own use. To hold otherwise, in my view, is to allow the fact finder to resort to speculation or conjecture, and *Chism* v. *State, supra*, holds that this is wrong.

Finally, I note that the State has relied upon some out-of-state cases. The one most similar to the present case appears to be *Spriggs* v. *United States*, 618 A.2d 701 (D.C. App. 1992). There, the government's expert testified that "the quantity, packaging, and value of the drugs possessed by the appellant (thirteen separate packets — eight packets of heroin and five packets of cocaine — worth approximately $470.00) was more consistent with an intent to distribute than with personal use."

The court affirmed the conviction of "possession with intent to distribute" and pointed out that the expert's opinion was based in part "on the quantity, value, and packaging in smaller bags, and also on the possession of *both* heroin and cocaine." (Emphasis in the opinion.) Clearly, the evidence in that case was much stronger than is the evidence here.

In summary, based on the evidence in this case and the law as set out in the cases cited, I think the conviction of appellant Carter should be reduced to a conviction for possession only, which is a lesser included offense of possession with intent to deliver. *See Mock* v. *State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987). Therefore, I would modify and remand for resentencing. *See Tiller* v. *State, supra.*

Herbert E. HANEY *v.* SMITH, DOYLE & WINTERS and Continental Insurance Company

CA 93-299 878 S.W.2d 775

Court of Appeals of Arkansas
En Banc
Opinion delivered June 29, 1994

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

Laser, Sharp, Wilson, Bufford & Watts, by: *Ralph R. Wilson*, for appellees.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case sustained a compensable injury in the course of his employment with the appellee Smith, Doyle & Winters Construction Company on August 7, 1986. The appellant chose Dr. Swain, a chiropractor, as his treating physician. The claim was initially accepted as compensable and payment for chiropractic treatments was made from the time of the injury through July 28, 1989. However, after July 28, 1989, the appellee insurance carrier refused to pay for any additional chiropractic treatments and requested that the appellant be referred to Dr. Hartmann, an orthopedic surgeon. Dr. Hartmann examined the appellant on March 20, 1991; on March 21, 1991, Dr. Hartmann prepared a written report detailing the results of his examination and expressing his opinion that the appellant's condition was stable and no orthopedic treatment was necessary at that time, although he indicated that further procedures might be considered if the appellant's symptoms were exacerbated. After a hearing on the appellant's claim that the appellees should be liable for chiropractic treatment rendered subsequent to July 28, 1989, the Commission found that chiropractic treatment provided subsequent to that date was unreasonable and unnecessary. From that decision, comes this appeal.

For reversal, the appellant contends that the Workers' Compensation Commission erred in finding that chiropractic treatment rendered subsequent to July 28, 1989, was unreasonable and unnecessary. We affirm as modified and remand.

At the hearing, there was evidence that the appellant injured his back lifting some steps while performing construction work in the course of his employment with the appellee construction company. On the recommendation of a relative, the appellant sought treatment from a chiropractor. He stated that the treatments gave him relief and enabled him to continue doing construction work. Dr. Hartmann testified that he believed that the appellant suffered from a herniated disc which the chiropractic physician had misdiagnosed as a back strain. Dr. Hartmann stated that, had he been treating the appellant, he would have given him physical therapy for only a few weeks, with rest and medication prescribed for subsequent flare-ups.

In reviewing decisions of the Arkansas Workers' Com-

pensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we uphold those findings if there is substantial evidence to support them. Where, as here, the Commission has denied a claim because of failure to show entitlement to benefits, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991). It has been held that, when the medical evidence is conflicting, the resolution of that conflict is a question for the Commission. *See Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987). In the case at bar, Dr. Hartmann stated that he did not believe that chiropractic treatment was necessary for the appellant's condition for five years after the appellant's compensable injury. The Commission found that Dr. Hartmann's opinion was entitled to great weight. Consequently, we affirm the Commission's finding that further chiropractic treatments were not reasonably necessary with respect to treatments rendered subsequent to Dr. Hartmann's letter of March 21, 1991, in which he expressed his opinion that the appellant's condition was stable and that no further treatment was required at that time. However, we modify the Commission's decision with regard to benefits for chiropractic treatments rendered prior to Dr. Hartmann's letter of March 21, 1991.

The Arkansas General Assembly, in Act 444 of 1983, specifically permitted an injured employee to choose either a medical or chiropractic physician. This portion of the Act is now codified at Ark. Code Ann. § 11-9-514(2) (1987). We think that the legislative intent was to provide for an alternative form of treatment as an alternative to treatment by a medical doctor. The clear implication of the Commission's ruling in the case at bar is that a claimant must accurately assess his own condition to determine which of the competing schools of treatment is proper in his case, and will be denied benefits for those treatments if his decision is later determined by medical experts to have been incorrect. We do not think that the legislature so intended in enacting Act 444 of 1983. In the case at bar, after initially treating the claim as compensable and providing benefits for treatments, the appellee insurance company stopped payment of ben-

efits on July 28, 1989, and requested an independent medical examination which was not performed until almost two years later, on March 20, 1991.

Although the appellant did not appeal from that portion of the order appointing Dr. Hartmann as his treating physician, the very fact that a treating physician was appointed indicates that the appellant required medical treatment up to and after the time of the hearing in this case. Furthermore, no witness, including Dr. Hartmann, testified that the treatments rendered subsequent to July 28, 1989, were unreasonable and unnecessary.[1] Regardless of whether the appellees assumed the burden of proving that the chiropractic treatments were not reasonable and necessary, or whether that burden remained on the appellant, we hold that fair-minded persons could not conclude that the treatments provided between the appellees' request for an independent examination and the completion of that examination were not reasonable and necessary, and that charges for treatments provided during that interim period are therefore to be borne by the appellees. Consequently, we remand to the Commission for the entry of an order consistent with this opinion.

Affirmed as modified and remanded.

ROBBINS and MAYFIELD, JJ., agree.

ROGERS, J., concurs.

JENNINGS, C.J., and PITTMAN, J., dissent.

JUDITH ROGERS, Judge, concurring. I concur with the majority that under the particular facts in this case, the chiropractic treatment received by appellant between July 28, 1989, and March 20, 1991, is compensable.

---

[1]Dr. Hartmann characterized chiropractic treatment as the equivalent of physical therapy, and testified that he would not continue physical therapy for five years, but would instead allow only a few weeks of physical therapy and would prescribe medication for the treatment of subsequent flare-ups. We regard this testimony as a mere description of the difference between medical and chiropractic treatment which cannot reasonably be regarded as evidence that the chiropractic treatments administered in the case at bar were not reasonable and necessary, especially in light of the clear legislative intent to afford injured workers a chiropractic alternative to medical treatment in Act 444 of 1983.

Once the injured worker has proven that his treatment is necessary and causally related to his compensable injury, he should not be required to prove it anew each and every day that he might need treatment.

Here, when the medical bills were disputed, the claimant agreed to another medical opinion at the request of his employer. It is significant to note in this case, that the claimant was not released to return to work by his doctor at the time the employer stated that the treatment was unnecessary, and when the employer requested a second opinion. During the interim between the dispute and the requested examination, the claimant should not be deprived of treatment for pain or medical services provided, and medicine if this is ordered. In this case, the examination was approximately twenty months after the agreement to undergo an additional examination. There is evidence in the record that the claimant continued to experience pain during and after this interim. The record does not disclose why there is a long interval between the date that the employer disputes additional coverage and the first examination by the doctor who is selected by the employer. If no further diagnosis or examination was arranged, the employer could cut off all benefits unilaterally by the simple expedient of stating that the medical expenses are not reasonable and necessary. It would be foolish to suggest that the purpose of ameliorative legislation is to put the injured worker in a posture of getting the employer's permission for every single treatment.

Despite the dissent's statement, the majority opinion recognizes that under the law an injured worker still bears the burden of proving that he suffered an injury, that it is causally connected to his work, and that he is in need of medical services. This claim was originally accepted by the employer as compensable and the ensuing medical services were paid for a long period. I think, however, that it defies logic to say that treatment becomes unnecessary just because the employer, at some point decides this is so, without any supporting evidence.

I do not mean to imply by this decision that treatment continue indefinitely, nor that a causal connection need not be established. I do however think it takes more than the employer's statement, without any additional evidence, that the medical treatment is unnecessary to cease payments *once liability* is established.

There is no indication in the record that the claimant *ever* refused to undergo an examination by a physician chosen by the employer. I hope the dissent is not saying that once the medical necessity of treatment is established, then by the simple expedience of refusing to pay for treatment, an injured worker should be without medical attention, even though at that time there is no proof in the record that treatment is unnecessary and there is evidence in the record to the contrary.

JOHN E. JENNINGS, Chief Judge, dissenting. The issue for the Commission was whether the chiropractic treatment of the appellant, Herbert Haney, was reasonable and necessary beyond July 28, 1989. This is the date that the appellees controverted the issue by refusing to make further payments for the chiropractic treatment.

Whether the treatment for a compensable injury is reasonable and necessary is a question of fact. *Tracor/MBA* v. *Baptist Medical Center*, 29 Ark. App. 198, 780 S.W.2d 26 (1989); *Savage* v. *General Industries*, 23 Ark. App. 188, 745 S.W.2d 644 (1988); *DeBoard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). When the Commission's finding of fact is challenged on appeal we must affirm if the finding is supported by substantial evidence. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993); *Garrett* v. *Sears, Roebuck & Co.*, 43 Ark. App. 37, 858 S.W.2d 146 (1993). Whether the Commission's finding is supported by substantial evidence is a question of law for the appellate court to decide. *Pickens-Bond Constr. Co.* v. *Case*, 266 Ark. 323, 584 S.W.2d 21 (1979); *Aluminum Co. of America* v. *McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Perry* v. *Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1989). When the issue is whether the Commission's finding of fact is supported by substantial evidence the question for us is whether reasonable minds could have reached the conclusion reached by the Commission. *See Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992); *Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991); *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). In deciding this question we must view the evidence in the light most favorable to the findings of the Commission. *Quality Serv. Railcar* v. *Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991); *Hope Brick Works* v. *Welch*, 33 Ark. App. 103, 802

S.W.2d 476 (1991); *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

When the evidence is viewed in that light, I am unable to understand the result the majority reaches.

Mr. Haney sustained an admittedly compensable injury on August 7, 1986, when he reached down to pick up a set of steps. He saw Dr. A.H. Swain, an El Dorado chiropractor. Dr. Swain diagnosed the injury as a back strain and certified on August 9, 1986, that Mr. Haney could return to regular work without restrictions.

After appellant had been cleared to return to work he continued to see Dr. Swain and, later, other chiropractic physicians who had purchased Dr. Swain's practice. Mr. Haney testified that the only treatments he received were "adjustments of the low back," where his back would be massaged. He also testified that since the date of the injury he had seen the chiropractic physicians hundreds of times and had gotten no "long-term relief." As to "short-term relief," he said sometimes it helped him and sometimes it didn't.

While Dr. E.R. Hartmann, an orthopedic physician, testified that he believed Mr. Haney had the "residuals of a herniated lumbar disc," he conceded that it was a possibility that Dr. Swain's diagnosis of the lumbar strain or sprain was correct. Dr. Hartmann testified that "in some areas chiropractors are pretty good physical therapists," but that "you certainly wouldn't give a patient [physical therapy] for five years." He said, "I would prescribe it, let them have a few weeks, and if it helps, great."

Between the time the appellees controverted the necessity of continued chiropractic treatment on June 28, 1989, and the date of the hearing before the administrative law judge on November 20, 1991, Mr. Haney saw Dr. Swain's successors on seventy-eight separate occasions and charges were submitted for more than 200 separate procedures. In my view, reasonable minds could conclude that the adjustments administered after July 28, 1989, were not necessary for the treatment of appellant's injury.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent. This case should be very simple. As Chief Judge Jennings states in his

dissent, the issue presented to the Commission was whether the chiropractic treatment undergone by appellant subsequent to July 28, 1989, was reasonably necessary for the treatment of his injury. *See* Ark. Code Ann. § 11-9-508 (1987). The Commission found that appellant had failed in his burden of proving that the treatment was reasonable and necessary. The only issue presented on appeal is whether the Commission's finding is supported by substantial evidence. I agree with Chief Judge Jennings' analysis of this issue and join in his dissenting opinion.

However, I feel I must write separately in order to offer a direct response to some of the more troubling statements and implications of a majority of this court. The majority *reverses* a significant portion of the Commission's decision because "no witness, including Dr. Hartmann, testified that the treatments rendered subsequent to July 28, 1989, were unreasonable and unnecessary." In the process of so holding, the majority: (1) imposes on the employer a burden of disproving the reasonableness and necessity of a claimant's chiropractic treatment; (2) effectively imposes on the employer a burden of forcing a claimant to submit to and attend an independent medical evaluation; and (3) seemingly declares as a matter of law that an employer is liable for an injured employee's chiropractic treatment unless and until an independent medical examination is performed.

The law in this state has always been that the claimant bears the burden of proving his entitlement to workers' compensation benefits. *See Arkansas Department of Health* v. *Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993); *Gencorp Polymer Products* v. *Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991); *Morrow* v. *Mulberry Lumber Co.*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). This same rule is applicable not only to claims for medical benefits generally, *see Morgan* v. *Desha County Tax Assessor's Office*, 45 Ark. App. 95, 871 S.W.2d 429 (1994), but to charges for chiropractic care as well, *Alexander* v. *Lee Way Motor Freight*, 15 Ark. App. 41, 689 S.W.2d 3 (1985) ("The claimant's right to seek treatment from a chiropractor is not unconditional; *he must still prove the treatment is reasonable and necessary* and causally related to his compensable injury"). The employer has no burden of disproving a claimant's entitlement to benefits.

The issue before the Commission, therefore, was *not* whether

appellee had offered definitive proof that appellant's chiropractic treatment was *un*reasonable and *un*necessary. Instead, the issue was whether *appellant* had met *his* burden of affirmatively proving by a preponderance of the credible evidence that the treatment was, in fact, reasonably necessary. Likewise, the issue on appeal is *not* whether appellee presented one witness or another from whose testimony the Commission could have found the treatment to be unreasonable and unnecessary. Since the Commission found that the party with the burden of proof, appellant, had failed to meet that burden, the issue is whether the Commission's opinion displays a substantial basis for the denial of relief. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993); *Johnson* v. *American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992); *Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991); *Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987); *Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979). These differences are fundamental, but are missed entirely by the majority.[1]

If, however, the majority is insistent upon shifting the burden of proof to the employer, then the case should at least be remanded for an evidentiary hearing at which appellee would be allowed the opportunity to offer whatever additional evidence it might have in order to disprove the reasonableness and necessity of the treatment administered to appellant between July 1989

---

[1]Aside from the absence of expert testimony that the treatment was, in so many words, unreasonable and unnecessary, the only other evidentiary support offered for the majority's conclusion is that a treating physician was appointed for appellant. The majority maintains that the "fact" that "the order" appointed a treating physician "indicates that the appellant required medical treatment up to and after the time of the hearing in this case." Clearly, the inference drawn by the majority with respect to the need for prior medical treatment is a non sequitur. Even if it were not, however, it cannot be said that the mere existence of a need for *some* medical treatment justifies the automatic imposition of liability on the employer for *any and all* treatment previously received, regardless of whether it was reasonable and necessary. As basic as the foregoing is, it is nevertheless secondary when one considers that the Commission's order in this case, which is the order appealed from and the only order abstracted by either party, is absolutely silent regarding the appointment of a treating physician. Even assuming that some order touching on the subject might exist, the majority can only have found it by reference to the record. Therefore, in addition to everything else, the majority must also have violated the well-established rule that we do not go to the record to reverse. *See, e.g., Boren* v. *Qualls*, 284 Ark. 65, 680 S.W.2d 82 (1984).

and March 1991. As it stands, the majority places upon appellee a burden of proof of which appellee could not have been aware, as it never before existed, and then, after conducting a *de novo* review of the record, faults appellee for not having met that burden. This is wrong.

Finally, I cannot help but note that the majority also attaches a crucial significance to March 21, 1991, the date of Dr. Hartmann's report following his independent examination of appellant. In the next to last paragraph of Judge Cooper's opinion, three judges apparently conclude that our Workers' Compensation Act prohibits the denial of benefits for chiropractic treatment that is undergone prior to a "determin[ation] by medical experts" that such treatment is unreasonable and unnecessary. This same sentiment is echoed throughout the concurring opinion. As a practical matter, the majority has elevated chiropractic care to a state that it is automatically treated as reasonable and necessary and compensable unless and until an independent medical examination conclusively establishes otherwise. I do not understand the position taken by the majority. First, it is clear that the majority has created the argument out of whole cloth and, as such, the question should not be considered at all. It simply cannot be said that appellant has at any time argued that the dates of Dr. Hartmann's examination or report are in any way significant, that he (appellant) had any reason to believe that appellee was willing to pay for the treatment received prior to those dates, or that appellee should be responsible for the cost of the treatment because of some delay in having him independently examined. Appellant argues only that all of his chiropractic treatment was, *in fact*, reasonable and necessary for the treatment of his compensable injury and that the evidence is insufficient to support a finding otherwise.

In any event, I am unaware of any authority, or reason, supporting the majority's decision to make an independent medical examination essentially a prerequisite to the employer's right to contest its liability for chiropractic expenses. While an employer may request that the Commission order a claimant to undergo such an independent examination, Ark. Code Ann. § 11-9-511 (1987), there is no requirement that the employer make such a request or that the Commission grant it. If there is no requirement that such an examination be performed at all, then there

certainly is no requirement that an employer secure the performance of an examination that the majority would deem either conclusive or "timely." Indeed, only the Commission can require a claimant to undergo an independent medical examination. Ark. Code Ann. § 11-9-511.[2] The fact of the matter is that controverting liability for a claimant's chiropractic treatment, as appellee did in this case as of July 28, 1989, is all that is required for an employer to put the claimant to his burden of proving that the treatment for which benefits are sought was reasonable and necessary. *See DeBoard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987); *see also Alexander* v. *Lee Way Motor Freight, supra.*

Douglas A. SINGH *v.* RILEY'S, INC.

CA 93-769 878 S.W.2d 422

Court of Appeals of Arkansas
Division I
Opinion delivered June 29, 1994

[2]It should be noted that appellee was *not* seeking to bar appellant's right to further compensation on grounds that appellant had failed to obey any order of the Commission with respect to an independent examination, *see* Ark. Code Ann. § 11-9-511(e); appellee was merely contesting whether the treatment appellant had received was reasonable and necessary. In the former situation, it may be that the employer would bear the burden of proving the claimant's failure to obey an order; in the latter, the employer has no burden of proof.

Dover & Dixon, P.A., by: *W. Michael Reif*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Byron Freeland* and *Marshall S. Ney*, for appellee.

JAMES R. COOPER, Judge. The appellant in this civil case brought an action for breach of an employment contract against Riley's, Inc., seeking contractual severance pay of $36,000.00; $6,000.00 for wages earned in July 1991; $4,154.00 for accrued vacation; $8,295.00 for real estate commissions incurred from the sale of his house; $1,365.00 in moving expenses; $9,000.00 for an incentive bonus earned between February 1, 1991, and July 31, 1991; attorney's fees; and costs. After the conclusion of the appellant's case at a bench trial on February 12, 1993, in which Riley's, Inc., stipulated that Singh was entitled to $3,600.00 in accrued and unpaid wages, the trial court directed a verdict against the appellant with regard to the disputed elements of his claim, and awarded him $3,600.00 in wages and an attorney's fee of $360.00. From that decision, comes this appeal.

On appeal, Singh does not contest Riley, Inc.'s right to terminate his employment at will; however, he contends that he was entitled to certain benefits under the agreement because he was terminated without cause. The agreement, which was handwritten by Pat Riley, president of Riley's, Inc., provides in part:

> This is a brief memorandum covering agreements reached by Riley and Singh as to his new position effective 8-1-90. Riley will develop a Job Description, Goals to be accomplished by Singh, Incentive Compensation and reasonable yardsticks to evaluate performance and timing of such evaluations. As for now the brief but pertinent outline is as follows:
>
> . . . .
>
> Reports to: Pat M. Riley, Sr. - President and Chm. of Board.

. . . .

> Severance Pay - (1) If Singh resigns there will be none. (2) If he is released for cause there will be none. Cause does not mean failure to meet corporate goals or to earnings and other performance ratings. *Nor does it mean failure to demonstrate the necessary qualifications for the position or extension of appropriate effort.* It does mean fraud or dishonest acts and/or conduct in his daily life that is inappropriate to his executive position. (3) If he is released for other reason than cause as broadly defined above he will receive severance pay of $36,000.00 if it occurs prior to 8/1/93.
>
> . . . .
>
> This constitutes all of the agreement.

(Italics supplied). Riley's, Inc. responds that although "cause" is frequently included in employment agreements, it is seldom completely defined and that the trial court correctly determined that the grounds for cause listed in the contract were not exclusive but merely illustrative. We do not agree. Instead, we think it clear that the trial court misread the handwritten contract and based his directed verdict on an erroneous belief that the failure to exert appropriate effort was included within the contractual definition of "cause." This is apparent from the trial judge's order, in which he stated that:

> I think the extension of appropriate effort means exactly what it says. You simply are not going to tie yourself into a contract of employment for someone who does not perform appropriately. The effort they put into it is not the poundage that they lift, but the amount of struggle they do to perform the job.
>
> In this situation, Mr. Riley has testified that he didn't feel this man extended appropriate effort in curing the problems that the Long-term Care Board had placed on him because of the inappropriate placement of funds. He also felt there wasn't appropriate effort used to investigate a very severe problem which could have caused the corporate entity not only embarrassment but legal problems that

> would have cost them monetary problems, so I feel that extension of appropriate effort has definite meaning to this contract and it should be broadly defined as cause, so I agree with Mr. Freeland.

Although a question of fact is presented when a contract is ambiguous as to the parties' intent, *Elkins* v. *Arkla, Inc.*, 312 Ark. 280, 849 S.W.2d 489 (1993), the construction and legal effect of a contract are questions of law when the terms thereof are not susceptible to more than one equally reasonable construction. *See State Farm Fire & Casualty Co.* v. *Amos*, 32 Ark. App. 164, 798 S.W.2d 440 (1990). We hold that the contractual provision that failure to extend appropriate effort did not constitute cause for dismissal with respect to severance pay was not ambiguous, and that the trial court erred as a matter of law in directing a verdict against the appellant.

We address the appellant's remaining point for reversal because it is likely to recur on retrial. He contends that the trial court erred in admitting parol evidence to determine the meaning of the term "cause" with respect to the severance pay provision. This argument is meritorious. Because parol evidence is admissible only if an ambiguity exists, *see Minerva Enter., Inc.* v. *Bituminous Casualty Corp.*, 312 Ark. 128, 134, 851 S.W.2d 403 (1993); *Pizza Hut of America, Inc.* v. *West Gen. Ins. Co.*, 36 Ark. App. 16, 20, 816 S.W.2d 638 (1991), we hold that the trial court erred in admitting parol evidence for the purpose of determining the meaning of this provision.

Reversed and remanded.

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

Jimmy MYERS, Cathy Owen & Kenneth Owen *v.*
STATE of Arkansas

CA CR 93-1035 878 S.W.2d 424

Court of Appeals of Arkansas
Division II
Opinion delivered June 29, 1994

John W. Settle Law Firm, by: *John W. Settle*, for appellants.

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

JOHN B. ROBBINS, Judge. Appellants Jimmy Myers, Cathy Owen, and Kenneth Owen were charged with possession of methamphetamine and marijuana with intent to deliver, and possession of drug paraphernalia. Motions to suppress were filed in which appellants asserted that all items seized should be suppressed because there was no valid basis for the issuance of a warrant which authorized a nighttime search. Following a hearing, the motions to suppress were denied. Thereafter, all three appellants entered a guilty plea pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, which provides:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendre [contendere], reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

The appellants now appeal, arguing that the trial court erred in overruling their motions to suppress because the nighttime search was not justified by the affidavit for the warrant and was in violation of the Fourth and Fourteenth Amendments to the United States Constitution, article 2, section 15 of the Arkansas Constitution, and Rule 13.2 of the Arkansas Rules of Criminal Procedure. In addition, appellants Cathy Owen and Kenneth Owen contend that the court erred in allowing testimony of a police

officer at the motion hearing because it was outside the scope of the affidavit. We find no error and affirm.

The evidence shows that, at about 8 p.m. on the evening of December 31, 1992, a confidential informant entered Mr. Myers' residence for the purpose of purchasing controlled substances. The informant purchased a substance represented to be methamphetamine and, while making the purchase, he observed an additional quantity of methamphetamine, as well as marijuana and drug paraphernalia.

Based on the information provided by the informant, Officer Dennis Alexander of the Fort Smith Police Department prepared an affidavit with the assistance of a Deputy Prosecutor and proceeded to the home of Circuit Judge John Holland. In reliance on the affidavit, Judge Holland signed a warrant for the search of Mr. Myers' residence. The warrant was executed at 4:00 a.m. on January 1, 1993, during which methamphetamine, marijuana, currency and drug paraphernalia were seized.

The affidavit signed by Officer Alexander stated that an informant purchased illegal drugs from Mr. Myers during the nighttime hours, that the informant saw additional methamphetamine, marijuana and drug paraphernalia in Myers' house, and that "since sales are being made in the nighttime hours it is respectfully requested that a nighttime search be authorized." The warrant signed by Judge Holland authorized a nighttime search. He represented in the warrant that he was satisfied that reasonable cause existed to believe that "the objects to be seized are in danger of imminent removal" and that "the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy."

We need not address the merits of the arguments presented by appellants Mr. Owen and Ms. Owen because neither has standing to challenge the search of Mr. Myers' residence. The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights have been violated by the challenged search or seizure. *State* v. *Hamzy*, 288 Ark. 561, 709 S.W.2d 397 (1986). A person's Fourth Amendment rights are not violated by the introduction of damaging evidence

secured in the search of a third person's premises or property. *Fernandez* v. *State*, 303 Ark. 230, 795 S.W.2d 52 (1990). In *Parette* v. *State*, 301 Ark. 607, 786 S.W.2d 817 (1990), the Arkansas Supreme Court held that an individual had no standing to contest a warrantless search and seizure because there was no showing that the person owned or leased the searched premises or maintained any control over the premises. Mr. Owen and Ms. Owen failed to make any showing that either of them had any right of control over Mr. Myers' home. Because their arguments amount to an attack on the nighttime search and no control or legitimate expectation of privacy was established, we affirm the convictions of Mr. Owen and Ms. Owen.

We next address the merits of the argument presented by Mr. Myers. Arkansas Rule of Criminal Procedure 13.2(c) addresses a person's right against an unreasonable nighttime search and provides:

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

An affidavit for a search warrant must set forth facts establishing reasonable cause to believe that circumstances exist which justify a nighttime search. *Ramey* v. *State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993). Conclusory statements do not provide the requisite factual basis to establish reasonable cause. *Garner* v.

State, 307 Ark. 353, 820 S.W.2d 446 (1991). In reviewing a trial court's decision to deny an appellant's motion to suppress evidence, this court makes an independent determination based on the totality of the circumstances and reverses the decision only if it is clearly against the preponderance of the evidence. *Houston* v. *State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993).

After a careful review of the affidavit presented in this case, we find that the trial judge's decision to deny the motion to suppress evidence seized in the nighttime search was not clearly against the preponderance of the evidence. The instant case presents a fact pattern similar to that of *Holmes* v. *State*, 39 Ark. App. 94, 839 S.W.2d 226 (1992), a case in which we upheld the trial court's finding that a nighttime search warrant had been validly issued. In *Holmes*, as in the case at bar, the affidavit set forth information that the residence in question contained illegal drugs and paraphernalia in addition to that purchased by a reliable informant; that the informant had purchased drugs with recorded currency; and that appellant was believed to be active in the sale of illegal drugs. Furthermore, the informant in this case, operating under police surveillance, purchased methamphetamine on the same night that the search was executed. Based on the facts set out in the affidavit, the issuing judge was satisfied that there was reasonable cause to believe that the contraband and recorded currency at issue were in danger of imminent removal and authorized a nighttime search. Based on the precedent of *Holmes*, we cannot say the trial court erred in its denial of Mr. Myers' motion to suppress. *See also Coleman* v. *State*, 308 Ark. 631, 826 S.W.2d 273 (1992).

This case is distinguishable from *Zeiler* v. *State*, 46 Ark. 182, 878 S.W.2d 417 (1994), a case in which we held an affidavit to be insufficient to justify a nighttime search. In that case, the affidavit did not indicate whether the informant who purchased marijuana observed more marijuana or other controlled substances at the appellant's residence, nor did it indicate whether any drug paraphernalia was present at the appellant's home. In addition, the affidavit gave no indication that any other drug activity was occurring on the premises. By contrast, the affidavit in the instant case provided information regarding additional drugs and paraphernalia at appellant's home along with a statement, based on the informant's knowledge, that Mr. Myers was active in drug

dealing. These additional factors supply the reasonable cause to justify the trial judge's refusal to suppress the fruits of the night-time search.

Affirmed.

PITTMAN and MAYFIELD, JJ., agree.

ARKANSAS DEPARTMENT OF CORRECTION
v. William HOLYBEE

CA 93-901 878 S.W.2d 420

Court of Appeals of Arkansas
Division I
Opinion delivered June 29, 1994

Richard S. Smith, for appellant.

Friedman Law Offices, by: *Errol N. Friedman*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission. We affirm.

At the hearing before the administrative law judge, it was stipulated that on September 5, 1991, the claimant, an employee of the Arkansas Department of Correction, was bitten by an inmate known to be HIV positive. It was also stipulated that the claimant missed no time from work, the injury was accepted as compensable, and payment had been made for treatment of the bite wound. It was further stipulated that the claimant's treating physician at the hospital emergency room recommended that the claimant be tested for, and receive treatment to prevent the development of, tetanus, hepatitis, HIV, AIDS, and AIDS related complex (ARC) and that the appellant declined to pay for these tests and prophylactic measures. The stipulation stated that the only issue before the Commission was the compensability of the medical procedures for which the respondent had declined to pay.

The administrative law judge held that the injury was compensable; that the exposure to the AIDS virus arose directly from the claimant's work-related injury; and that the testing, treatment, and prevention of the development, or spread, of the dis-

ease would be "reasonably necessary for the treatment of the injury" pursuant to Ark. Code Ann. § 11-9-508 (1987). The full Commission affirmed and adopted the opinion of the law judge.

The appellant argues that: "The Commission erred in holding that the diagnostic and preventive measures prescribed for detection, diagnosis and/or prevention of AIDS, ARC, HIV, tetanus, and hepatitis or other infectious diseases were reasonably necessary for treatment of the claimant's compensable injury, in that such a holding is not supported by substantial evidence and is contrary to applicable law."

Arkansas Code Annotated section 11-9-508 (1987) provides:

> (a) The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing service, and medicine, crutches, artificial limbs, and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee.

What constitutes reasonable and necessary treatment under this section is a fact question for the Commission. *Wright Contracting Co.* v. *Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984). Also, whether the medical treatment actually provided is reasonable and necessary is a question of fact for the Commission. *DeBoard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings, and we must affirm if there is any substantial evidence to support them. We may reverse the Commission's decision only when we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Id.*

Appellant contends that the medical care reasonable and necessary to "treat" the claimant's injury was merely cleansing the bite wound, suturing, and bandaging it. Appellant cites *City of Littleton* v. *Schum*, 38 Colo. App. 122, 553 P.2d 399 (1976), in support of its argument. In that case the Colorado Workers' Compensation Commission declined to allow a fireman, exposed to infectious hepatitis, preventative treatment because it did not

meet the criteria for occupational disease under the state statute; because mere exposure to a disease does not warrant an award of benefits; and because there was no statutory authority for requiring employers to provide preventive measures. The appellee/claimant distinguishes that case from this one by pointing out that Colorado had a specific statute quite different from that of Arkansas; the claimant in the Colorado case said he could have been exposed to hepatitis at work or outside work; and the disease was one to which the employee might have been equally exposed outside of his employment.

However, in *Jackson Township Volunteer Fire Company* v. *Workmen's Compensation Appeal Board (Wallet)*, 594 A.2d 826 (Pa. Commw. Ct. 1991), Wallet was a volunteer with the Ambulance Association, a division of the fire department, when he assisted with transporting the body of a person killed in an automobile accident and in the process got the victim's blood and body fluids on his hands and shirt. The victim was found to have had AIDS and was actively infected with the hepatitis B virus. The coroner immediately summoned Wallet to the hospital where he was tested for AIDS and hepatitis and received a series of injections to kill the hepatitis virus. The fire department and its insurer refused to pay for the tests and immunizations. The issue was whether the statutory definition of "injury" could apply to exposure to AIDS and hepatitis under these circumstances. It was held that Wallet's "injury" was "the risk of infection," and that "persons exposed to a serious risk of contracting a disease which is commonly known to be highly contagious/infectious and potentially deadly, have been 'injured' for the purpose of receiving compensation under the Act." 594 A.2d at 828.

The focus of our decision in the instant case is the Commission's decision that the appellee "is entitled to the medical treatment prescribed for the purposes of detecting and/or preventing tetanus, HIV, hepatitis, all of which arise out of his admittedly compensable injuries." We affirm that decision based on the Commission's specific finding that "the prescribed regimen of treatment is 'reasonably necessary for the treatment of the injury.'"

Affirmed.

PITTMAN and ROGERS, JJ., agree.

James Eddie McCRAW *v.* John A. McCRAW, Jr.

CA 94-460 878 S.W.2d 3

Court of Appeals of Arkansas
Opinion delivered June 29, 1994

George C. Walthall, for appellant.

Michael Sherwood, for appellee.

PER CURIAM. The appellee in this case has filed a motion to dismiss the appellant's appeal, contending that the record was not timely filed with the clerk of this court. We agree and dismiss the appeal.

On December 28, 1993, the chancery court of Pulaski County entered its order denying and dismissing appellant's complaint for specific performance of a contract and awarding appellee an attorney's fee of $1,000.00. On January 6, 1994, appellant filed a timely notice of appeal from the December 28 order, *see* Ark. R. App. P. 4(a), and a motion to stay the order pending appeal. Appellant filed the record in this court on May 2, 1994.

Rule 5(a) of the Arkansas Rules of Appellate Procedure provides that the record on appeal shall be filed with the clerk of the appellate court within ninety days of the filing of the notice of appeal, unless the time is extended by timely order of the trial court. Here, the record was not tendered until 116 days after appellant's notice of appeal. The record fails to disclose that any

order to extend the time for filing was ever sought or obtained. Nor has appellant alleged that the late filing resulted from some unavoidable casualty. Under these circumstances, we grant appellee's motion. *See Mitchell* v. *City of Mountain View*, 304 Ark. 585, 803 S.W.2d 556 (1991).[1]

Appeal dismissed.

CARGILL, INC. *v.* STORMS AGRI ENTERPRISES, INC.

CA 93-696 878 S.W.2d 786

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

[1]We note that appellant filed a second notice of appeal from the December 28 order on January 31, 1994. Of course, the January 31 notice of appeal was ineffectual, as appellant's motion for a stay is not one of the limited types of post-trial motions that, under Ark. R. App. P. 4, will extend the time for filing notice of appeal. *See* Ark. R. App. P. 4 (b); *Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993). Moreover, even if the motion for a stay were, or were analogous to, one of the motions referred to in Rule 4(b), no written order denying the motion was ever entered. Therefore, a notice of appeal filed prior to the expiration of thirty days after the motion was filed, as appellant's second notice was here, would be premature and have no effect. *See* Ark. R. App. 4(c); *Phillips Construction Co.* v. *Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991); *see also Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992).

Mashburn & Taylor, by: *Timothy L. Brooks*, for appellant.

Everett, Mars & Stills, by: *David D. Stills* and *John C. Everett*, for appellee.

JOHN E. JENNINGS, Chief Judge. Appellant, Cargill, Inc., sued appellee, Storms Agri Enterprises, Inc., for repudiating a contract to purchase cottonseed from appellant and sought $12,012.00 in damages. At the conclusion of appellant's case, the trial court granted appellee's motion for directed verdict, holding that appellant had failed to produce any evidence that appellee's repudiation of the contract had substantially impaired the value of the contract to appellant as required by Ark. Code Ann. § 4-2-610 (Repl. 1991). On appeal, appellant contends the trial court erred in directing a verdict for appellee and dismissing its claim for damages.

Appellant is a seller of cottonseed, a by-product of the cotton-ginning process, that is used as a component in the feed ration of dairy cattle. Appellee operates a dairy farm and for the past few years has purchased cottonseed from appellant. At trial, appellant contended that on November 14, 1990, appellee's president, Bill Storms, verbally agreed to purchase from appellant

seventeen truckloads of cottonseed at the rate of $176.00 per ton to be delivered to appellee's farm. In support of its claim, appellant introduced into evidence Contract No. 5053, which recited the terms for appellee's purchase of seventeen truckloads, each containing approximately 400 short tons of cottonseed, at $176.00 per ton. Under the terms of this contract, appellee had the option of accepting delivery of the cottonseed at any time from the date the contract was made until August 1991.

Appellant's agent, John Fricke, testified that he received no objection concerning the contract from appellee and that appellee ordered three separate truckloads for delivery and paid for these truckloads pursuant to the terms stated in the contract. He testified that, in January 1991, he was informed that appellee had not signed and returned a copy of Contract No. 5053 as requested and that he contacted Bill Storms, who stated he had not received the contract and asked for another copy. Fricke stated that he then mailed him two more copies of the contract, which were not returned. He stated that, on February 25, Storms called him, told him that he had been quoted a price of $143.00 per ton for cottonseed, and wanted to know what appellant was going to do for him. Fricke stated he advised Storms that he could work something out but he would first have to have the signed contract returned. He testified that Storms then told him to deliver another truckload of cottonseed to appellee and he would decide whether he was going to sign the contract but that Storms canceled the delivery of cottonseed later that same day. Fricke testified that appellee's cancellation of the delivery alerted him that there could be a problem with appellee's future performance under the contract and that, on March 20, he sent appellee a letter stating the terms and conditions of the contract and advising him of the cash price of the contract if appellee canceled it. The letter concluded with a request that appellee advise appellant of its intentions for the balance of the contract by March 26, 1991. Fricke stated that appellee did not respond to his letter and that, on April 11, 1991, appellant's legal department sent appellee a letter by certified mail, which stated:

> You have received three loads under the contract with Cargill and a balance of 14 loads remain open on the contract. Because of previous communications with you indicating a possibility of breach on your part and because you

> have not replied to Mr. Fricke's letter by the March 26 deadline, Cargill is treating the contract as breached and is demanding payment from you in the amount of $12,012.00, which is the difference between the contract price of $176.00 per ton plus $6.00 carrying charges and the current market of $143.00 per ton.

Fricke testified that appellant then canceled appellee's contract effective March 20 and computed the damages owed by appellee by taking the difference between the contract price of $176.00 per ton and the market price to which Storms testified of $143.00 per ton times the remaining fourteen undelivered truckloads, at twenty-two tons per truck, and then adding the accrued storage fees for January, February, and March 1991.

Bill Storms, president of appellee, was also called as a witness by appellant. Although he did not admit that he had entered into a contract to purchase seventeen loads of cottonseed from appellant, he did admit he bought three loads from appellant for the same charges and terms as shown on Contract No. 5053. He also admitted receiving a registered letter from appellant and that he did not respond to this letter. He also stated that he had decided by the end of February 1991 that he was not going to order any more cottonseed from appellant.

At the conclusion of appellant's case, appellee moved for a directed verdict, contending appellant had not produced any evidence that appellee's repudiation of the contract "substantially impaired" the value of the contract to appellant as required by Ark. Code Ann. § 4-2-610 (Repl. 1991). Although the trial court found there was evidence of repudiation by appellee, the court held that appellant was still required to prove that appellee's repudiation substantially impaired the value of appellant's contract and that appellant had failed to present any evidence in support of this issue. On this basis, the trial court directed a verdict for appellee.

For its first point on appeal, appellant contends the trial court erred in holding appellant had failed to introduce evidence of substantial impairment in accordance with § 4-2-610 and directing a verdict for appellee. In deciding whether a directed verdict should have been granted, we must view the evidence in

the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into consideration all reasonable inferences deducible from it. *Howard* v. *Hicks*, 304 Ark. 112, 800 S.W.2d 706 (1990). Where the evidence is such that fair-minded people might reach different conclusions, then a jury question is presented, and it is error to grant a directed verdict. *Mankey* v. *Wal-Mart Stores, Inc.*, 314 Ark. 14, 16, 858 S.W.2d 85, 86 (1993).

In awarding appellee a directed verdict, the circuit court relied on Ark. Code Ann. § 4-2-610 (Repl. 1991), which provides:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:
>
> (a) For a commercially reasonable time await performance by the repudiating party; or
>
> (b) Resort to any remedy for breach (§ 4-2-703 or § 4-2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
>
> (c) In either case suspend his own performance or proceed in accordance with the provisions of this chapter on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (§ 4-2-704).

The trial court interpreted the phrase "substantially impair" in this section to require that appellant must show some "special circumstances . . . that it's going to cause special damage" in order to sustain a claim for anticipatory breach. Although we do not agree that such a showing was required under the facts of this case, we understand the trial court's confusion, as the Uniform Commercial Code does not provide a useful definition of the phrase "substantially impair the value of the contract."

Comment 3 to § 2-610 of the Uniform Commercial Code states:

> The test chosen to justify an aggrieved party's action under this section is the same as that in the section on breach in installment contracts [U.C.C. 2-612] — namely the substantial value of the contract. The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the *part* or *aspect* repudiated. [Emphasis added.]

Arkansas Code Annotated § 4-2-612(3) provides that whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. Comment 4 to § 2-612 of the Uniform Commercial Code [Ark. Code Ann. § 4-2-612 (Repl. 1991)] states that substantial impairment must be judged in terms of the normal or specifically known purposes of the contract.

The phrase "substantially impair" as used in § 4-2-610 requires the factfinder to look at the materiality of a party's repudiation as it relates to the entire contract. When a party repudiates as to a single installment or performance, it is incumbent on the party seeking damages under § 4-2-610 to prove the value of the contract as a whole was substantially impaired to justify his resort to his remedies for breach. *See* § 4-2-610(b). The determination of whether such a partial breach substantially impaired the value of the contract would be a question for the trier of fact. *See Cherwell-Ralli, Inc.* v. *Rytman Grain Co.*, 180 Conn. 714, 433 A.2d 984 (1980); *USX Corp.* v. *Union Pacific Resources Co.*, 753 S.W.2d 845 (Tex. Ct. App. 1988).

In the case at bar, however, it cannot be seriously argued that appellee's repudiation of fourteen out of seventeen loads of cottonseed that it allegedly agreed to purchase did not substantially affect the value of the whole contract, and appellant should have been allowed to present its claim to the jury. The essential point is that the evidence here shows a breach of the whole contract, not just a part. Where a buyer's conduct is sufficiently egregious, such conduct will, in and of itself, constitute substantial impairment of the value of the whole contract. *See S & S, Inc.* v. *Meyer*, 478 N.W.2d 857, 863 (Iowa Ct. App. 1991); *Cherwell-Ralli, Inc.* v. *Rytman Grain Co.*, 433 A.2d at 987. *See also Capital Steel Co.* v. *Foster and Creighton Co.*, 264 Ark.

683, 689-90, 574 S.W.2d 256, 259-60 (1978) (Remedies provided by the Uniform Commercial Code are to be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.)

Because we must reverse on appellant's first point, we need not address the other issues raised.

Reversed and remanded.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I do not agree with the majority's conclusion that the trial judge erred in finding no evidence that the appellee's repudiation substantially impaired the value of the contract. I submit that, in order to show that the value of the contract had been impaired, the appellant was required to show not only the difference between the market price at the time and place for tender and the unpaid contract price, but also the amount of "expenses saved in consequence of the buyer's breach" as required by Ark. Code Ann. § 4-2-708(1) (Repl. 1991). This the appellant failed to do, and I believe that the trial court was therefore correct in granting the directed verdict motion.

Moreover, the case of *Capital Steel Co.* v. *Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978), cited by the majority for the proposition that a mere showing of lost profits constitutes an adequate basis for a finding of substantial impairment of the contracts value, is inapplicable to the facts of the present case. In *Capital Steel, supra*, the Court held that a showing of lost profits was sufficient to present an issue for the jury with regard to damages. However, that holding was based squarely on the fact that Ark. Code Ann. § 4-2-708(1) was not applicable because the steel which was to be sold was not in existence at the time of the repudiation, so that the Court was required to "turn to subsection (2), which governs when subsection (1) is not applicable."

In the case at bar, there was no showing that the measure of damages in subsection (1) was inadequate; therefore, there is no occasion to apply the "lost profits" provision of subsection (2), as the majority has done in the case at bar. Because the showing of expenses saved on account of the breach, required by sub-

section (1), was not adequately made, and because subsection (2) was not applicable, I think the trial court correctly granted the appellee's motion for directed verdict.

I respectfully dissent.

Linda JOHNSON *v.* RAPID DIE & MOLDING

CA 93-837 878 S.W.2d 790

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

Denver L. Thornton, for appellant.

Bridges, Young, Matthews & Drake, by: *Ruth A. Wisener*, for appellee.

JOHN E. JENNINGS, Chief Judge. Linda Johnson suffered an admittedly compensable injury in the form of a back strain and bruised knee when she slipped and fell at work on February 6, 1990. She was released by Dr. Randolph Taylor to return to light work on May 15, 1990, with the restriction that she not lift more than twenty-five pounds. She was laid off work on June 21, 1990, and one month later received a termination notice.

Mrs. Johnson continued to have difficulties and on May 9, 1991, Dr. Stephen Cathey diagnosed her as having "low back strain superimposed on preexisting degenerative disc disease without neurological deficit" and "morbid obesity." In August 1991, Dr. Taylor said:

> I am going to send her a letter so that she can take it by and get on a weight loss program. I think she is having relative instability in her back due to a combination of her obesity and degenerative disc disease and that she would greatly benefit from losing weight and then reconditioning.

The respondents paid temporary total disability through the time Mrs. Johnson returned to work. At a hearing before an administrative law judge on October 15, 1992, the claimant contended that she was entitled to a weight loss program to be paid for by the respondents and that she was entitled to a continuation of temporary total disability. On appeal, the full Commission approved a weight loss program but held that she was not entitled to additional temporary total disability benefits. The sole argument on appeal is "[a]ppellant had not reached her healing period and was entitled to additional temporary total disability as found by the administrative law judge." We hold that the Commission's decision is supported by substantial evidence and affirm.

In the course of its opinion the Commission found that the claimant's healing period had ended. The sole argument on appeal is simple and straightforward. As the appellant states: "The weight loss program is a 'way of treatment' that 'will improve that condition.' Until that happens, the healing period has not ended." The argument is that the claimant still remains within her healing period, not that the Commission was bound to find that the healing period ended at some other time subsequent to her return to work.

If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Arkansas Highway & Transp. Dept.* v. *McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *J. A. Riggs Tractor Co.* v. *Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period has ended is a factual determination and is to be made by the Commission. *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). When the sufficiency of the evidence to support the Commission's findings of fact is challenged, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings. *Thurman* v. *Clark Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994). We must uphold those findings unless there is no substantial evidence to support them. *Thurman, supra.*

In May 1991, Dr. Cathey stated, "Since the injury occurred

well over a year ago, I believe the patient has reached maximum medical benefit and could be released to return to work whenever she feels she could handle herself there." In September 1991, both Dr. Taylor and Dr. Carl Goodman expressed the opinion that the claimant had reached "maximum medical improvement." In the case at bar we hold that the Commission's finding, that the claimant is not still within her healing period, is supported by the evidence.

There is another reason that the decision of the Commission must be affirmed. In *Arkansas State Highway Dept.* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981), the supreme court made it clear that the mere fact that the claimant remains within the healing period does not mean that he or she is entitled to temporary total disability. "Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages." *Breshears*, 272 Ark. at 246. Temporary total disability is not based on the claimant's healing period, but is instead awarded where the claimant is incapacitated because of injury to earn the wages she was receiving at the time of the injury.

In the case at bar the Commission expressly found that Mrs. Johnson was not entitled to additional temporary total disability after May 15, 1990. The Commission based this finding on the fact that the claimant had returned to work, her testimony that she would probably still be working for the appellee had she not been laid off, the fact that she subsequently worked part-time for a photographer, and her testimony that she helped her husband at his service station and was physically capable of doing so.

We cannot say that fair-minded persons could not reach the conclusion that Mrs. Johnson did not suffer "a total incapacity to earn wages" beyond May 15, 1990. *See Breshears, supra.*

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

Affirmed.

MAYFIELD, COOPER and ROBBINS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached by the majority opinion in this case because I

do not think there is substantial evidence to support the Commission's decision. The majority holds that three of appellant's doctors said appellant had "reached her maximum medical improvement." The problem is that these doctors were talking about a point in time *after* May 14, 1990. They did not say her healing period ended on May 14, 1990, and that is the last day for which the Commission allowed temporary disability.

Dr. Steven Cathey concluded in a report dated May 9, *1991*, that "since the injury occurred well over a year ago, I believe the patient has reached maximal medical benefit and *could be released to return to work. . . .*" (Emphasis added.) Dr. Carl Goodman said in a report dated September 16, *1991*, that "I feel like this lady had probably reached maximum medical improvement." Also, Dr. Randolph Taylor said in a note dated September 26, *1991*, "I am in agreement with Dr. Goodman that she's reached her maximal medical improvement."

Thus, the evidence relied upon does not support the Commission's finding that appellant's healing period ended on May 14, *1990*. In fact, the Commission really does not rely upon the doctors for its holding. The Commission says that appellant's healing period ended because:

> Claimant testified that she would still be working for the respondent had she not been laid off. Thus, by the claimant's own admission, she was physically capable of performing that work.

First, appellant's testimony was that if she had not been laid off, "I would *probably* still be working there." (Emphasis supplied.) Secondly, being "physically capable" of performing work is not the same as having reached the end of the healing period. As we said in *J.A. Riggs Tractor Co.* v. *Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990):

> The healing period is defined as that period for healing of the injury resulting from the accident which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable *and if nothing further in the way of treatment will improve the condition*, the healing period has ended. *Mad Butcher, Inc.* v. *Parker*,

> 4 Ark. App. 126, 628 S.W.2d 582 (1982). *Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition.*

30 Ark. App. at 203, 785 S.W.2d at 53 (emphasis added).

Thus, "the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition." That, obviously, is the purpose of and the reason for the weight-loss program allowed by the law judge and the Commission in this case. The Commission's opinion states:

> The remaining issue on appeal involves the claimant's entitlement to a weight reduction program. Such a program has been recommended by the claimant's physicians, therefore, *we find under the facts in this case that it is reasonable and necessary in relation to the claimant's compensable injury.*

(Emphasis added.)

It therefore follows as night follows day that under the law and the facts found by the Commission, the appellant's healing period has not ended because the treatment that is reasonable and necessary in relation to her injury has not been administered. The law judge allowed temporary total disability benefits through appellant's healing period and the Commission cut off those benefits after May 14, 1990. I think there may be evidence to support the disallowance of total disability at the end of one year *after* May 14, 1990. The doctors agree on that point. But I do not think the evidence supports the disallowance of temporary total disability before that point.

Appellant was terminated approximately one month after she returned to work on May 14, 1990. She did find another job doing telephone solicitation work for Olan Mills for approximately one month, but she has not been able to find any other work that she was able to do. The Commission placed great emphasis upon the fact that appellant helped her husband at times at his service station, but appellant testified that this was a self-service station and she mainly ran the cash register. It is obvious that appellant has not been confined to bed every day since her injury, but Larson says that "the disability period is not automatically

terminated merely because claimant obtains some employment, if maximum recovery had not been achieved at the time." 1C Larson, *The Law of Workmen's Compensation* § 57.12(d) at 10-47 (1993).

Also, the fact that appellant *thought* she could have performed the duties of some jobs that she did not get does not mean that her healing period ended on May 14, 1990. Until the doctors said approximately one year later that appellant had reached maximum medical benefit, there is no substantial evidence to support the Commission's decision to stop the temporary total disability benefits.

Logically, this would mean that the weight-loss program is no longer needed for treatment of appellant's injury, but I suppose that since no one questions that point the appellant is still entitled to the program. Unless the Commission's opinion is modified to cut off the temporary total disability only on May 14, 1991, I do not think it would be supported by substantial evidence. I would reverse and remand.

COOPER and ROBBINS, JJ., join this dissent.

Elizabeth Z. SELF *v.* Mildred SELF

CA 93-517 878 S.W.2d 436

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

Legal Services of Arkansas, by: *Ben Seay*, for appellant.

Ronald L. Griggs, for appellee.

JOHN E. JENNINGS, Chief Judge. This appeal is a result of a dispute between Elizabeth and Mildred Self, the two wives of Alex Self, now deceased, over which one is entitled to the deceased's veteran's benefits. The issue is whether the motion of Mildred Self, the first wife, to set aside an earlier divorce decree, is barred by the doctrine of laches. The trial court held that it was not and we affirm.

There is no serious dispute as to the facts. Alex and Mildred Self were married in 1947 and eventually had four children. Alex served in the military overseas.

In 1964 Alex and Mildred returned from Tripoli, Libya, and moved to Pineville, Louisiana, where they owned a home. Alex was stationed at the air force base in Clinton, Oklahoma and Mildred and the children remained in Pineville.

On September 1, 1965, Alex filed a complaint for divorce in Union County Chancery Court, alleging that he had been a resident of the state of Arkansas for more than ninety days and that Mildred's last known address was Alexander City, Alabama.

A warning order was issued and an attorney ad litem wrote Mildred at an address in Alexander City. The letter was returned as "undeliverable." It is undisputed that Alex had not been a resident of Arkansas for the time prescribed by law, that Mildred was not then a resident of the State of Alabama, and that Mildred had no notice whatsoever of the proceedings.

On October 8, 1965, Alex obtained a decree of divorce and promptly returned to his home in Pineville, Louisiana. One week later Mildred found the divorce decree in Alex's car. She promptly consulted with James Gravel, a lawyer in Alexandria, Louisiana, who thought that the Arkansas divorce decree was "null and void." Mr. Gravel then filed for and obtained, in Louisiana, a decree of separation from bed and board on Mildred's behalf. Alex paid child support under the terms of this decree, albeit sporadically. He and Mildred never lived together again.

In 1982, Alex met Elizabeth Zagatta. On February 15, 1984, they had a daughter, and they married on May 17, 1984. Elizabeth testified that Alex had shown her his divorce decree prior to the marriage.

On May 10, 1987, Alex died. Elizabeth applied for, and began receiving, veteran's benefits. In August 1987, Mildred filed for veteran's benefits. Her claim was eventually denied. On April 3, 1989, Mildred filed a motion to set aside the Union County Chancery decree of divorce, without notice to Elizabeth. On May 24, 1989, the Union County Chancery Court entered an order holding that the decree was void for lack of jurisdiction. On November 18, 1991, Elizabeth filed a motion to intervene and to set aside the order setting aside the decree. After a hearing the chancellor denied the motion, and Elizabeth appeals. The sole question is whether the chancellor erred in not finding that Mildred's claim was barred by the doctrine of laches.

The doctrine of laches is founded on the equitable maxims of "he who seeks equity must do equity" and "equity aids the vigilant." *Grimes* v. *Carroll*, 217 Ark. 210, 229 S.W.2d 668 (1950). In the application of the doctrine, each case must depend upon its own particular circumstances. *Grimes, supra.* The issue of laches is one of fact. *See Davenport* v. *Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991). We will not reverse the

trial court's decision on a question of fact unless it is clearly erroneous. Ark. R. Civ. P. 52(a); *Mobley* v. *Harmon*, 313 Ark. 361, 854 S.W.2d 348 (1993).

In the case at bar it is undisputed that Mildred was not aware of Alex's purported remarriage to Elizabeth until after his death. The contention, however, is that Mildred should have taken action to set aside the Arkansas divorce decree within a reasonable time of her discovery of it in 1965. Unquestionably, Mildred took prompt action upon her discovery of the divorce decree. She consulted local counsel, filed an action for legal separation, and sent the Union County Chancery Clerk a letter stating that Alex had not been a resident of Arkansas and that she had had no notice of the proceedings. It is by no means clear that the Louisiana attorney's advice was in error. When service of process is invalid, judgments obtained thereby have been said to be void. *See Wilburn* v. *Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989); *Edmonson* v. *Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978); *Davis* v. *Schimmel*, 252 Ark. 1201, 482 S.W.2d 785 (1972); *Black* v. *Merritt*, 37 Ark. App. 5, 822 S.W.2d 853 (1992). Actual knowledge of proceedings does not validate defective service of process. *Green* v. *Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989). In *Murphy* v. *Murphy*, 200 Ark. 458, 140 S.W.2d 416 (1940), the supreme court said:

> Here, the naked truth is that a man who never, even for ninety days, became a resident of this state, gave an improper address, which made it impossible to notify his wife that she had been sued, and she remained in ignorance of that fact until after she had been divorced. Such divorces have a "mail-order" appearance, and we shall not hesitate to set them aside, even though the divorced party shall have remarried before we have that opportunity; and, however innocent the second wife may be, we cannot permit such frauds to be practiced upon the courts of this state.

In support of her position, Elizabeth cites *Sariego* v. *Sariego*, 231 Ark. 35, 328 S.W.2d 136 (1959); *Allsup* v. *Allsup*, 199 Ark. 130, 132 S.W.2d 813 (1939); *Corney* v. *Corney*, 97 Ark. 117, 133 S.W. 813 (1910); *Fair* v. *Fair*, 232 Ark. 800, 341 S.W.2d 22 (1960); and *Maples* v. *Maples*, 187 Ark. 127, 58 S.W.2d 930 (1933). Each case lends support to her position, but the most

compelling is *Maples*, which is markedly similar to the case at bar. *Maples* was an adversary proceeding between Emma Lou Maples and Bertha Maples, both of whom claimed to be the widow of B.F. Maples. The issue was which woman was entitled to veteran's benefits. In 1917, B.F. Maples obtained a decree of divorce in Pulaski County Chancery Court from Emma Lou after the issuance of a warning order. It was undisputed that B.F. was a resident of Alabama and that his representation that he was a resident of Arkansas was false. Ten days after he obtained the divorce decree, B.F. married Bertha in Tennessee and soon a child was born. B.F. and Bertha then returned to the community in Alabama where his first wife still resided.

In 1918 B.F. Maples died and in 1924 Bertha began receiving veteran's benefits. In 1931 Emma Lou filed suit in Pulaski County Chancery Court to set aside the decree of divorce. In reversing the chancellor's decision the supreme court said:

> Here, the first wife, having been advised that her husband had married another woman in 1917, waited until after her husband was dead and until 1931 before proceeding to have the divorce decree vacated. We feel constrained to hold that she waited too long, and is barred by her laches.

The differences between *Maples* and the case at bar are significant. The first Mrs. Maples had known of her husband's remarriage and the birth of a child by that marriage since 1918 and took no action until 1931. Mildred Self was not aware of Alex's remarriage until after his death in 1987. While Emma Lou Maples took no action at all, Mildred Self promptly filed suit in Louisiana for separation from bed and board. Alex's payment of child support pursuant to the Louisiana decree was an indication that even he regarded the Arkansas divorce as invalid. Finally, there is no indication from the supreme court's decision in *Maples* that the first Mrs. Maples received no notice of the pendency of the Arkansas divorce proceeding.

Our conclusion is that the chancellor's decision on the question of laches was not clearly erroneous.

Affirmed.

ROBBINS, MAYFIELD, JJ., and WRIGHT, S.J., dissent.

PITTMAN, J., not participating.

JOHN B. ROBBINS, Judge, dissenting. I respectfully dissent from the decision of the prevailing opinion of this court which holds that Mildred Self's twenty-four year delay in seeking to set aside her husband's 1965 decree of divorce does not give rise to the defense of laches. I believe the chancellor's decision, which the prevailing opinion of this court affirms, is clearly erroneous.

I think it important to recognize that we are not required to decide whether the 1965 divorce decree should have been entered. Clearly it should not. The issue is whether Mildred Self should be barred by laches for having waited twenty-four years before seeking to have the divorce decree set aside. The adversaries are not Mildred and Alex Self, but Mildred and Elizabeth. One of these women, depending upon our decision, will suffer adverse consequences. If the chancellor's decision is reversed, Mildred will not be entitled to receive VA widow's benefits. If the chancellor's decision is affirmed, Elizabeth will not be entitled to receive VA widow's benefits and her child may very well become illegitimate under applicable Louisiana law. As between these women, which one has caused, or is at least more culpable in bringing about, this situation?

The prevailing opinion cites several cases on which the appellant, Elizabeth, relies. The most striking parallel to this case, however, is found in *Maples* v. *Maples*, 187 Ark. 127, 58 S.W.2d 930 (1933), and should be the controlling precedent. Rarely does a precedent bear the similarities of fact and procedural posture as Maples does to the case at bar. The following columns show the comparison:

Maples	Self
Maples, a nonresident, obtains an Arkansas divorce on service by publication of a warning order and upon false representations to an Arkansas court that he was a resident of Arkansas and that his wife had deserted him.	Self, a nonresident, obtains an Arkansas divorce on service by publication of a warning order and upon false representations to an Arkansas court that he was a resident of Arkansas.

Maples' first wife learns of the divorce.[1]	Self's first wife learns of the divorce decree within a week of its entry.
Maples remarries.	Self remarries.
Maples dies and his widow becomes entitled to VA benefits.	Self dies and his widow becomes entitled to VA benefits.
Maples' second wife begins receiving VA benefits.	Self's second wife begins receiving VA benefits.
Fourteen years after the divorce decree was entered, the first wife brings an action to set it aside.	Twenty-four years after the divorce decree was entered, the first wife brings an action to set it aside.
In an ex parte proceeding the chancellor sets the decree of divorce aside.	In an ex parte proceeding the chancellor sets the decree of divorce aside.
Maples' second wife intervenes and seeks to set aside the prior order which set aside the decree of divorce.	Self's second wife intervenes and seeks to set aside the prior order which set aside the decree of divorce.
An adversarial proceeding is held with first and second wives appearing.	An adversarial proceeding is held with first and second wives appearing.
The chancellor refuses to set aside the prior order which set aside the decree of divorce.	The chancellor refuses to set aside the prior order which set aside the decree of divorce.
Maples' second wife appeals.	Self's second wife appeals.
The supreme court reverses.	

[1]This is the only fact listed which is implied rather than explicit. The *Maples* opinion does not disclose when the first wife learned of the fraudulent divorce, only that she learned of Maples' marriage to the second wife soon after the marriage, which occurred in the same year as the divorce. It is most unlikely, however, that the supreme court would have found that she was barred by laches to attack the fraudulent divorce decree unless she knew about the decree.

In *Maples* the supreme court cited its earlier case of *Corney* v. *Corney*, 97 Ark. 117, 113 S.W. 813 (1910), and repeated a quotation in that opinion from Bishop on Marriage and Divorce (vol. 2, § 1533) as follows:

> There are excellent reasons why judgments and matrimonial causes, whether of nullity, dissolution or separation, should be more stable, certainly not less, than in others, and so our courts hold. The matrimonial status of the parties draws with it and after it so many collateral rights and interests of third persons that uncertainty and fluctuation in it would be greatly detrimental to the public. And, particularly to an innocent person who has contracted a marriage on faith of the decree of the court, the calamity of having it reversed and the marriage made void is passed estimation. These considerations have great weight with the courts, added whereto there are statutes in some of the States according a special inviolability to such judgments.

The supreme court concluded by holding that because the first wife waited fourteen years before bringing her action to have the divorce decree vacated, she had waited too long and was barred by her laches.

The prevailing opinion attempts to distinguish *Maples* from the instant case by pointing out that in *Maples* the first wife knew of her husband's remarriage in 1918 and took no action until 1931, while here the first wife did not learn of her husband's remarriage until his death. This, however, is a point without relevance. Maples' remarriage was merely a consequence of the fraudulent divorce. It must have been her knowledge of the fraudulent decree and failure to act within a reasonable time that gave rise to laches. Alex Self's first wife admitted that she learned of the divorce decree within a week of its entry. Yet she delayed for twenty-four years before bringing this action to set it aside.

The prevailing opinion also suggests that Alex's payment of child support pursuant to the Louisiana decree was an indication that even he regarded the Arkansas divorce as invalid. However, Alex's opinion of the validity of the divorce decree has no relevance to whether laches applies to Mildred's cause of action, but even if it did, Alex's payment of child support may have resulted

from his recognition of a moral obligation to support his children who were residing with his first wife, whether or not the Louisiana court order so required, rather than from an opinion that the Arkansas divorce was invalid. Furthermore, even if Alex believed the decree of divorce was invalid, he utilized the decree by displaying it to his second wife, Elizabeth, before she married him. Elizabeth is the party raising the defense of laches, not Alex.

The consequences which may result upon the voiding of a decree of divorce are multiplied and magnified with the passage of time. Laches is particularly appropriate in this setting to avoid the inevitable harm to new family units and the difficulty in sorting out the property interests of the parties, especially those of the members of the new family unit. Delays of even six months, or two years, after a divorce has been granted before bringing an action to set aside the decree have been held sufficient to raise the bar of laches where one of the parties has remarried. *Sariego* v. *Sariego*, 231 Ark. 35, 328 S.W.2d 136 (1959); *Corney* v. *Corney*, 97 Ark. 117, 133 S.W. 813 (1910).

The additional fact, mentioned in the prevailing opinion, that Mildred sought the advice of an attorney upon learning about the divorce decree is of no consequence. A client is bound by the inaction and inattention of her attorney. *Beth* v. *Harris*, 208 Ark. 903, 188 S.W.2d 119 (1945). Furthermore, Mildred chose this attorney, Elizabeth did not. Elizabeth had no reason to know that she needed to consult an attorney prior to marrying Alex, for she had seen the decree of divorce which appeared perfectly valid in form.

As noted in the prevailing opinion, the doctrine of laches is founded on equitable maxims of "he who seeks equity must do equity" and "equity aids the vigilant." *Grimes* v. *Carroll*, 217 Ark. 2, 210, 229 S.W.2d 668 (1950). I believe the chancellor's decision to render aid to Mildred violates these maxims and is clearly erroneous. I would reverse.

MAYFIELD, J., and WRIGHT, S.J., join in this dissent.

Cathy Lynn STUART (Hunter) *v.* Michael Sherman STUART

CA 93-779 878 S.W.2d 785

Court of Appeals of Arkansas
Division I
Opinion delivered July 6, 1994

Len W. Bradley, for appellant.

Bruce R. Wilson, for appellee.

JOHN E. JENNINGS, Chief Judge. This case began as a post-divorce action by the appellant, Cathy Hunter, to modify the decree. During the course of the hearing the chancellor heard evidence relating to arrearages in child support allegedly owed by the appellee, Michael Stuart. After considering the evidence of appellee's payments over a four-year period, the chancellor found an arrearage of $353.10. For reversal, appellant contends that the chancellor erred in giving the appellee credit against his child support obligation for savings bonds purchased at a cost of $3,300.00 and for $1,100.00 paid to the appellant prior to the date of the decree of divorce. We agree with both arguments and reverse.

The decree of divorce between the parties, entered on April 18, 1989, provided that the appellee would pay $400.00 per month as child support beginning May 1, 1989. At the hearing appellee testified that the parties had agreed that he would invest $100.00 per month in savings bonds for the children and pay only $300.00 per month to the appellant. The appellant denied entering into such an agreement. At the conclusion of the hearing the chancellor stated he could not find that such an agreement existed. He nevertheless gave the appellee credit against the arrearage for $3,300.00 paid to purchase savings bonds.

The appellant cites *Sullivan* v. *Edens*, 304 Ark. 133, 801 S.W.2d 32 (1990), for the proposition that chancery courts may not recognize private agreements by the parties for the payment of child support. *See also*, Ark. Code Ann. § 9-12-314(b) and (c) (Supp. 1989), and *Burnett* v. *Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993). Appellee's response is that the court's ruling "does not alter the amount of support to be paid, but merely affirms the parties' agreement as to the manner in which the support was to be paid." Apart from the fact that the chancellor expressly stated he could find no such agreement between the parties, we agree with the appellant that the rule in *Sullivan* governs and that appellee should not have received credit against the arrearage for the cost of the savings bonds.

We also must agree with the appellant that the chancellor erred in giving the appellee credit for amounts paid prior to May 1, 1989. As a matter of law, appellee is not entitled to credit against child support arrearages for voluntary expenditures. *Glover* v. *Glover*, 268 Ark. 506, 598 S.W.2d 736 (1980); *Buckner* v. *Buckner*, 15 Ark. App. 88, 689 S.W.2d 84 (1985).

The chancellor should have awarded judgment to the appellant in the sum of $4,753.10 and held that the savings bonds belong to the appellee. We therefore reverse and remand for the entry of a judgment consistent with this opinion.

Reversed and Remanded.

COOPER and ROGERS, JJ., agree.

Larry CHASE *v.* STATE of Arkansas

CA CR 93-1007 879 S.W.2d 455

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

William R. Simpson, Jr., Public Defender, by: *William M. Brown*, Deputy Public Defender, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Larry Chase appeals from his conviction at a non-jury trial of theft by receiving property valued in excess of $200.00, a Class C felony. Being found to be an habitual offender, appellant was sentenced to ten years in the Arkansas Department of Correction. Appellant does not contend that he did not commit theft by receiving. He argues only that the evidence is insufficient to support a finding that the stolen property exceeded $200.00 in value. We agree and affirm as modified.

At trial, appellant moved to reduce the charge to a misdemeanor. When the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the State and will affirm if there is any substantial evidence to support a finding of guilt. *Coley* v. *State*, 302 Ark. 526, 790 S.W.2d 899 (1990). Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or another and pass beyond mere speculation or conjecture. *Austin* v. *State*, 26 Ark. App. 70, 760 S.W.2d 76 (1988).

The property owner testified that two of her eight specially manufactured and recently installed copper downspouts were stolen from her house on May 26, 1992. She testified that the eight downspouts installed in May 1992 cost $262.50 each, for a total of $2,100.00. She stated that the $262.50 price per downspout included the cost of installation. Without dispute, the two downspouts were removed from the house by an unidentified individual. Appellant subsequently came into possession of the stolen downspouts. Jerry Ford, of Blume's Scrap Metal, testified that he purchased two flattened copper downspouts from appellant on May 26, 1992, for seventy cents a pound, for a total of $48.00. Thereafter, the owner identified these downspouts as those stolen from her home.

A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen. Ark. Code Ann. § 5-36-106(a) (1987). Theft by receiving is a Class C felony if the value of the property is less than $2,500.00 but more than $200.00. Ark. Code Ann.

§ 5-36-106(e)(1) (1987). "Value" is the market value of the property at the time and place of the offense or if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense. Ark. Code Ann. § 5-36-101(11)(A)(i) and (ii) (Repl. 1993). The purchase price paid by the owner for property is admissible as a factor to consider in determining market value when it is not too remote in time and bears a reasonable relation to present value. *Coley* v. *State, supra; Stewart* v. *State*, 302 Ark. 35, 786 S.W.2d 827 (1990). The State bears the burden of establishing value. *Coley* v. *State, supra.*

Here, there was no testimony separating the cost of the two downspouts from the cost of installation. The owner also stated that the two downspouts were replaced shortly after the theft; however, she did not state at what cost. We cannot conclude that there is substantial evidence to support the lower court's finding that the property value exceeded $200.00 as there was no testimony concerning the property value without installation. We affirm appellant's conviction of theft by receiving stolen property but reduce his conviction to a Class A misdemeanor. Ark. Code Ann. § 5-36-106(e)(3) (Repl. 1993). We remand for resentencing consistent with this opinion.

Affirmed as modified and remanded.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I do not agree to reduce the appellant's conviction to a misdemeanor. The appellant was convicted of theft by receiving property having a value of over $200 but less than $2,500. The evidence shows that the property he received, knowing that it was stolen or having good reason to believe it was stolen, was two of eight copper downspouts from the historical "Hotze House" at 1619 Louisiana, Little Rock. The house was built around 1904 and contains 16,000 square feet. It was being renovated and the downspouts were specially manufactured for this house and were purchased for $2,100.00 (making each worth more than $250.00).

The majority opinion recognized that the definition of value in Ark. Code Ann. § 5-36-101(11)(A)(ii) (Repl. 1993) provides that "if the market value of the property cannot be ascertained,

the cost of replacing the property within a reasonable time after the offense" may be used.

It is argued on appeal that the charge should have been reduced to a misdemeanor because appellant sold the two downspouts for $48.00. The other judges agree that the value should not be fixed "as installed" and that the amount paid for them as manufactured and installed is not the correct value.

However, the State says:

> The company that manufactures the copper downspouting does so to the specifications required of the home and its installation. The purchase price of those services and materials constitute its market value and bears a reasonable relationship to its present value. The "market value" of any property is inextricably bound to its cost of production. This is just one of the considerations that go into the concept of value. Testimony of an owner as to purchase price is admissible in determining market value when it is not too remote in time and bears a reasonable relationship to present value. *Jones* v. *State*, 6 Ark. App. 7, 636 S.W.2d 880 (1992).

I agree with the State's argument. In discussing the historical development of theft by receiving 2 LaFave and Scott, *Substantive Criminal Law* § 8.10 at 422 (1986) states:

> The ordinary thief steals in order to sell the stolen property, not to use it. Yet he cannot, by himself, successfully deal with the ultimate consumer. He must operate through a middleman, the professional receiver of stolen property. Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out theft in its various forms.

It is fairly clear to me, that it does not help "stamp out theft" to allow one to receive stolen property and suffer the penalty of a misdemeanor because he received property reduced to the value of scrap, but which could only be replaced by property costing many times more than scrap.

I dissent.

Crystal Dawn CORLEY *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES, Howard D. and Cathy Ann Dodgen, James Thurman Corley

CA 93-1033 878 S.W.2d 430

Court of Appeals of Arkansas
Division I
Opinion delivered July 6, 1994
[Rehearing denied August 17, 1994.]

Walters Law Firm, P.A., for appellant.

Kay West Forrest, for appellee ADHS.

Sara M. Sawyer, for appellees Howard D. and Cathy Ann Dodgen.

JAMES R. COOPER, Judge. The appellant is the mother of two children, Andrew Michael Corley, born November 12, 1990, and Amber Michelle Corley, born October 22, 1989. She appeals a chancery court order terminating her parental rights and granting the adoption of the children by the appellees, Howard D. Dodgen and Cathy Ann Dodgen. We affirm.

On January 22, 1991, Andrew Corley was admitted to Sparks Regional Hospital with multiple fractures. On January 25, 1991, the appellee Arkansas Department of Human Services obtained an order finding both children dependent/neglected/abused and took custody of them. The Dodgens subsequently petitioned for and were granted temporary custody of the children after a review hearing on May 16, 1991. The court conducted review hearings during the following two years and found the reunification attempts unsuccessful and continued custody with the Dodgens. The Dodgens subsequently petitioned for termination of the parental relationship and for adoption pursuant to Ark. Code

Ann. § 9-9-220 (Repl. 1993)[1]. After a hearing on May 17, 1993, the chancery court found that, although the parents had made some effort to comply with the terms of the case plan, there was not a reasonable likelihood in the future that they could comply with the case plan to the extent that the best interest of the children would mandate that they be returned to them. The chancellor found that it was in the best interest of the children that the parental rights be terminated and the Dodgens' petition for adoption be granted. On appeal, the appellant contends that the chancellor clearly erred in terminating her parental rights and in granting the adoption.

Chancery cases are reviewed *de novo* on appeal, and we will reverse the chancellor's findings only if they are clearly erroneous or clearly against a preponderance of the evidence, giving due regard to the opportunity and superior position of the trial court to judge the credibility of the witnesses. *Jones* v. *Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993); *Manuel* v. *McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988). Our case law is clear that termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Anderson* v. *Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). However, parental rights will not be enforced to the detriment or destruction of the health and well being of the child. *Burdette* v. *Dietz*, 18 Ark. App. 107, 711 S.W.2d 178 (1986).

Arkansas Code Annotated § 9-9-220 (Repl. 1993) provides in pertinent part:

> (a) The rights of a parent with reference to a child, including parental right to control the child or to withhold consent to an adoption, may be relinquished and the relationship of parent and child terminated in or prior to an adoption proceeding as provided in this section.
>
> . . .
>
> (c) In addition to any other proceeding provided by

[1]Arkansas Code Annotated § 9-27-306(b)(1) (Repl. 1993) vests jurisdiction of adoptions under the Revised Uniform Adoption Act in the juvenile court where they arise during the pendency of a dependent-neglected proceeding.

law, the relationship of parent and child may be terminated by a court order issued under the subchapter on any ground provided by other law for termination and the relationship, or on the following grounds:

. . .

(2) Neglect or abuse, when the court finds the causes are irremediable or will not be remedied by the parent.

A. If the parents have failed to make reasonable efforts to remedy the causes and such failure has occurred for twelve (12) months, such failure shall raise the rebuttable presumption that the causes will not be remedied.

B. If the parents have attempted to remedy the causes but have failed to do so within twelve (12) months, and the court finds there is no reasonable likelihood the causes will be remedied by the eighteenth month, such failures shall raise the rebuttable presumption that the causes will not be remedied.

At the final hearing, Kathy Clark, a psychological examiner, testified that the appellant had substantially improved and that her behavior was less impulsive. However, she stated that the appellant had not taken responsibility for the physical abuse to her children. She went on to state that she could not say that the causes of abuse had been remedied. The appellant's case worker, Monica Eisenhower, testified that the appellant had complied with all the terms and conditions of her case plan. She stated that she had seen a substantial improvement in the appellant, that she was more stable and was maintaining a job and housing. However, she stated that she would recommend termination of parental rights because of the seriousness of the abuse and because it was in the best interest of the children. She noted that the appellant had never admitted to the seriousness of the abuse. At the time of the hearing, the appellant was nineteen years old and separated from the children's father. She testified that she had been in her present job for ten and a half months, received her GED, and completed counseling. She stated that she went to parenting classes and visited with her children as regularly as she could. She admitted that Andrew had been in her

custody when he was injured. However, she stated that she did not know how he had been injured or who had hurt him. She stated that she was not responsible for his injuries and could guarantee that it would not happen again but that she could not have prevented it before. Therefore, we hold the chancellor's finding that the causes of abuse have not been or will not be remedied was not clearly erroneous. Thus, he did not err in terminating the appellant's parental rights.

A chancery court may grant a petition for adoption if it determines at the conclusion of a hearing that the required consents have been obtained or excused and that the adoption is in the best interest of the children. *In re Adoption of B.A.B.*, 40 Ark. App. 86, 842 S.W.2d 68 (1992). In cases involving minor children, a heavier burden is cast upon the trial court to utilize to the fullest extent all its powers of perception in evaluating witnesses, their testimony, and the children's best interests. *Id.* This Court has no such opportunity and we know of no case in which the superior position, ability, and opportunity of the trial court to observe the parties carries as great a weight as one involving minor children. *Id.*

Ms. Eisenhower recommended that the Dodgens be allowed to adopt the children. She noted that the children had been with the Dodgens for two years and that some kind of permanency and stability needed to be established. She stated that she thought the ideal situation for the children would be permanent custody with the Dodgens and visitation with the appellant. The Dodgens testified that they were close to the children and could provide a loving home for them. They testified that the children were doing well in their custody but that Amber misbehaved after visitation with the appellant. A home study was conducted which indicated that the Dodgens had adequate income to care for the children and that they could provide a nurturing home for them. James Corley, the father of the children, testified that he was not in compliance with his case plan and that if he could not have the children, he wanted the Dodgens to adopt them.

After reviewing the record, we conclude that the chancellor did not err in finding that it was in the best interest of the children to be adopted by the Dodgens.

Affirmed.

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

BANQUE INDOSUEZ *v.* Gerald KING, et al.

CA 93-766 878 S.W.2d 432

Court of Appeals of Arkansas
Division II
Opinion delivered July 6, 1994

Dover & Dixon, P.A., by: *Michael R. Johns* and *Thomas S. Stone*, for appellant.

Winston Bryant, Att'y Gen., by: *Arnold M. Jochums*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. This appeal involves a dispute under Act 401 of the Public Grain Warehouse Law between the

creditors of Sunrice Milling, Inc., a public grain warehouse, over the proceeds from the sale of rice in its possession. The chancellor held that Ark. Code Ann. § 2-17-303(a) (1987) protected the claims of the appellees who produced the rice and that their claims were entitled to be paid first from the proceeds from the sale of the rice. On appeal, the appellant, Banque Indosuez, a secured creditor of Sunrice, claims that the appellees' claims are not entitled to protection under the Public Grain Warehouse Law and that it is entitled to priority in the proceeds by virtue of its perfected security interest in the Sunrice inventory.

Sunrice Milling, Inc. (Sunrice), operated a rice mill and warehouse in Crawfordsville, Arkansas. The appellant, Banque Indosuez, loaned operating capital to Sunrice and obtained a security interest in Sunrice's real and personal property including its inventory. In late 1991 and early 1992, Sunrice verbally agreed to purchase rice produced by the appellees and had their rice delivered to its warehouse. The appellees were never paid for their rice, however, and Sunrice discontinued operating its business shortly thereafter. Sunrice was then audited by the Arkansas State Plant Board, and in the course of its audit, the State Plant Board determined that a mistake had been made in its past audits of Sunrice. The State Plant Board decided that, since Sunrice did not have priced scale tickets or any other written documentation evidencing its alleged purchase of the appellees' rice, the rice in its possession should be considered stored grain rather than inventory. The effect of this decision was to make the rice produced by the appellees "stored grain" under the Arkansas Public Grain Warehouse Law. Because the rice in Sunrice's possession was insufficient to cover the claims of Sunrice's creditors, a petition for receivership was filed by the State Plant Board, and the State Plant Board Director, Gerald King was appointed receiver.[1] Under the receiver's proposed plan of distribution, the appellees' claims were given priority to the proceeds over the claim of the appellant. The appellant was allowed to intervene and at trial contended that the State Plant Board erred in determining that the rice in Sunrice's possession was stored grain rather than grain purchased by Sunrice and subject to its perfected inventory lien.

[1]Although Gerald King is also considered an appellee in this appeal, our reference to the appellees refers only to the claimants whose grain was in the possession of Sunrice at the time it went into receivership.

At the conclusion of the trial, the chancellor held that, because the rice was not beneficially owned by Sunrice and title to the rice had not been transferred to Sunrice by written document, the grain should be considered stored grain and subject to the provisions of Act 401 of 1981 of the Public Grain Warehouse Law. Act 401 § 2, codified at Ark. Code Ann. § 2-17-303, voids any encumbrance placed by a warehouseman on grain in its possession unless the owner of the grain has transferred title of the grain to the warehouseman by written document. The chancellor therefore concluded that the claims of the appellees were entitled to priority in the proceeds and approved distribution of the proceeds according to the receiver's plan. Additionally, the chancellor held that there was sufficient evidence of constructive fraud and that it would be inequitable to hold that Sunrice or the appellant beneficially owned the rice.

The appellant couches its arguments in terms of the applicability of Act 401 of 1981 to the case at bar. These arguments are premised on the appellant's contention that the appellees sold their grain to Sunrice. The arguments are without merit, however, because the premise is unfounded. In our view, the threshhold question in this case is whether, on this record, the chancellor's conclusion that there was no sale is clearly erroneous or against the preponderance of the evidence. Upon our review of the record, we cannot say that the chancellor was wrong.

Act 401 of 1981 amended the Public Grain Warehouse Law, which is codified at Ark. Code Ann. § 2-17-201 *et seq.* Section 2-17-303, which is the basis of the present dispute, provides that:

> (a) Ownership of grain shall not change by reason of an owner delivering grain to a public grain warehouseman. No public grain warehouseman shall sell or encumber any grain in his possession unless the owner of the grain has by written document transferred title of the grain to the warehouseman.
>
> (b) Notwithstanding any provision of the Uniform Commercial Code, as amended, 4-1-101 et seq., to the contrary or any other law to the contrary, all sales and encumbrances of grain by public grain warehousemen are void and convey no title unless the sales and encumbrances are sup-

> ported by a written document executed by the owner specifically conveying title to the grain to the public warehouseman.

In the case at bar, it is undisputed that no documents of transfer or conveyance of title were executed by the appellees nor were the appellees paid for their rice that Sunrice had delivered to its warehouse. Therefore, the burden was on the appellant to show that a sale occurred.

> The clear language of Act 401 defines "owner" and declares that any transfer of title of grain by a warehouseman is void without the original written transfer of title from the grain depositor to the warehouseman. In other words, the farmer continues to own his grain until he signs a document giving up title to the grain. This requirement is similar to the "statute of frauds" title transfer requirement for realty. Once the farmer shows that he signed no document, the initial legal conclusion under the statute is that no sale occurred. The burden of proof is then on the party alleging the occurrence of a sale. A successful defense against the farmer would be to prove that the farmer did sell and should therefore be estopped from asserting void title.

Gregory K. Stephens, *Act 401 of the Public Grain Warehouse Law: An Exception to the U.C.C. Concept of Voidable Title*, 37 Ark. L. Rev. 293, 304-06 (1984).

Sunrice, as a licensed public grain warehouse, was subject to all the provisions of the Arkansas Public Grain Warehouse Law including the rules and regulations adopted by the State Plant Board. *See* Ark. Code Ann. § 2-17-205. Regulation VIII(B)(4) requires that all scale tickets issued by a warehouse must be marked to denote the type of transaction and applies to all persons delivering grain to a public grain warehouse. The Plant Board relied on this regulation in concluding that the rice at Sunrice was stored and not owned.

Edward Downing, manager of the Grain Warehouse Division of the Arkansas State Plant Board, testified that he is responsible for the licensing and auditing of public grain warehouses and that the Plant Board audits facilities to determine whether there is stored grain in a facility and if there is enough grain in a facil-

ity to cover the warehouse's obligations. He stated that, under the Public Grain Warehouse Law, everything is considered "stored grain" until documents such as a priced-scale ticket, a contract, or a purchase where a check has been written can prove otherwise. In order to make this determination, he testified that the auditor reviews the scale tickets on received grain and, if the scale tickets are priced, the grain represented by those tickets is not considered "stored grain." He further testified that Ark. Code Ann. § 2-17-202(7) includes an unpriced scale ticket under the definition of a warehouse receipt and that is why the Plant Board considers unpriced scale tickets as obligations of the warehouse. He testified that there are regulations and instructions which the Plant Board has issued specifying how the licensed warehousemen are to handle scale tickets; that warehouseman are supposed to issue scale tickets on all grain received in the facility; and that there are boxes on the scale tickets, which can be checked to show whether the grain is for sale, stored, or condition or purchase contract. He also stated that, if a warehouse has a priced scale ticket, it can then issue itself a warehouse receipt in its own name and use it as collateral at a lending institution to borrow money. In reference to the claims of the appellees J & G Farms, P & C, Inc., and Phillip Pollard, Downing testified that he audited Sunrice after it shut its doors and determined that there were no priced scale tickets, contracts transferring title, or evidence that Sunrice had paid for the grain from these producers.

Roger Gilmore, former mill manager and rice buyer for Sunrice, testified that Sunrice's primary business was buying rice from farmers, milling the rice, and selling the rice and its by-products. He stated that the purchases he made for Sunrice were done by verbal agreement and that payment was made by Sunrice's Houston office directly to the farmers after the Houston office received his "rough rice report." He stated that, normally, he would fill out a "buyer's report" when he made a deal with a farmer; that the buyer's report contained the estimated quantity of grain, the milling yields, and the quoted price; and that he then arranged for transportation of the rice. He stated that a scale ticket showing the weight of the rice was completed when the grain was delivered to Sunrice and, after he received the scale ticket, he then completed a rough rice purchase report (also known as a settlement report) on which he figured the price

and then sent it to Houston. He stated that the "buyer's report," scale ticket, and the "rough rice report" were routinely used in every transaction and it was the only paperwork he had on acquiring rice. Although he admitted that Sunrice did not issue priced scale tickets, evidencing its purchase of the grain, Gilmore contended that the rice was all priced because he had buyer's reports showing the prices and the scale ticket numbers. He stated that the farmers were entitled to scale tickets after the trucks were weighed but that the buyer's reports that he completed which showed the agreed price were not furnished to the farmers on a regular basis. Concerning the rice he purchased from J & G Farms, he testified that nothing was provided J & G evidencing Sunrice's receipt of its rice. He also testified that it was his personal opinion that Sunrice did not own the rice until the producer was paid.

The appellees' witness, Chris O'Neal, of P & C, Inc., a farming operation, testified that P & C delivered 8,400 bushels of rice to Sunrice in 1992 but did not receive any scale tickets. He stated that he had talked with Gilmore in November and they had agreed on a price and delivery but he had locked in a price at a later date.

Greg Edmondson, partner in the appellee J & G Farms, testified that he had gotten with Gilmore at Sunrice, saw what Sunrice was offering for rice, and that Sunrice had arranged to come and pick up his rice. He stated that the rice was for cash as soon as it was delivered, there was no contract signed, and he never signed any document transferring title to Sunrice. He testified that it was his understanding that Sunrice would hold the rice until he got paid and, once paid, the rice was theirs and they could mill it. He admitted, however, that he had no specific conversation with Gilmore to this effect.

On our review of chancery cases, we will not set aside a chancellor's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. *Bright* v. *Gaşs*, 38 Ark. App. 71, 78, 831 S.W.2d 149, 153-54 (1992). Based on our review of the record, we cannot say that the chancellor erred in finding that no sale of the disputed grain occurred and, therefore, that the grain in question was stored grain.

Because we affirm the chancellor's holding as to the appellant's first point, we need not address the appellant's contention that the chancellor erred in finding constructive fraud.

Affirmed.

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

John Douglas MARTIN *v.* STATE of Arkansas

CA CR 93-228 879 S.W.2d 470

Court of Appeals of Arkansas
Division I
Opinion delivered July 6, 1994
[Supplemental Opinion on Denial of Rehearing
September 28, 1994.*]

*Cooper, J., not participating; Mayfield, J., dissents.

John Wesley Hall, Jr., P.A., by: *Craig Lambert*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant John Douglas Martin was convicted of first degree murder and kidnapping for which he was sentenced to consecutive terms of twenty years and ten years, respectively. Martin now appeals, arguing that the evidence is insufficient to support the convictions. Alternatively, Martin contends that the trial court erred in refusing to instruct the jury on the lesser included offense of second degree murder. We find no error and affirm.

The only direct evidence against Martin came through testimony given by his nephew, Adell Henry. Henry testified that he and Martin traveled in Martin's gold Cadillac from their home in Lawton, Oklahoma to Little Rock, arriving on the evening of October 11, 1991. While Martin slept in his car that night, Henry visited an old girlfriend and stayed until the morning. When Henry returned to the vehicle, Martin got in the driver's seat and drove to Philander Smith College. He got out of the car and met with his estranged wife, Felicia. Felicia was

employed in the cafeteria at Philander Smith. She entered the building where she worked, came back out, and talked to Martin again. Some time thereafter, Martin opened the back passenger door and pushed her into the car, laying on top of her. Martin instructed Henry to drive off. Henry complied. While driving, Henry heard Felicia choking and gasping for air. Martin then told Henry to pull over, and Martin got in the driver's seat and drove to Fourche. He stopped the car, handed Henry some gloves, and asked Henry to help him remove Felicia from the car. They put her body in some weeds, and proceeded back to Oklahoma. Later that day, Felicia's body was discovered in the area described by Henry.

Martin's first argument for reversal is that sufficient evidence does not support the verdicts because the accomplice testimony of Adell Henry is inadequately corroborated. Arkansas Code Annotated § 16-89-111(e)(1) (1987) provides:

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

The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982). In other words, the test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Daniels* v. *State*, 308 Ark. 53, 821 S.W.2d 778 (1992). On appeal, it is this court's duty to determine whether there is substantial evidence to support the jury's finding that the corroborating evidence was sufficient. *Smith* v. *State*, 310 Ark. 247, 837 S.W.2d 279 (1992).

We will not consider the merits of Martin's argument because this point has not been preserved for appeal. The sufficiency of the evidence is challenged by a motion for directed ver-

dict. Arkansas Rules of Criminal Procedure 36.21(b) provides the following:

> Failure to Question the Sufficiency of the Evidence. When there has been a trial by jury, the failure of a defendant to move for a directed verdict at the conclusion of the evidence presented by the prosecution and at the close of the case because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict.

The above rule has been strictly construed, and the supreme court has consistently stated that the burden of obtaining a ruling is on the movant, and the failure to secure a ruling constitutes a waiver, precluding its consideration on appeal. *Donald* v. *State*, 310 Ark. 197, 833 S.W.2d 770 (1992). In *Donald*, the appellant renewed his motion for directed verdict at the close of the evidence but did not obtain a ruling. As a result, his sufficiency argument was not considered on appeal. In the instant case, Martin moved for a directed verdict after the state rested on the ground that no substantial evidence connected him with the commission of the offense except for the testimony of the accomplice, Adell Henry. The court denied that motion. After calling one witness, the defense rested. The court then inquired "show the motions renewed?" and counsel for Martin replied "yes." The above exchange does not amount to a motion for directed verdict, and even if it does the defendant failed to obtain a ruling on the motion. Furthermore, even if counsel's answer "yes" to the court's inquiry constituted a motion for directed verdict, it falls far short of meeting the requirement that the moving party apprise the trial court of the specific basis on which the motion is made. *Brown* v. *State*, 316 Ark. 724, 875 S.W.2d 828 (1994), *and see Brown* v. *State*, 315 Ark. 466, 869 S.W.2d 9 (1994). For these reasons, we do not address the sufficiency argument on appeal.

Martin's remaining argument is that the trial court erred in not instructing the jury on the lesser included offense of second degree murder. If there is any rational basis upon which the jury could have found the accused guilty of a lesser crime, it is reversible error to refuse to give a correct instruction on that lesser crime. *Hill* v. *State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991). In the case at bar, Martin relied on the defense of com-

plete denial in asserting that he was not even in the state of Arkansas on the date of Felicia's death. Where the appellant relies on the defense of complete denial there is no rational basis for giving instructions on lesser included offenses and the trial court is correct to refuse such instructions. *Vickers* v. *State*, 313 Ark. 64, 852 S.W.2d 787 (1993). In *Vickers*, the appellant was convicted of first degree murder and was not allowed a jury instruction regarding second degree murder because he completely denied any knowledge or involvement with the fatal shooting at issue. Since Martin completely denied any involvement, there was no rational basis for instructing the jury on second degree murder in this case. Thus, it was not error for the trial court to deny Martin's request for an instruction regarding this lesser included offense.

Affirmed.

JENNINGS, C.J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the affirmance of the appellant's conviction in this case. However, I would address the sufficiency of the evidence argument which the majority refuses to do on the basis that the appellant did not make a motion at the close of the evidence for a directed verdict and, if he did, there was no ruling on the motion.

The majority opinion points out that the appellant did move for a directed verdict after the state rested and that the motion was made "on the ground that no substantial evidence connected him with the commission of the offense except for the testimony of the accomplice, Adell Henry." The opinion states that "the court denied that motion." The opinion then states "that after calling one witness, the defense rested" and that the court then inquired, "show the motions renewed" and counsel for [appellant] replied, "Yes." The majority opinion does not tell us that the transcript shows that the next thing that occurred after appellant's counsel said "Yes" was that the court asked, "Are you ready for me to instruct the jury?" and counsel said, "Yes, Your Honor." Appellant's abstract shows that all of the these events occurred except instead of abstracting the final question and answer the abstract simply says, "Whereupon, the jury retired to deliberate."

I submit that this court should address the sufficiency of the evidence argument which is based — the majority opinion states — upon "whether there is substantial evidence to support the jury's finding that the corroborating evidence was sufficient."

In all due respect, I do not see how it can be said that the motion for directed verdict was not made, not specific enough, or not ruled upon. I am not willing to say that the trial judge did not know the specifics of the motion that he asked if counsel wanted to renew, and I am not willing to say that the motion was not overruled — as it obviously was.

I do not think that either of the cases cited by the majority opinion supports refusal to consider the appellant's argument that "the accomplice testimony of Adell Henry is inadequately corroborated." I have, therefore, reviewed the evidence carefully and I think Henry's testimony was adequately corroborated. For that reason I concur in affirming the case.

I feel very strongly, however, that we should not court review by the federal courts by holding that counsel has failed to properly try a case based upon the circumstances involved here. I also think that malpractice insurance is too high to treat the directed verdict issue as the majority opinion has in this case.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING SEPTEMBER 28, 1994

883 S.W.2d 854

Petition for Rehearing denied.

John Wesley Hall, Jr., P.A., by: *Craig Lambert*, for appellant.

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

PER CURIAM. Petition for rehearing is denied.

COOPER, J., not participating.

MELVIN MAYFIELD, Judge, dissenting. This court, sitting en banc, has today denied the appellant's petition for a rehearing of the court's opinion handed down on July 6, 1994. In his brief on

appeal, the appellant argued that the evidence was insufficient to support his convictions for first degree murder and kidnapping and, alternatively, that the trial court erred in refusing to instruct the jury on the lesser included offense of second degree murder. A panel of this court affirmed the convictions, and I agreed with the majority opinion on the second point. However, the opinion failed to address the sufficiency argument because, the majority said, the appellant did not preserve that point by a proper motion for directed verdict. I thought the evidence was sufficient, although it was a close question, and I concurred in affirming appellant's convictions, but I wrote a concurring opinion stating that, in my view, the majority opinion should have addressed the merits of the sufficiency argument.

The petition for rehearing strongly contends that the sufficiency argument should have been decided on its merits. Not only do I agree, but I think the issue is important to the administration of justice, affects the practice of law by the attorneys in this state, and invites federal court review of constitutional questions. Therefore, I dissent from the court's failure to grant rehearing and address the merits of the appellant's argument on the sufficiency issue.

The majority opinion relies upon Arkansas Rules of Criminal Procedure 36.21 and three cases by the Arkansas Supreme Court to support the failure to pass upon the merits of the argument concerning the sufficiency of the evidence. The rule simply provides that in a jury trial "the failure of a defendant to move for a directed verdict at the conclusion of the evidence presented by the prosecution and at the close of the case because of insufficiency of the evidence" will constitute a waiver of that issue. The first case cited, *Donald* v. *State*, 310 Ark. 197, 833 S.W.2d 770 (1992), holds that the failure to obtain a ruling upon a motion for directed verdict constitutes a waiver of the motion and precludes the consideration of the issue on appeal. The other two cases deal with the failure of a moving party to apprise the trial court of the specific basis on which the motion is made. The majority opinion describes the situation in the instant case as follows:

> Martin moved for a directed verdict after the state rested on the ground that no substantial evidence connected him with the commission of the offense except for the testi-

> mony of the accomplice, Adell Henry. The court denied that motion. After calling one witness, the defense rested. The court then inquired "show the motions renewed?" and counsel for Martin replied "yes." The above exchange does not amount to a motion for directed verdict, and even if it does the defendant failed to obtain a ruling on the motion. Furthermore, even if counsel's answer "yes" to the court's inquiry constituted a motion for directed verdict, it falls far short of meeting the requirement that the moving party apprise the trial court of the specific basis on which the motion is made.

46 Ark. App. at 279, 879 S.W.2d at 472.

I would only add to that description the information, set out in my concurring opinion, that the appellant's abstract of the record shows that after appellant's counsel answered "Yes" to the court's inquiry, "the jury retired to deliberate." Therefore, my concurring opinion states that "I am not willing to say that the trial judge did not know the specifics of the motion that he asked if counsel wanted to renew, and I am not willing to say that the motion was not overruled — as it obviously was."

Now *Donald* v. *State*, cited in the majority opinion, states that the appellant renewed his motion for directed verdict at the close of the evidence but "he did not obtain a ruling." However, that opinion does not describe the circumstances involved, and it cites three cases involving the failure to obtain a ruling on objections made — not on motions for directed verdicts. So I have to assume that the circumstances in *Donald* were not the same as in the instant case; perhaps in the *Donald* case there was nothing to show that the trial judge knew that the motion had been made. But in the instant case we know that the trial court knew that a previous motion for directed verdict had been made, because the court asked appellant's counsel if he wanted to renew that motion. We also know that after counsel said "Yes," the motion was denied. We know this because we know that the jury then retired to deliberate without hearing any other testimony. We also know that the motion made at the close of the State's case was specific. We know this because the majority opinion tells us the specific grounds on which it was based and that was exactly the basis of the sufficiency of the evidence argument made in appel-

lant's brief on appeal.

However, even if there is some doubt about the adequacy of the motion for directed verdict, I would resolve that doubt in favor of addressing the merits of the appellant's argument. I say this for three reasons.

In the first place, our decision rests upon a procedural technicality. In this case the appellant made a specific motion for directed verdict at the close of the State's case. He renewed that motion at the close of the case. And the trial judge knew that the appellant's motions questioned the sufficiency of the evidence to corroborate the testimony of an accomplice. Therefore, it seems to me, that under the circumstances of this case, our refusal to come to grips with the merits of the appellant's argument tends to demonstrate the truth of Judge Learned Hand's statement that "there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance." *See Loubriel* v. *United States*, 9 F.2d 807, 808 (2d Cir. 1926). And in Arkansas, Robert A. Leflar, an outstanding lawyer, judge, teacher, and author has said:

> One of the major functions of any system of law is to assure its own acceptance in the society it governs, and this is part of the job of each judicial opinion.

Leflar, *One Life in the Law* 129 (1985). I believe that a decision on the merits of the argument made on the sufficiency of the evidence by the appellant in this case would do more for the acceptance of our system of law than does the manner in which that issue is handled in the majority opinion issued on July 6, 1994.

Moreover, it is common knowledge that malpractice insurance is expensive. Motions for directed verdicts may be made in both criminal and civil cases, and the procedural requirements involved in this case for those motions are involved in any jury trial. *See* Arkansas Criminal Procedure Rule 36.21(b) and Arkansas Civil Procedure Rule 50(e). Even if only a few attorneys fail to meet these procedural requirements, this is very likely to affect the cost of malpractice insurance to all attorneys. I do not think we should contribute to this outcome by decisions that put form over substance.

Finally, there is the real probability that a federal constitutional issue will result from our decision in this case. Present counsel was not trial counsel, and the petition for rehearing tells us that unless we pass on the merits of the issue involving sufficiency of the evidence, a federal court will be called upon to make that decision. Obviously, failure to make a proper motion for directed verdict could constitute ineffective assistance of the counsel guaranteed by the Sixth Amendment to the United States Constitution. The test in evaluating an attorney's performance in that regard was set out by the United States Supreme Court in *Strickland* v. *Washington*, 466 U.S. 688 (1984). In *Cox* v. *State*, 313 Ark. 184, 197, 853 S.W.2d 266, 273 (1993), the Arkansas Supreme Court summarized the *Strickland* requirement as follows:

> In order to show his attorney was ineffective an appellant must first show that counsel's performance was so deficient that the counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second he must show that he was so prejudiced by the defense as to be deprived of a fair trial. The appellant must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors.

Thus, it appears that the appellant may next file a petition for a writ of habeas corpus in a United States District Court and that court will have to decide whether trial counsel's failure to make a proper motion for directed verdict deprived appellant of the effective assistance of counsel. In making that determination the federal court would surely have to examine the sufficiency of the corroborating evidence in order to pass upon the prejudice prong of the *Strickland* test. Had we not held that appellant's counsel failed to make a proper motion for directed verdict, it is unlikely that the federal courts would review this case because the "corroboration requirement is a matter of state law which does not implicate a constitutional right cognizable on habeas review." *Reeding* v. *State of Minnesota*, 881 F.2d 575, 578 (8th Cir. 1989), *cert. denied* 493 U.S. 1089 (1990).

But as matters now stand, a federal court may review the sufficiency of the corroboration evidence as part of its review of

the issue of effective assistance of counsel. Furthermore, it may well be that our decision holding that we cannot review the sufficiency of the evidence because of trial counsel's failure to make a proper motion for directed verdict would afford appellant relief under *Evitts* v. *Lucey*, 469 U.S. 387 (1985), which holds that the right to due process requires the effective assistance of counsel in order that an appeal may be considered on its merits where, as in Arkansas, there is an appeal as a matter of right. But, regardless of which constitutional right is involved, it appears that our failure to address the evidentiary issue will result in the expenditure of additional time, effort, and money before this case is concluded.

Therefore, for all of the reasons discussed above, I dissent from the refusal of this court to review the merits of appellant's contention regarding the sufficiency of the evidence.

Shirley WILSON *v.* C & M USED CARS

CA 93-862 878 S.W.2d 427

Court of Appeals of Arkansas
Division II
Opinion delivered July 6, 1994

Lewellen & Associates, by: *Thomas A. Young*, for appellant.

Easley, Hicky & Cline, by: *Preston G. Hicky*, for appellee.

MELVIN MAYFIELD, Judge. Appellant Shirley Wilson filed a complaint in Forrest City Municipal Court against C & M Used Cars seeking damages for breach of contract. After a trial held January 17, 1990, the municipal court awarded appellant damages in the amount of $1,040.00 plus interest, and on March 7, 1990, appellee appealed to circuit court. On April 8, 1992, the circuit court entered an order in *Shirley Wilson Plaintiff* v. *C & M Used Cars Defendant*, CIV 90-71, which stated: "The above cause is hereby dismissed for lack of prosecution."

A dispute arose between the parties as to the effect of this dismissal, and on September 2, 1992, appellee C & M filed a "Motion to Clarify Order of Dismissal." In its motion, appellee stated that appellant took the position that the effect of the case being dismissed is that the lower court judgment is affirmed, but the appellee took the position that the "Plaintiff's cause of action has been dismissed." Appellee asked the court to enter an amended order dismissing "Plaintiff's cause of action for lack of prosecution."

In an order entered July 8, 1993, the trial court held that the dismissal of the cause of action was a "dismissal without prejudice in accordance with Rule 41(b), A.R.C.P." and that the dismissal terminated the action, and the municipal court judgment "became invalid or set aside" by the order of dismissal.

Appellant argues on appeal that the circuit court erred when it dismissed the case without prejudice in accordance with Rule 41(b), and in holding that the dismissal terminated the action and that the judgment of the municipal court became invalid or set aside by the dismissal. Appellant argues that the court should have relied on Inferior Ct. R. 9 and affirmed the municipal court judgment. That rule provides:

> (d) Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal to circuit court in a civil case, he shall present to the inferior court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree, or order of the inferior court. . . .

The appellee argues the case was properly dismissed pursuant to Ark. R. Civ. P. 41(b), which provides that an involuntary dismissal is without prejudice to a future action by the plaintiff. Appellee says appellant's proper remedy is to refile her lawsuit within one year of dismissal and that Rule 9 applies only to those cases in which there is a supersedeas bond.

In January 1994, we certified this case to the Arkansas Supreme Court, pursuant to Ark. Sup. Ct. R. 1-2(a)(3), as a case involving the construction of the rules of civil procedure and the inferior courts. Certification was refused and the case was returned to this court for decision.

We first note that the "Motion to Clarify Order of Dismissal" filed on September 2, 1992, has given us some concern with regard to the trial court's authority to interpret an order entered more than 90 days earlier. However, we do not think there is a lack of jurisdiction involved, and each party has invoked the court's assistance to determine the controversy. Moreover, because the September 1992 pleading is in substance a petition for declaratory judgment, we treat it accordingly. Authority for a declaratory judgment as to the rights of parties under a final

judgment entered by a court is found in the cases of *Minne* v. *City of Mishawaka*, 240 N.E.2d 56 (Ind. 1968); *National-Ben Franklin Fire Insurance Co.* v. *Camden Trust Co.*, 120 A.2d 754 (N.J. 1956); and *Aetna Life Insurance Co.* v. *Martin*, 108 F.2d 824 (8th Cir. 1940).

We agree with appellant's argument that the trial court erred when it dismissed the case pursuant to Rule 41(b) and held that the municipal court judgment was invalid or set aside by the dismissal. As early as 1885, the Arkansas Supreme Court held that a dismissal in circuit court of an appeal from a justice of the peace court has no effect on the judgment from the inferior court which "stands until it is set aside by the superior court." *Burgess* v. *Poole*, 45 Ark. 373, 375 (1885). And, in *Brenard Manufacturing Co.* v. *Pate*, 178 Ark. 163, 165, 10 S.W. 489, 489 (1928), our supreme court held that nonsuits taken in circuit court of cases appealed from justice of the peace courts amounted to dismissals of the appeals, and when that was done, the judgments of the justice of the peace courts were left in force as if no appeal had been taken. *See also M.M. Cohn Co.* v. *Hutt*, 136 Ark. 185, 206 S.W. 130 (1918).

Brenard, supra, was followed in *Fowlkes* v. *Central Supply Co.*, 187 Ark. 201, 58 S.W.2d 922 (1933). In that case, Central Supply filed suit on an account against Fowlkes in a justice of the peace court which rendered judgment in favor of Fowlkes. Central Supply appealed to circuit court which entered a nonsuit "without prejudice to the right of bringing another suit." Central Supply then filed a new suit on the same cause of action in circuit court where Fowlkes pleaded that the justice of peace judgment was *res judicata*; however, the circuit court overruled this plea and entered judgment for the supply company. The issue on appeal to our supreme court was whether a nonsuit without prejudice is tantamount to a dismissal of an appeal so as to leave a judgment of a justice court in force. Our supreme court held it is.

The court stated:

> Appellee insists that it had the right to abandon its appeal from the judgment of the justice of the peace and to take a nonsuit without prejudice to a future action under

> § 1201[sic], Crawford & Moses' Digest, which provides that an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. But this section has no application to suits reaching circuit court on appeal from justice courts. It defines the practice in circuit and chancery courts and relates to suits brought in those courts. Here, before the nonsuit was taken, there had been a final submission of the cause to a court having jurisdiction thereof, and that jurisdiction had been exercised and a judgment rendered which determined the rights of the parties thereto. An appeal to the circuit court was the remedy provided by law for the review of the justice judgment, where, upon a trial in the circuit court, the cause would have been heard *de novo*. There was neither necessity nor authority to bring a new suit to obtain this *de novo* trial, and the judgment of the circuit court, from which this appeal comes, must be reversed . . . .

187 Ark. at 203-04, 58 S.W.2d at 923-24. (We point out that the above citation makes reference to § 1201, Crawford & Moses' Digest. This is an error, which is corrected in the headnote of the case, and should have been § 1261. Section 1201 related to set-off; section 1261 related to dismissal by the court. Section 1261 was codified as Ark. Code Ann. § 27-1405, which was superseded by the enactment of the Arkansas Rules of Civil Procedure. *See* Compilers Note's to Ark. Code Ann. § 27-1405 (Repl. 1979), which states "See Rule 41, ARCP.")

The same rule would apply to a municipal court. In *United Loan & Investment Co.* v. *Chilton*, 225 Ark. 1037, 1039, 287 S.W.2d 458, 459 (1956), the court explained the jurisdiction of justice of the peace and municipal courts as follows:

> A municipal court, like a justice of the peace court, is a court of limited and restricted jurisdiction. *Bynum* v. *Patty*, 207 Ark. 1084, 184 S.W.2d 254. In construing the foregoing sections of the Constitution in *State ex rel. Moose* v. *Woodruff*, 120 Ark. 406, 179 S.W. 813, this court held that while the language of Art. 7, Sec. 43, was not meant to confine the jurisdiction of municipal courts to such juris-

> diction as might always be exercised by justices of the peace, "it was meant as authority for the Legislature to confer such jurisdiction upon municipal courts as might under the Constitution be conferred upon justices of the peace."

Further, the principles announced in *Fowlkes, supra*, have been applied to an appeal from a municipal court. In *Watson* v. *White*, 217 Ark. 853, 233 S.W.2d 544 (1950), James Watson brought suit against E. White in municipal court for damages arising out of an automobile accident. White filed a cross-complaint seeking damages to his car as a result of the accident. Municipal court entered judgment for Watson in the amount of $100, and White appealed to circuit court which directed a verdict in White's favor. White was then allowed to dismiss his cross-complaint without prejudice, and on appeal our supreme court, citing *Fowlkes*, held that the taking of the nonsuit in such circumstances was tantamount to a dismissal of the cross-complaint with prejudice. *See* 217 Ark. at 859, 233 S.W.2d at 547.

We think it is clear that an appeal from a municipal court judgment to circuit court is a continuation of the municipal court action and Arkansas Rule of Civil Procedure 41(b), which applies to original actions in circuit court, does not apply to an appeal from municipal court so as to vest circuit court with the authority to dismiss the cause of action without prejudice. We also believe that Inferior Court Rule 9 supports our view. Subsection (d) of this rule states that, "if such appeal *for any cause* be dismissed, that appellant shall satisfy and perform the judgment, decree, or order of the inferior court." (Emphasis added.) Although subsection (d) concerns supersedeas bonds, it is nonsensical to say that an appellant on appeal from an inferior court has to satisfy a judgment if it has put up a supersedeas bond but not otherwise.

Therefore, we find that the circuit court erred in holding that its dismissal of the case appealed from municipal court terminated the action and caused the municipal court judgment to be invalid or set aside. We hold that the dismissal in circuit court simply did away with the appeal and left the municipal court judgment valid and enforceable.

The order appealed from is reversed and set aside.

PITTMAN and ROBBINS, JJ. agree.

CHEMICAL METHODS LEASCO, INC. *v.*
Judith ELLISON & Jessie Rowe

CA 93-492 879 S.W.2d 467

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

[redacted]

Josh E. McHughes, for appellant.

Michael J. King, for appellee.

JUDITH ROGERS, Judge. The appellant, Chemical Methods Leasco, Inc., appeals the dismissal of its petition to register a foreign judgment. Appellant, a California corporation, obtained a default judgment[1] against appellees, Judith Ellison and Jessie Rowe, residents of Arkansas, in the Municipal Court of West Orange County, California. Appellant thereafter sought registration of the judgment in the Garland County Circuit Court. Appellees objected to registration on the ground that the California Court lacked personal jurisdiction over them. After a hearing, the trial court agreed with appellees' position, and dismissed the petition. This appeal followed.

On appeal, appellant contends that the trial court erred in not affording the California judgment full faith and credit. We disagree and affirm.

---

[1]Although appellees both testified that they were served with notice of the California lawsuit and that they forwarded some sort of response to the California court, the judgment recites that a default judgment was rendered, stating that the appellees "failed to appear and answer the complaint of Plaintiff within the time allowed by law."

The record discloses that the parties entered into a lease agreement in 1987, whereby appellees leased a commercial dishwasher for use in their restaurant. As pertinent here, the agreement provided that the lease would not be effective until countersigned by the authorized Leasco signatory, and that it would be governed by the laws of California. The lease did not contain a forum selection clause. Apparently, appellees defaulted in their payments after which appellant obtained the judgment in California for the principal sum of $4,208.79.

The Uniform Enforcement of Foreign Judgments Act, found at Ark. Code Ann. § 16-66-602 to -608 (Supp. 1991), provides a summary procedure in which a party in whose favor a judgment has been rendered may enforce that judgment promptly in any jurisdiction where the judgment debtor can be found, thereby enabling the judgment creditor to obtain relief in an expeditious manner. *Butler Fence Co.* v. *Acme Fence & Iron*, 42 Ark. App. 30, 852 S.W.2d 826 (1993). The Uniform Act requires only that the foreign judgment be regular on its face and duly authenticated to be subject to registration. *Strick Lease, Inc.* v. *Juels*, 30 Ark. App. 15, 780 S.W.2d 594 (1989). Under the Full Faith and Credit Clause of the United States Constitution, art. IV, § 1, a foreign judgment is as conclusive on collateral attack as a domestic judgment would be, except for the defenses of fraud in the procurement or want of jurisdiction in the rendering court. *McDermott* v. *Great Plains Equipment Leasing Corp.*, 40 Ark. App. 8, 839 S.W.2d 547 (1992). These judgments are presumed valid; an answer asserting lack of jurisdiction is not evidence of the fact and the burden of proving it is on the one attacking the foreign judgment. *Butler Fence Co.* v. *Acme Fence & Iron Co., supra.*

California Code of Civil Procedure A. § 410.10 (1991) provides that "[a] court of [California] may exercise jurisdiction on any basis not inconsistent with the Constitution of [California] or of the United States." In order for a valid judgment to be rendered against a non-resident not served within the forum state, due process requires that certain minimum contacts exist between the non-resident and the state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Akin* v. *First National Bank of Conway*, 25 Ark. App. 341, 758 S.W.2d 14 (1988), *citing Interna-*

tional Shoe Co. v. *Washington*, 326 U.S. 310 (1945). For the exercise of jurisdiction to be proper, the contacts with the forum state must be such that the non-resident defendants should reasonably anticipate being "haled" into the foreign court. *See World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). A single contract can provide the basis for the exercise of jurisdiction over a non-resident defendant, if there is a substantial connection between the contract and the forum state. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957). However, whether the "minimum contacts" requirement has been satisfied is a question of fact, which is to be decided on a case-by-case basis. *Moran* v. *Bombardier Credit, Inc.*, 39 Ark. App. 122, 839 S.W.2d 538 (1992); *Meachum* v. *Worthen Bank & Trust Co.*, 13 Ark. App. 229, 682 S.W.2d 763 (1985). There is no exact formula for what is reasonable and fair under the circumstances. *Jagitsch* v. *Commander Aviation Corp.*, 9 Ark. App. 159, 655 S.W.2d 468 (1983).

In her testimony, appellee Judith Ellison related the circumstances surrounding the lease of the dishwasher. She said that the dishwasher which was first used in the restaurant did not work properly, and that the salesperson for Sysco Food Services in Little Rock, which supplied food for the restaurant, suggested that "they" could lease a dishwasher to them. She testified that all conversations about leasing the equipment took place in the restaurant with the salesperson from Sysco, and that she never communicated with anyone from California. She said that the lease was signed in the restaurant. Ms. Ellison further testified that she gave the downpayment of $247 to the salesperson, but that she mailed thirteen payments to appellant at a California address. She stated that she was not told that the lease had to be approved by appellant, and she did not recall the provision in the agreement stating that the lease would not become effective until counter-signed by a Leasco signatory. When cross-examined on that point, she related that "we went through Sysco," and she said that they bought chemical products from Sysco "to keep the dishwasher going."

Appellee Jessie Rowe gave similar testimony as that of Ms. Ellison. She also maintained that she had no communications with anyone about the dishwasher outside of Garland County. Ms. Rowe added that the dishwasher was delivered by the sales-

person from Sysco and that the salesperson was required to fix it because it did not work.

In the case at bar, it is clear that the appellees had no direct communications with anyone from appellant-corporation in California. Instead, appellees dealt solely with a person from a concern out of Little Rock, and it was this person who presented them with the lease, which they signed in their local restaurant. Although the lease did require the counter-signature of someone from the appellant-corporation, and payments were forwarded to appellant in California, we cannot disagree with the trial court's conclusion that the appellees could not have reasonably anticipated being subjected to a lawsuit in California on the basis of those contacts alone. Nor do we believe that the provision stating that California law would govern mandates a contrary conclusion when the circumstances surrounding the transaction are considered as a whole. We hold that, under these facts, the appellees' contacts with California were of insufficient quantity and quality to satisfy the requirements of due process. Accordingly, we affirm the trial court's dismissal of the petition.

The dissent would reverse this case on the basis of our decision in *Meachum* v. *Worthen Bank & Trust Co., supra.* There, we upheld the trial court's exercise of personal jurisdiction over a non-resident defendant under our long-arm statute, based on entirely different circumstances than those present here. In *Meachum*, the non-resident defendant had guaranteed a debt in Arkansas and had sent his financial statement in support of the guaranty to the Arkansas lender. Further, the non-resident defendant was heavily involved with the corporation which had not only transacted business with the Arkansas debtor-corporation, but which was also responsible for the formation of the Arkansas corporation. The non-resident defendant had even personally drafted the Arkansas corporation's articles of incorporation and had mailed them to Arkansas for filing. Under those circumstances, we concluded that the non-resident defendant had "transacted business" in the State of Arkansas, that the contract he was a party to had a substantial connection with the State of Arkansas and that the non-resident defendant could have reasonably anticipated being haled into the courts of Arkansas in light of those contacts with this State. In *Meachum*, we also recognized that cases of this kind are dependent on their own facts and that each

case is to be decided on a case-by-case basis. The facts in this case are distinguishable from those in *Meachum*, and we are of the view that the decision in that case and its rationale, while illustrative, do not warrant the reversal of the case at hand.

Affirmed.

PITTMAN, J., concurs.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached by the majority opinion in this case. I would reverse this case and allow the California judgment to be registered in Arkansas under the rationale of *Meachum* v. *Worthen Bank & Trust Co.*, 13 Ark. App. 229, 682 S.W.2d 763 (1985). In that case the trial court had found Meachum liable as guarantor of a lease agreement between Telecompo of Arkansas and appellee Worthen Bank & Trust Company. Appellant Meachum was a Dallas, Texas, attorney, and an officer, director, and general counsel of Composition Management Company (CMC), a computerized typesetting Texas corporation with its principal place of business in Dallas, and a network of outlying stations which fed data to CMC. CMC supplied part of the financing to set up a company, Telecompo of Arkansas, in Conway, Arkansas. CMC then purchased two computers and related equipment and sold them to Worthen Bank, whose leasing agent, First Arkansas Leasing Corporation (FALCO), leased them to Telecompo. Before purchasing and leasing the equipment, Worthen Bank required several guarantors, including the individual guaranty of Meachum. Meachum sent his financial statement to Worthen and signed the lease guaranty in Dallas as an individual and as an officer for CMC.

Telecompo defaulted on the lease agreement, appellee repossessed the equipment, sold it and instituted in an Arkansas Circuit Court an action on the lease agreement against each of the individual guarantors. The trial court found jurisdiction over Meachum based on our long-arm statute, then Ark. Stat. Ann. § 27-2502 (Repl. 1979), now Ark. Code Ann. § 16-4-101 (1987), which provides that a trial court may exercise personal jurisdiction over a person as to a cause of action "arising from the person's . . . transacting any business in this State. . . ."

Meachum argued on appeal that he had not transacted any business in this State. This court held that the lease agreement which Meachum had guaranteed clearly had a substantial connection with Arkansas based on the five factors outlined by the Eighth Circuit Court of Appeals in *Aftanese* v. *Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965). Those factors are (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience to the parties. In holding Meachum liable on the guaranty we held that his contacts may have been few but they were substantial in nature and quality.

In the instant case, in my opinion, the appellees' contacts with the State of California were as substantial in nature and quality, even though they were transacted through appellant's Little Rock agent, as were those of the appellant in *Meachum.*

Stripped to the essentials, the situation that gave Arkansas personal jurisdiction over Meachum in Texas was that he had agreed to pay a debt due to a creditor in Arkansas. Based on that precedent, I see no reason why California should not have personal jurisdiction over the appellees in Arkansas who have agreed to pay a debt due to a creditor in California. Therefore, I think the trial court should have allowed registration of the foreign judgment in the instant case. It seems to me that the law should be consistent when based on facts not substantially different.

William CROW *v.* WEYERHAEUSER COMPANY

CA 93-744 880 S.W.2d 320

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

Wright, Chaney, Berry & Daniel, P.A., by: *Don P. Chaney*, for appellant.

Wright, Lindsey & Jennings, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant failed to prove by a preponderance of the evidence that he was entitled to receive permanent partial disability benefits. On appeal, appellant contends that the Commission erred in its interpretation and application of Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1993) and that the Commission erred in not considering new evidence. We disagree on both points and affirm.

The record reflects that appellant sustained a compensable injury in the course and scope of his employment with appellee on November 28, 1989. According to appellant, he was attempting to separate two kiln trucks, when he felt a sensation which he testified "felt like somebody had thumped him in the right testicle." Appellee accepted appellant's injury as compensable. Dr. Dale Gullett examined the appellant and could not determine the source of appellant's pain. Dr. Gullett referred appellant to Dr. John Hearnsberger. Dr. Hearnsberger discovered an inguinal hernia and operated to repair it. Appellee paid for the cost of the surgery to repair appellant's hernia. After the surgery, the appellant continued to complain of pain and was off work drawing temporary total disability benefits. Six weeks after appellant's surgery, appellee ceased payment of temporary total disability benefits.

Appellant filed a claim for additional benefits contending that he was entitled to permanent partial disability benefits based upon a ten percent rating by Dr. John R. Gregory. Appellee controverted any additional benefits other than those paid for the work-related hernia. The administrative law judge denied benefits. The Commission reviewed the case and denied benefits and appellant's request for the Commission to consider newly discovered evidence.

Appellant appealed the Commission's decision. We issued an unpublished opinion on December 23, 1992, remanding the case for the Commission to reconsider its decision in light of our recent opinion in *Keller* v. *L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992). The Commission reconsidered the case in light of *Keller*, and again denied benefits. This appeal followed.

Where the Commission's denial of relief is based on the claimant's failure to prove entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Moser* v. *Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (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. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993). In conducting our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *CDI Contractors* v. *McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993). The Commission also has the duty of weighing the medical evidence as it does any other evidence, and resolving any conflict is a question of fact for the Commission. *Chamberlain Group* v. *Rios*, 45 Ark. App. 144, 871 S.W.2d 595 (1994). However, the Commission is not bound by medical opinion, although it may not arbitrarily disregard the testimony of any witness. It is also entitled to examine the basis for a doctor's opinion in deciding the weight to which that opinion is entitled. *Reeder* v. *Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992).

Appellant argues that the Commission erred in its interpretation and application of Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1993), contending that the Commission construed the statute strictly by requiring the determination of the existence of an "abnormality."[1] We disagree.

Arkansas Code Annotated § 11-9-704(c)(1) provides in part that "*any determination of the existence* or extent of physical impairment *shall be supported by objective and measurable physical or mental findings*." The Commission found that appellant failed to present objective medical evidence to support his claim, as required by Ark. Code Ann. § 11-9-704(c)(1). The Commission explained that in considering claims for permanent partial disability the first determination is:

> [W]hether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Then, if we determine that an abnormality has produced a permanent physical impairment, we must also evaluate the evidence to determine the extent of the impairment. With regard to both of these determinations, Ark.

---

[1]While not applicable to the case before us, we note that Ark. Code Ann. § 11-9-704(c)(3) was amended in 1993. The amendment substituted the word "strictly" for the word "liberally" and became effective on July 1, 1993.

> 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 objective and measurable physical or mental findings.' Therefore, Ark. Code Ann. § 11-9-704(c)(1) provides a specific element of proof which must be found before the Commission can find the *existence* or extent of a permanent physical impairment.

(Emphasis added.) After considering this case in light of *Keller* v. *L.A. Darling Fixtures, supra*, the Commission determined that there was no objective and measurable findings to support a finding of the existence of an impairment.

The record contains an extensive medical history of examinations and treatments by at least six doctors, including an orthopedic physician and three other specialists, none of whom could propose an explanation for the source or cause of appellant's pain. After appellant's hernia repair, Dr. Hearnsberger's records indicate that appellant was complaining of "recurrent pain" which appellant maintained was "exactly the same pain he had prior to his operation." Consequently, Dr. Hearnsberger concluded that the hernia was not the cause of the pain appellant began experiencing in November of 1989. Dr. Hearnsberger's report on February 19, 1990, indicates that he was unable to determine the source of appellant's pain.

The record also reflects that appellant was examined by Dr. T. M. O'Gorman, a urologist, on April 13, 1990. Dr. O'Gorman noted that he could "find absolutely no abnormality of the [right] testicle" and that the testicle was not tender to palpation. Appellant was also referred to Dr. John R. Gregory, an orthopedic physician. Dr. Gregory performed an x-ray, a myelogram, a CT scan, an MRI, and a diskogram. All of these tests revealed normal findings. It appears from the evidence presented that the only source of information for Dr. Gregory's evaluation and his determination of a ten percent permanent partial disability rating is the appellant's complaint of pain and appellant's response of being in pain during the functional evaluation test.

Appellant and his wife testified that appellant had no significant physical problems prior to the incident on November 28, 1989. However, the evidence presented shows that appellant

sought treatment from Dr. Mark Floyd, his regular physician, on October 19, 1989, for complaints of right testicular and groin pain. Appellant also testified on January 4, 1991, that he continued to feel a burning and throbbing sensation in his right testicle. According to appellant, he was never free of pain and physical activity exacerbates the pain. However, the record indicates that since September of 1990, appellant has been employed driving a truck ten to twelve hours a day, five to six days a week. The record also reflects that the recurrence of appellant's pain occurred shortly after a dispute arose between appellant and appellee because appellant's temporary total disability had been discontinued after he was observed driving a log truck and unbinding his load.

The Commission reviewed the case in light of *Keller* and determined that appellant failed to prove that he sustained a permanent physical impairment. The Commission emphasized that there was no objective evidence in the record to prove the existence of any underlying damage which would substantiate appellant's complaints of pain. The Commission noted that appellant had been performing work after his hernia repair; therefore, it is implicit from the Commission's opinion that it found appellant's complaints of constant pain unbelievable. After reviewing all the evidence in the record, we cannot say that there is no substantial basis for the Commission's denial of permanent partial disability benefits.

The dissent appears to agree with the appellant that the use of the word "abnormality" establishes an additional requirement under Ark. Code Ann. § 11-9-704(c). We do not think that this assumption is correct. The Commission chose to use the word "abnormality" to reflect an underlying cause producing the appellant's alleged pain. Arkansas Code Annotated § 11-9-704(c) requires that any determination of the existence of a physical impairment shall be supported by objective and measurable findings. Although the Commission chose to use the medical term "abnormality" in describing the existence of an impairment, it did not establish an additional requirement under Ark. Code Ann. § 11-9-704(c).

Appellant also argues that the Commission erred by not considering newly discovered evidence, specifically a report

by Dr. John Bomar, a chiropractor. Whether to remand for taking additional evidence is a determination within the Commission's discretion; on appeal an exercise of that discretion will not be lightly disturbed. *Johnson* v. *American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992). A case should be remanded only if the newly discovered evidence is relevant, is not merely cumulative, would change the result, and was diligently discovered and produced by the movant. *Id.* In our unpublished opinion remanding this case back to the Commission, we stated that appellant could renew his request for reconsideration of Dr. Bomar's report. The record reflects that appellant did not renew his request; therefore, we decline to address this issue.

Affirmed.

JENNINGS, C.J., concurs.

MAYFIELD, J., dissents.

JOHN E. JENNINGS, Chief Judge, concurring. I do not agree that the Commission decided this case on the basis of Ark. Code Ann. § 11-9-704(c)(1), but I concur in the result reached by the majority.

MELVIN MAYFIELD, Judge, dissenting. This matter was here before and was remanded to the Commission by an unpublished opinion dated December 23, 1992. That opinion stated that the case was remanded to be reconsidered in light of this court's opinion in *Keller* v. *L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), as to the meaning of the "objective and measurable" requirement contained in Ark. Code Ann. § 11-9-704(c) (Supp. 1991).

It is my position that the Commission did not comply with the mandate of our previous opinion. I do not address the question of what the ultimate decision of the Commission should be — nor am I concerned with whether our decision in *Keller* was right or wrong. It is my position that under the doctrine of the law of the case, the Commission must decide this case under the rules, definitions, and findings made by our opinion in *Keller* so far as the "objective and measurable" requirements are concerned. The Commission, however, held:

> Allegations about the intensity and persistence of pain or

> other symptoms may be considered only if medical signs and laboratory findings show the presence of an abnormality which could reasonably be expected to produce the pain or other symptoms alleged.

By requiring the presence of an "abnormality" in order to have objective and measurable findings, the Commission injected an element into the equation not authorized by the *Keller* opinion. In fact, I am shocked by the Commission's constant and consistent use of the word "abnormality." In the appellant's abstract of the Commission's opinion — an abstract to which the appellee makes no objection — the word "abnormality" appears a total of 24 times in the 22-page abstract. In contrast, I have been unable to find that word — not even one time — in the *Keller* opinion. It is hard to understand how the Commission could use that word 24 times while considering this case in the light of the *Keller* opinion which did not use the word even one time..

So, the Commission departs from our decision in *Keller*, where we quoted from our decision in *Reeder* v. *Rheem Manufacturing Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992), the holding that, "The statute precludes an award for permanent disability *only* when it would be based *solely* on subjective findings.'" Actually, the Commission's opinion quotes that statement, citing both *Keller* and *Reeder* as its source, but has added the word "abnormality" to the language of *Keller* and *Reeder*. Not only is the word added, but the concept is changed. The Commission is equating the concept of "based solely on subjective findings" with the requirement of "the presence of an abnormality." I submit, however, that precluding an award for permanent disability "based solely on subjective findings" is not the same as precluding such an award unless the "presence of an abnormality sufficient to produce the pain alleged" is demonstrated.

Therefore, because the Commission did not follow our decision in *Keller* as directed by us in our remand of the instant case, I would again remand for the Commission to make a decision in keeping with *Keller*.

Tracy NIX *v.* WILSON WORLD HOTEL

CA 93-797 879 S.W.2d 457

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

Baim, Gunti, Mouser, DeSimone & Robinson, by: *William Kirby Mouser*, for appellant.

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

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant failed to prove by a preponderance of the evidence that the surgery which was performed on her knee was causally related to her compensable injury or that she was entitled to additional temporary total disability benefits through September 19, 1991. On appeal, appellant contends that there is no substantial evidence to support the Commission's decision. We disagree and affirm.

Appellant was employed by appellee as an auditor. She suffered a compensable injury to her knee on April 11, 1990, when she attempted to jump over a puddle at appellee's hotel. Appellee accepted the claim as compensable and paid temporary total disability benefits through July 20, 1990. Appellant filed a claim contending she was entitled to additional benefits for temporary

total disability. The administrative law judge agreed and awarded additional benefits for temporary total disability benefits through a date yet to be determined. The Commission reversed, finding that appellant was not entitled to temporary total disability benefits through a date yet to be determined. The Commission remanded the case back to the ALJ for a determination of when appellant's healing period had ended.

Before the ALJ heard the case on remand, appellant received additional medical treatment and underwent surgery on her knee. On remand, the ALJ found that appellant was entitled to temporary total disability benefits from the date of her injury through September 19, 1991. The ALJ also found that appellee was responsible for medical treatment provided to appellant, including the surgery on her knee. The Commission reversed, finding that appellant was only entitled to temporary total disability benefits through August 30, 1990. The Commission also found that the surgery performed on appellant's knee was not causally related to her compensable injury.

Where the Commission's denial of relief is based on the claimant's failure to prove entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Moser* v. *Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (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. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993).

Appellant argues that she remained in her healing period after August 30, 1990, because she had not reached her maximum healing and had been released to work with restrictions established for her by her treating physicians; therefore she contends that she is entitled to temporary total disability benefits until September of 1991.

Temporary disability is that period within the healing period in which an employee suffers a total or partial incapacity to earn wages. The healing period is defined as that period

for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The determination of when the healing period ends is a factual determination to be made by the Commission. *Thurman* v. *Clarke Indus., Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994). The Commission also has the duty of weighing the medical evidence as it does any other evidence, and resolving any conflict is a question of fact for the Commission. *Chamberlain Group* v. *Rios*, 45 Ark. App. 144, 871 S.W.2d 595 (1994).

The record reflects that on August 29, 1990, Dr. Banks Blackwell found that appellant's knee had no effusion, and had full range of motion. He released appellant to return to work on August 30, 1990, with the use of one crutch. On October 10, 1990, Dr. Blackwell expressed the belief that appellant's primary problem was depression. The dissent points out that in that report Dr. Blackwell also opined that appellant had not reached her maximum healing because she will improve with "some type of gainful employment, weight reduction and counseling." According to Dr. James S. Mulhollan, Dr. Blackwell felt that the healing of appellant's knee had occurred, but he thought her subjective feelings and subjective symptoms would improve if she were able to work, lose weight and receive counseling. Dr. Blackwell also noted that appellant had an anterior cruciate ligament deficiency from an old injury and that weight loss was absolutely necessary. Dr. Blackwell's notes indicate that appellant was approximately fifty pounds overweight. Dr. Blackwell did not have any other recommendations for appellant's compensable injury other than pain abatement. The record also indicates that in October 1990 Dr. Blackwell could find no justification for assigning a rating for a permanent physical impairment for appellant as a result of her compensable injury.

In Dr. Mulhollan's letter dated July 17, 1990, he indicated that Dr. Blackwell had reported that appellant had a contusion on her knee. Dr. Mulhollan believed that appellant could return to work and that her injury on the job did not do any structural damage to her knee. In fact, Dr. Mulhollan opined that the compensable injury had simply caused her to undergo an "inhibition

of muscle function". He noted that appellant may have to use crutches, and if that were the case, she would probably need a back pack to carry items around the work place. According to Dr. Mulhollan, the use of the crutches would help appellant utilize a normal gait. He also believed that the use of the crutch prescribed by Dr. Blackwell could have been for the patient's peace of mind because it would make her less likely to fall. As of July 17, 1990, Dr. Mulhollan found that appellant did not have any impairment as a result of her compensable injury.

Appellant testified that Dr. Blackwell allowed her to use crutches for her peace of mind. She also stated that she had been performing odd jobs, such as babysitting, since she had been released by Dr. Blackwell on August 30, 1990. The dissent notes that appellant was not allowed to go back to work under the conditions mandated by Dr. Blackwell and that this was admitted. We note that the record does not contain any admission by appellee that appellant was not allowed to return to work. Appellant testified that she was not allowed to return to work and this was not controverted by any other evidence in the record. However, it is well settled that a party's testimony is never considered uncontroverted. *Lambert* v. *Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985).

The Commission concluded that appellant had failed to meet her burden of proving that she remained within her healing period subsequent to August 30, 1990, because nothing further in the way of treatment would improve her condition. The Commission is the finder of fact and it did not accept the subjective feelings of pain by appellant and her doctor's acquiescence to these complaints as evidence that appellant's healing period had not ended on August 30, 1990. The Commission found that Dr. Blackwell released appellant to return to work on August 30, 1990, and that Dr. Blackwell found that appellant suffered no permanent disability as a result of her compensable injury. The Commission also relied on Dr. Mulhollan's opinion that appellant had no permanent disability as a result of her compensable injury. We cannot say that there is no substantial basis for the Commission's finding.

Appellant also challenges the Commission's finding that there was insufficient credible evidence of record proving that the

treatment subsequent to August 30, 1990, including surgery, was causally related to appellant's original compensable injury.

The record reflects that appellant's treatment and surgery subsequent to August 30, 1990, was for instability in her knee. Dr. Blackwell and Dr. Mulhollan's records indicate that appellant's knee showed very little instability after her compensable injury. More specifically, Dr. Mulhollan reported that appellant had a mild level of instability. He believed the instability was due to the ligament injury that appellant had sustained in 1980. Dr. Mulhollan said that appellant's knee had been unstable for eleven years and the appellant's work-related accident did not have any effect on that pre-existing instability. The record further indicates that surgery performed by Dr. Kenneth Martin was to correct appellant's pre-injury knee problem back in 1980-81.

The Commission found that there was insufficient credible evidence proving that the appellant's knee instability and subsequent surgery was causally related to appellant's compensable injury. The Commission stated that the medical records from Dr. Mulhollan and Dr. Blackwell immediately after the appellant's compensable injury showed that there was very little instability in the appellant's knee. According to the Commission, it was not until much later that appellant suffered from a significant amount of instability that surgery was performed by Dr. Martin. Therefore, the Commission concluded that appellee was not liable for the medical treatment provided after August 30, 1990. After reviewing the record, we cannot say that there is no substantial basis for the Commission's denial of medical benefits.

Affirmed.

ROBBINS, COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I agree with Judge Mayfield's dissent, and write separately only to emphasize that my disagreement with the majority is based on the absence of substantial evidence to show that the appellant's healing period had ended.

As the majority notes, the determination of when the healing period ends is a fact question for the Commission to make by weighing the evidence and resolving any conflicts therein.

Thurman v. *Clarke Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994). Nevertheless, the Commission's authority to weigh the evidence, medical or otherwise, does not permit it to arbitrarily disregard the testimony of any witness. *Reeder* v. *Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992). It is clear to me that the Commission arbitrarily disregarded Dr. Blackwell's statements to the effect that the appellant had not yet reached maximum healing. On this basis, I conclude that the Commission's opinion is not supported by substantial evidence.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached by the majority opinion in this case. I agree there is substantial evidence to support the Commission's decision that Dr. Martin's surgery in May of 1991 was not related to the April 1990 compensable injury. However, I do not agree that there is substantial evidence to support the Commission's decision that appellant's temporary total disability from the April 1990 injury ended on August 30, 1990.

Dr. Blackwell's record of April 18, 1990, states that appellant was injured while working on April 11, 1990, and that the emergency room doctor had recommended non-weight bearing crutches. On May 30, 1990, Dr. Blackwell recorded that appellant had been given a no-work slip on May 18, 1990. He reported on June 20, 1990, that appellant's knee was improving, but, "I feel it would be unsafe for her to attempt returning to work at this time." On July 18, 1990, he recorded that appellant was not strong enough to return to work and recommended that she continue Clinoril, Prozac and Amitriptyline and continue working out on a knee machine and exercise at home. And on August 29, 1990, he recorded that appellant was returned to full duty status on August 30, 1990, but "*must use one crutch.*" (Emphasis added.) Dr. Blackwell did not testify in this case, but his office record dated August 29, 1990, stated that he also recommended that she avoid squatting, lifting more than twenty-five pounds, and working overhead. He said that he thought she would initially have weakness and difficulty standing for eight hours but standing and working should increase her strength.

We would not have any problem with the end of the period of temporary total disability benefits, except that the appellee would not let appellant go back to work under the conditions

mandated by Dr. Blackwell. This is admitted, and Dr. Blackwell's office note of September 12, 1990, states that it is regrettable that she was not allowed to return to work as this was a very important part of her rehabilitation which would now be more difficult. Then, Dr. Blackwell's office note of October 10, 1990, states, "I do not feel she has reached her maximum healing as she will improve with returning to some type of gainful employment, weight reduction and counseling."

The record also contains a deposition and some reports from Dr. James S. Mulhollan, an orthopaedic surgeon who examined appellant only one time. In a report dated July 17, 1990, he stated:

> I reviewed the patient's job requirements and it would appear to me there is no reason why she could not return to work even at this or at some very quick date. *She may have to use crutches and if that is the case, she will probably need a backpack to carry items around the workplace.* At home, she might try *using a walker with a basket.* She should wear an immobilizer at night, learn how to do terminal muscle sets, use a 3:1 gate pattern and swim since that would encourage muscle activity. As soon as she is able she should begin stationary bicycling[.] It is my projection that if she will do this program she will very quickly improve and get back to her pre-injury status.

(Emphasis added.)

I do not see how the majority can say that appellant has reached her maximum healing from her work-related injury when she will have to be on crutches and wear a backpack to carry books and supplies around the workplace, put on an immobilizer at night, and take extensive exercise and physical therapy. Moreover, in the final paragraph of the Commission's opinion it is stated that "we find that claimant was entitled to temporary total disability through August 30, 1990, the date Dr. Blackwell released her to return to full duty." As I have pointed out, Dr. Blackwell's report of August 29, 1990, states she was returned "to full duty *status* on August 30, 1990." (Emphasis added.) However, he said she "must use one crutch" and recommended that she avoid squatting, lifting more than twenty-five pounds, and working overhead. That is not a release "to return to full duty" and the Com-

mission's statement is simply not supported by the record. Furthermore, Dr. Blackwell's office note of October 10, 1990, as I have quoted above says, "I do not feel she has reached her maximum healing . . . ."

Therefore, I cannot agree that the Commission's decision finding appellant's temporary total disability ended on August 30, 1990, is supported by substantial evidence. I would reverse and remand on this point.

ROBBINS and COOPER, JJ., agree.

Teresa King WEBER *v.*
ALL AMERICAN ARKANSAS POLY CORP.

CA 93-750 879 S.W.2d 462

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

Davidson Law Firm Ltd., by: *Clark W. Mason*, for appellant.

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

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's opinion. The ALJ found that appellant had failed to prove that her premature labor arose out of and in

the course and scope of her employment with appellee. On appeal, appellant contends that there is no substantial evidence to support the Commission's decision. We disagree and affirm.

The record reveals that appellant was five months pregnant while being employed by appellee in August of 1990. On August 17, 1990, appellant brought $1,000 in cash to work and left it in her purse. While at the office, the money was stolen. She discovered that someone had stolen her money when she had left work to run an errand. Appellant returned to work and reported the theft to her supervisor, John Phillips. Mr. Phillips phoned the police and reported the incident. A temporary employee confessed to the theft, and the money was returned to appellant. The episode, from its inception until the money was returned, lasted approximately thirty to forty-five minutes. According to appellant, she became so hysterical that she began to have contractions. She was hospitalized the same day and released two days later on August 19, 1990. On October 21, 1990, she again suffered pre-term contractions. She subsequently gave birth to a healthy child on November 12, 1990. Appellant filed a claim for temporary total disability benefits and medical costs related to her premature labor. Appellee controverted appellant's claim by arguing that her premature labor was not causally connected to her work as a receptionist.

The Commission determined that appellant had failed to prove the existence of a causal connection between her work and the premature birth of her child. Appellant argues, however, that her injury was compensable under the positional risk doctrine. She contends that, but for the fact that she was required to keep her money in her purse at her desk in an area accessible to other employees, she would not have been the victim of this theft and thus would not have suffered the premature birth of her child.

Although the dissent states that we adopted the doctrine of positional risk in our decision *Deffenbaugh Industries* v. *Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), aff'd, 313 Ark. 100, 852 S.W.2d 804 (1993), we note that that decision was an affirmance by an evenly divided court and is not entitled to precedential weight. *See France* v. *Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987). Moreover, the supreme court reviewed and affirmed our decision in that case under a different theory, that of increased

risk. Therefore, we have not adopted the doctrine of positional risk to date. We are reviewing the facts in this case to determine if this presents an appropriate case in which to decide if we are going to adopt the doctrine of positional risk.

An injury is deemed to arise out of the employment under the positional risk doctrine, if it is one that would not have occurred but for the fact that the conditions and obligations of the employment placed the employee in the position where the injury occurred. *Kendrick* v. *Peel, Eddy & Gibbons Law Firm*, 32 Ark. App. 29, 795 S.W.2d 365 (1990). The positional risk doctrine is implicated in circumstances where an employee is injured by a neutral risk to which she is exposed due to the conditions and obligations of her employment. Id. A neutral risk means that the risk which caused the injury was neither personal to the appellant nor distinctly associated with the employment. *Deffenbaugh Industries & Travelers Ins. Co.* v. *Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993).

The record discloses that appellant brought $1,000 to work and kept it in her purse on August 17. Appellant testified that the $1,000.00 was to pay for the birth of her child.

Mr. Phillips testified that the $1,000 was not company money. He said that he did not ask appellant to bring the money to the office on the day in question. Mr. Phillips stated that he did not know appellant had brought $1,000.00 to work that day. He said that he discouraged employees from bringing large sums of cash to the office and the plant. He added that he did not encourage anyone to bring any more money than they needed to get through the day. Mr. Phillips also remarked that the temporary employee would have had no reason, business or personal, to be in the office where appellant worked on the day in question.

The record further reveals that the night before the theft, appellant stayed all night at the hospital with her husband. Dr. Stephen R. Marks testified that emotional stress, such as that which might be caused by appellant's husband's illness, could possibly have triggered premature labor.

The Commission found that nothing about appellant's work as a receptionist subjected her to the risk of theft; that the theft

of appellant's money was not the result of a work-related dispute between appellant and the temporary employee; and that appellant's work setting did not expose her to the danger of the theft of her money. The Commission concluded that the positional risk doctrine did not apply to the facts of this case because the risk involved was not neutral but one personal to the appellant.

Where the Commission's denial of relief is based on the claimant's failure to prove entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Moser* v. *Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (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. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993). In conducting our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *CDI Contractors* v. *McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993).

After reviewing the record, we cannot say there is no substantial basis for the Commission's denial of benefits. The record indicates that appellant's job as a receptionist did not require her to handle sums of money. Apparently, appellant chose to bring the cash to work and leave it in her purse unattended. Also, the record reveals that employees were instructed not to bring valuables or excess money to work. We cannot disagree with the Commission's conclusion that the risk to which appellant was exposed was personal and thus defeated compensability under the positional risk doctrine.

Although appellant purports to argue the positional risk doctrine, she suggests that the increased risk doctrine also applies. She contends that she was exposed to an increased risk of theft because of her employment setting.

Under the doctrine of increased risk, the injuries are compensable if the employment exposed the employee to a greater

degree of risk than other members of the general public in the same vicinity. Under this theory, the claimant must only prove that the conditions of her employment, or the place where her employment required her to be, intensified the risk of injury due to extraordinary natural causes. *Deffenbaugh Industries* v. *Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993).

As noted above, the Commission determined that appellant's work as a receptionist did not increase the risk of theft and that appellant's work setting did not increase the risk of theft of her money. After reviewing the evidence, we cannot disagree with the Commission's determination that appellant's work environment did not increase the risk of theft.

Affirmed.

PITTMAN, J., concurs.

MAYFIELD and COOPER, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, concurring. I fully agree with the majority opinion. However, in light of the position taken by the dissenting judges, I wish to state my further view that the positional risk doctrine is contrary to the provisions of the Arkansas Workers' Compensation Act and has no place in our law. My view on this issue is that as stated in the dissenting opinion of Chief Judge Cracraft in *Deffenbaugh Industries* v. *Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992).

MELVIN MAYFIELD, Judge, dissenting. In this case the Commission adopted and affirmed the decision of the administrative law judge who held that the positional risk doctrine was not applicable under the facts in this case. This court adopted that doctrine in *Deffenbaugh Industries* v. *Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), where we said:

> We now join those courts which accept the positional risk doctrine to provide compensation for employees who are injured by neutral risks. The question of who should bear the burden of the costs of such an injury is a policy consideration, and use of the positional risk doctrine where the risk is neutral places the risk of loss on the employer, the party most able to sustain such a loss. This, we believe, is in keeping with the spirit of our workers' compensation law.

39 Ark. App. at 30, 832 S.W.2d at 873.

The law judge refused to apply the doctrine to this case based on the finding adopted by the Commission, that the risk in this case was personal to the claimant, and I agree with the appellant that the evidence will not support that finding. Absent some specific evidence to the contrary, I would agree with the following from 1 Larson, *Workmen's Compensation* Law § 11.11(b) at 3-199 to -201 (1993).

> A few other cases have also fallen into this error of insisting that the *subject matter* of the assault or dispute be inherent in the employment, disregarding the risk created by the employment *environment*. An employee may be required to work in a lonely and isolated spot in the small hours of the morning, yet if the robbers happen to take only his purse and nothing belonging to the employer, one or two courts have been able to satisfy themselves that this makes the assault personal and that there is no more to be said. Apart from the initial fallacy of supposing that what the robbers finally steal or do not steal demonstrates the motive of their attack, the greater fallacy is to suppose that there is only one possible way of connecting an attack with the employment — the subject matter of the assault.
>
> In any case, even if the motive is to get the personal wallet of the victim, most robberies of this kind are not "private" in origin, in the compensation-law sense. There is a marked distinction between the holdup in which the robber says to himself, "I am going to track down Henry Davis wherever he may be and steal the gold watch which I know he has," and the holdup in which the robber says, "I am going to rob whoever happens to be on duty as night watchman at the Consolidated Lumber Company, or whoever happens to come down the dark, hidden path from the factory to the rear gate." The latter is not really personal to the victim at all; he is attacked exclusively in his employment capacity as being the one who occupies the position in relation to that employment which the robber has found to create a favorable opportunity.

There was no specific evidence in this case to overcome the natural and common-sense view taken by Larson. Since appellee's brief admits that appellant's supervisor acknowledged that there was no policy prohibiting employees from bringing sums of cash to work, and because there was no evidence of a business or personal reason for the theft of the appellant's money, I think that the positional risk doctrine should apply here.

The Arkansas Supreme Court reversed our decision in *Deffenbaugh* because it found that our decision should be affirmed for another reason, but it stated that "an appropriate scenario to the positional risk doctrine may eventually arise." *Deffenbaugh Industries* v. *Angus*, 313 Ark. 100, 106, 852 S.W.2d 804, 808 (1993).

I think the appropriate scenario has now arrived and should be applied in this case. Therefore, I dissent from the majority opinion.

COOPER, J., joins this dissent.

William Jay JOHNSON *v.* STATE of Arkansas

CA CR 93-724 880 S.W.2d 319

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1994

Richard Turberville, for appellant.

No response.

PER CURIAM. On April 13, 1994, by an unpublished opinion, we affirmed appellant's conviction of two counts of aggravated robbery. On June 13, 1994, forty-one days after our mandate issued May 3, 1994, appellant's attorney filed this motion for an attorney's fee.

Motions for attorney's fees from attorneys appointed to represent indigent appellants in criminal cases are required by Ark. R. Sup. Ct. 6-6(c) to be filed not later than thirty days after issuance of the mandate. Heretofore we have exercised our discretion to consider such motions for attorney's fees filed significantly later than thirty days after the mandate issued. However, by per curiam opinion delivered October 13, 1993, we gave notice that we would no longer consider motions for attorney's fees filed more than sixty days after our mandate issues. *Houston* v. *State*, 43 Ark. App. 167, 856 S.W.2d 326 (1993). Because appellant's motion for an attorney's fee in this case was filed within sixty days after issuance of our mandate we will grant the motion.

This opinion is being published as notice to the bar that hereafter, consistent with Rule 6-6(c), we will no longer consider motions for attorney's fees filed more than thirty days after our mandate issues unless good cause for delay in filing the motion is presented.

The motion for attorney's fee is granted in the amount of $650.

IN THE MATTER OF THE ESTATE OF
Charles L. TUCKER, Deceased

Laura Lucille Williams, Intervenor, By and Through her Guardian, Gary Tucker *v.*
Lyle Robert Titterington, Co-Executor

CA 93-884 881 S.W.2d 226

Court of Appeals of Arkansas
Division I
Opinion delivered August 24, 1994

[redacted]

Dennis C. Sutterfield, for appellant.

Jon R. Sanford, for appellee.

JAMES R. COOPER, Judge. The appellee in this probate case, one of the executors of the estate of Charles Tucker, filed a petition to establish the estate's ownership of certain real property in Pope County. The appellant, who is the decedent's sister, responded to the petition by arguing that the unrecorded deed upon which the estate's claim was founded was never delivered. After a hearing, the probate court entered an order holding that title to the tract of land belonged to the decedent's estate. From that decision, comes this appeal.

For reversal, the appellant contends that the probate court lacked jurisdiction; that the relief afforded was outside the scope of the pleadings; that there was insufficient evidence to support a finding that the decedent did not intend to convey ownership of the property to the appellant; and that the probate judge erred in refusing to allow the testimony of Mary Ann Creemer. We find no error, and we affirm.

The record shows that Charles Tucker, the decedent, gave a recorded deed to the disputed property to the appellant in March 1982. On the same day, the appellant gave a deed to the same property to Charles. The latter deed was not recorded and, after

Charles' death, it was found in a safe deposit box to which the appellant and Charles had access.

Charles died in March 1992, and his 1991 holographic will was admitted to probate. In this will, Charles stated:

> I would like for the home place and the Ted Martin place to be sold within a year, the money from these two places and the cattle and the money in the Bank is for a trust fund for Lucille. The interest from this money will pay for someone to take care of Lucy. . . . After Lucy [sic] death this trust fund is to be divided equal [sic] between my children June and her four children ten equal parts.

The appellee, Lyle Robert Titterington, one of the co-executors of the estate, filed a petition to establish the estate's ownership of the property in the probate court. The appellant responded by arguing that the unrecorded deed was never delivered.

At trial, the appellee testified that in 1969 he came to live with his aunt, June Eubanks, who lived with the decedent. Without objection by the appellant, the appellee testified that there was no question that Charles believed the property was absolutely his; that Charles had paid the taxes on the property; had made improvements on it without anyone's permission; and had lived there and treated the place as his own for years. The appellee also testified that the appellant never exhibited any conduct consistent with her claim of ownership. Also without objection by the appellant, the appellee testified that June had mentioned that, after Charles' first heart attack, he had put all of the property into Lucy's name and that he believed that Charles had created these deeds so that his V.A. benefits would not be disturbed. The appellee further testified that, in February 1992, he and Charles went through the provisions of Charles' will together. He stated that Charles told him the property had been put into Lucy's name but there was an unrecorded deed conveying the property to him in a lock box. The appellee testified that it was his belief that Charles did not want the appellant to have outright title to the property.

June Eubanks testified that the family regarded Charles as the owner of the property. She testified that Charles had a key to the safe deposit box and that, a day or two before he died, he told her that he needed to go there, get the deed out, and have it

recorded. She stated that the appellant did give Charles a recorded deed to the southern forty acres of the tract of land for no consideration; this deed was recorded in 1984. She also testified that she believed the deeds had been created so that Charles would be able to continue to draw V.A. benefits. She testified that, before he died, Charles expressed a desire that his property should be sold; that the appellant should get the benefit of this property during her lifetime; and that the remainder should go to his other beneficiaries.

Mary Ann Creemer testified that Charles had told her that the home place was in Lucy's name so that it would stay in the family and that he considered it to be Lucy's property. At this point, the court sustained the appellee's objection to Ms. Creemer's testimony because the appellant had not listed her as a witness.

On May 14, 1993, after explaining in a letter decision that he believed Charles had never intended to convey the property to appellant, the probate judge entered an order finding that the property belonged to the estate.

For her first point on appeal, the appellant argues that the probate court was without subject matter jurisdiction to determine title to the real property because, even though the appellant was a *beneficiary* of Charles' will, she was not acting in *that capacity* by asserting her claim to this property. Therefore, she argues, she was a stranger to the estate and the appropriate jurisdiction for this action was in chancery.

The jurisdiction of the probate court is set forth in Ark. Code Ann. § 28-1-104 (1987), which states in part: "(a) The probate court shall have jurisdiction over: (1) The administration, settlement, and distribution of estates of decedents; (2) [t]he probate of wills. . . ." Probate court is a court of limited jurisdiction and has only such jurisdiction and powers as are conferred on it by the constitution or by statute, or are necessarily incident thereto. *Bratcher* v. *Bratcher*, 36 Ark. App. 206, 209, 821 S.W.2d 481 (1991). The probate courts have no jurisdiction to resolve disputes as to property rights between a personal representative and third persons claiming adversely to the estate; persons who are neither heirs, devisees, distributees, nor beneficiaries of the estate are third persons and "strangers" within the

meaning of this rule. *Id.* at 209. *Accord Hilburn* v. *First State Bank*, 259 Ark. 569, 572-73, 535 S.W.2d 810 (1976); *Ellsworth* v. *Cornes*, 204 Ark. 756, 764-65, 165 S.W.2d 57 (1942); *Estate of Puddy* v. *Gillam*, 30 Ark. App. 238, 242, 785 S.W.2d 254 (1990). *See also Deal* v. *Huddleston*, 288 Ark. 96, 100, 702 S.W.2d 404 (1986).

Subject matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can be raised by this Court. *Hilburn* v. *First State Bank*, 259 Ark. at 576. *Accord Arkansas State Employees Ins. Advisory Comm.* v. *Estate of Manning*, 316 Ark. 143, 146, 870 S.W.2d 748 (1994); *see Pickens* v. *Black*, 316 Ark. 499, 504, 872 S.W.2d 405 (1994); *Arkansas Dep't of Human Servs.* v. *Estate of Hogan*, 314 Ark. 19, 22-23, 858 S.W.2d 105 (1993).

The appellant argues that *Bratcher* v. *Bratcher, supra*, supports her position. We do not agree. In *Bratcher*, we reversed an order of the probate court because it did not have jurisdiction to resolve all of the issues it had determined. There, Norma Jean Bratcher, the surviving spouse of the decedent, had entered into an antenuptial agreement with the decedent in which she had agreed to forego all of her rights as surviving spouse in exchange for a dower interest in the increase in value of the decedent's ownership interest in two corporations. Before his death, the decedent had sold most of his interest in the two corporations and had transferred the bulk of his assets to a trust benefitting his children by a former marriage; no provision was made for Mrs. Bratcher in that trust. The decedent's will also left his entire estate to his children and contained no provision for Mrs. Bratcher. She elected to take against the will, and the decedent's children set up the antenuptial agreement as a bar. The probate court held that the agreement barred her right to take against the will, and she did not appeal from that ruling. Mrs. Bratcher also filed a motion asking the probate court to interpret the antenuptial agreement and that court did so. On appeal, this Court held that the provisions of the order with respect to the tracing of the decedent's assets and the award to Mrs. Bratcher, calculated on the value of those assets, were wholly outside the jurisdiction of the probate court. This Court noted that the decedent's will made no provision for Mrs. Bratcher; she had not appealed from the probate court's holding that she was barred from taking against the

will and could not participate in the distribution of the estate as surviving spouse. When Mrs. Bratcher sought interpretation of the antenuptial agreement by the probate court, it was clear that she had no rights as a surviving spouse and was not an heir, devisee, distributee, or beneficiary of the estate. Her action for interpretation of the antenuptial agreement was, therefore, one by a third person or stranger to the estate. Accordingly, this Court held that the probate court lacked jurisdiction to interpret and enforce that agreement.

However, the facts of *Bratcher* v. *Bratcher* are distinguishable from the situation presented in this case. Mrs. Bratcher did not appeal from the probate court's decision that the antenuptial agreement barred her right to take against the will; therefore, she had no rights as a surviving spouse and was not an heir or devisee of the estate when she sought interpretation of the antenuptial agreement. In the case at bar, however, the appellant is clearly a beneficiary of the will. Furthermore, the will in the case at bar directed that the property be sold in order to create a trust for the appellant's benefit. Under these circumstances, we hold that the probate court had subject matter jurisdiction in the case at bar.

Without citation to authority, the appellant also argues that only a chancery court could effectuate the equitable remedy sought by appellee. An assignment of error unsupported by convincing argument or authority will not be considered on appeal unless it is apparent, without further research, that the assignment of error is well taken. *General Elec. Supply Co.* v. *Downtown Church of Christ*, 24 Ark. App. 1, 3, 746 S.W.2d 386 (1988). In any event, the cases discussed above clearly show that the probate court had the power to determine title to this property.

In her second point on appeal, the appellant argues that there are no pleadings to support the relief awarded the appellee. She contends that the delivery of the recorded deed from the decedent to the appellant was never pled as an issue. The appellant correctly states that, ordinarily, there must be pleadings in support of the relief awarded by the court. *See Bachus* v. *Bachus*, 216 Ark. 802, 804-05, 227 S.W.2d 439 (1950). Nevertheless, the appellee in the case at bar was permitted to introduce a substantial amount of testimony regarding the parties' intentions about

the actual ownership of this property and the circumstances surrounding the making of the deeds without objection by the appellant. We have held that, although pleadings are required so that each party will know the issues to be tried and be prepared to offer his proof, Rule 15(b) of the Arkansas Rules of Civil Procedure provides that issues not raised in the pleadings, but tried by express or implied consent of the parties, shall be treated in all respects as if they had been pled. *Mitchell* v. *Mitchell*, 28 Ark. App. 295, 299, 773 S.W.2d 853 (1989). Under the circumstances of the case at bar, we think that the issue was tried by the implied consent of the parties and that the pleadings should therefore be treated as amended to conform to the proof. *See Brown* v. *Imboden*, 28 Ark. App. 127, 129, 771 S.W.2d 312 (1989).

Next, the appellant argues that the evidence does not support the decision of the probate court. We do not agree. In attempting to discern the real character of the transaction evidenced by the deeds, the probate court correctly considered all of the oral and written evidence and properly focused on the intent of the parties in the light of all attendant circumstances. *See Bright* v. *Gass*, 38 Ark. App. 71, 78, 813 S.W.2d 149 (1992). In carrying out the true intent of the parties, the probate court properly looked beyond the mere form in which the transaction was clothed and considered all the facts and circumstances, the conduct of the parties, and their relations to one another and to the subject matter. *Id.* Conclusions regarding the true intent of the parties primarily involve issues of fact. *Id.* Although probate cases are reviewed *de novo* on the record, this Court will not reverse the findings of the probate judge unless clearly erroneous, giving due deference to the probate judge's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *O'Flarity* v. *O'Flarity*, 42 Ark. App. 5, 12, 852 S.W.2d 150 (1993). *See also In re Estate of Spears*, 314 Ark. 54, 59, 858 S.W.2d 93 (1993).

The fact that the appellant's deed to this property was recorded is not dispositive of this question. In *Crowder* v. *Crowder*, 303 Ark. 562, 564, 798 S.W.2d 425 (1990), the Arkansas Supreme Court stated that a presumption of valid delivery of a deed attaches when the deed is recorded. The Court also stated that, while the recording of a duly executed and acknowledged deed, as well as its being found in the possession of the grantee, raises

the presumption of delivery, this presumption is not conclusively established when there is proof of other factors pertaining to the deed which may rebut the presumption. *Id.* There, the Court stated that a party's continuing to live in the home and pay taxes, insurance, and maintenance thereon are relevant considerations. *Id.* at 565-66. Ordinarily, the grantor's continued use of the property and the payment of taxes on it are evidence that would tend to rebut a claim of delivery. *Id.* at 566. In light of these considerations, we cannot say that the probate court erred in finding that Charles did not intend to convey ownership of the property to the appellant.

In her fourth point on appeal, the appellant argues, without citation to authority, that the probate court erred in refusing to allow the testimony of Mary Ann Creemer. The essence of the appellant's argument is that, by waiting to object until after Ms. Creemer had given *some* testimony, the appellee waived his right to object. We do not agree. It is true that a timely, specific objection at trial is essential in order to afford the trial court an opportunity to rule, *Bohannan* v. *Underwood*, 300 Ark. 110, 111, 776 S.W.2d 827 (1989), and that, if an objection is not timely made, it will be considered as waived when the case reaches this Court on appeal. *Umberger* v. *Westmoreland*, 218 Ark. 632, 644, 238 S.W.2d 495 (1951). It is likewise true that, for the trial court to have committed reversible error, it must be said that timely and accurate objection was made, so that the trial court was given the opportunity to correct such error. *Gustafson* v. *State*, 267 Ark. 830, 837, 593 S.W.2d 187 (Ark. App. 1979). Nevertheless, we think that the appellant in the case at bar has failed to recognize the distinction between waiving an issue for purposes of appeal by virtue of failure to object, and waiver of the right to object at trial. Here, the probate judge was apparently given an adequate chance to correct the error and, thus, no waiver of the right to object occurred. A trial court's decision regarding whether a witness may give testimony rests largely within the sound discretion of the trial court, and its determination will not be reversed unless that discretion is abused. *See Duncan* v. *State*, 38 Ark. App. 47, 53-54, 828 S.W.2d 847 (1992). Under the circumstances, we cannot say that the probate judge abused his discretion in refusing to admit this testimony.

Affirmed.

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

Paulla WOZNIAK *v.*
COLONIAL INSURANCE COMPANY of California

CA 93-897 885 S.W.2d 902

Court of Appeals of Arkansas
Division II
Opinion delivered September 7, 1994

Richard McMillan, for appellant.

Wright, Chaney, Berry & Daniel, P.A., by: *Travis R. Berry*, for appellee.

JAMES R. COOPER, Judge. The appellant in this automobile insurance case struck a pedestrian while driving an automobile she had previously insured with the appellee, Colonial Insurance. The pedestrian obtained a jury verdict of approximately $22,000.00 from his insurer, Allstate, which then received a judgment for this amount against the appellant. The appellant's insurance company, the appellee, denied coverage, claiming that the appellant's automobile policy had been cancelled for nonpayment of premium prior to the date of the appellant's accident. After reviewing the pleadings and the affidavit and deposition of the appellant, the trial court found that no contract existed between the parties at the time of the accident and entered summary judgment for the appellee. From that decision, comes this appeal.

For reversal, the appellant claims that the trial court erred in granting summary judgment because a question of fact existed for a jury's determination. We agree, and we reverse and remand.

The party moving for summary judgment must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Keller* v. *Safeco Ins. Co.*, 317 Ark. 308, 311, 877 S.W.2d 90 (1994). All proof submitted must be considered in the light most favorable to the non-moving party, and any doubts or inferences must be resolved against the moving party. *Id.* On appeal, the court determines if summary judgment was proper based on whether the evidence presented by the movant leaves a material question of fact unanswered, *id.* at 311-12, and summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals an aspect from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. *Baxley* v. *Colonial Insurance Co.*, 31 Ark. App. 235, 240, 792 S.W.2d 355 (1990).

Most of the facts in this case are undisputed by the parties. On February 11, 1991, the appellant signed an application for automobile insurance with the appellee and paid two months premium, which provided coverage until April 12, 1991. The policy application incorrectly stated the appellant's mailing address as 108 Jim Bob Circle rather than the correct address of 106 Jim Bob Circle. The appellant signed the application without noticing the mistake. On March 7, 1991, the appellee sent a premium notice to the appellant at the incorrect address shown on the application. The appellant never received the premium notice and, at the hearing on the appellee's motion for summary judgment, the appellee's attorney stated that the premium notice was returned to the appellee after the accident, stamped "return to sender." On March 29, 1991, the appellee mailed a notice of cancellation to the appellant at the incorrect address, stating that her automobile policy would lapse April 12, 1991, for nonpayment of premium. This notice was also returned to the appellee and was stamped "returned to sender 4-14-91."

In her deposition, the appellant testified that she never received a policy, premium notice, or any correspondence from the appellee after she signed her application; that two weeks before the end of March, she called the agency and advised a woman with whom she spoke that she had not received anything from the insurance company and that the woman took her telephone number and stated that she would get back with the appellant but never did respond; and that, the day after the accident occurred, the lady with whom she had previously spoken stated that she remembered the appellant's previous call checking on the status of her policy. The appellant also testified that she had moved to a new address on Walker Street three weeks before the accident occurred but she had not advised the insurance company of her new address or filed a change of address with the post office.

Although it was undisputed that the appellant had not paid the policy premium for coverage after April 11, 1991, we hold that a jury question remained regarding whether the appellee properly cancelled the appellant's policy. Arkansas Code Annotated § 23-89-304 (Supp. 1991) provides in part:

> (a)(1) No notice of cancellation of a policy to which

> § 23-89-303 applies, and no notice of cancellation of a policy which has been in effect less than sixty (60) days at the time notice of cancellation is mailed or delivered, shall be effective unless mailed or delivered by the insurer to the named insured.
>
> (2) No notice of cancellation to any named insured shall be effective unless mailed or delivered at least twenty (20) days prior to the effective date of cancellation, provided that, where cancellation is for non-payment of premium, at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given.

Arkansas Code Annotated § 23-89-306 (1987) provides that "[p]roof of mailing of notice of cancellation, or of intention not to renew, or of grounds for cancellation to the named insured at the address shown in the policy shall be sufficient proof of notice."

The appellee argues that, because it mailed proof of cancellation to the address shown on the policy application, which was signed by the appellant, it complied with § 23-89-304 and its cancellation of the appellant's policy prior to the date of the accident was therefore valid. The appellee relies on *Carmichael* v. *Nationwide Life Insurance Co.*, 305 Ark. 549, 552, 810 S.W.2d 39 (1991), and *Pittsburgh Steel Co.* v. *Wood*, 109 Ark. 537, 542, 160 S.W. 519 (1913), for the proposition that one is bound under the law to know the contents of the paper signed by him and cannot excuse himself by saying he did not know what it contained. The appellee concludes that, although it is disputed whether the appellant or the appellee's agent caused the wrong address to be placed on the appellant's policy application, the appellant signed the application and is therefore bound by the statements included in it.

The appellee also points out that the appellant acknowledged that she moved from her address between the last of March and the first week in April without notifying the appellee or the post office, suggesting that, even if the notices had been mailed to the appellant's correct address, she might not have received them.

The appellant responds that she gave her correct address to the appellee's agent and he made the mistake in completing her application; therefore, she argues, the appellee is responsible for the mistake. She relies on *General Agents Insurance Co.* v. *St.*

Paul Insurance Co., 22 Ark. App. 46, 51, 732 S.W.2d 868 (1987), where we held that, when the facts had been truthfully stated to the soliciting agent but, by fraud, negligence, or mistake, are misstated in the application, the company cannot set up the misstatements in avoidance of its liability, if the agent was acting within his real or apparent authority and there is no fraud or collusion on the part of the insured. *See also Time Ins. Co.* v. *Graves*, 21 Ark. App. 273, 282-83, 734 S.W.2d 213 (1987); and *Gilcreast* v. *Providential Life Ins. Co.*, 14 Ark. App. 11, 13, 683 S.W.2d 942 (1985). We note that the cases cited by both the appellee and the appellant regarding statements made in applications are to be distinguished from the case at bar because, in those cases, the applications involved statements critical to the risks being assumed by the insurance companies; whereas, here, the mistake was merely a clerical one.

In her brief, the appellant also relies on this Court's holding in *Swinney* v. *Atlanta Casualty Co.*, 42 Ark. App. 80, 854 S.W.2d 728 (1993). However, since the appellant's brief was written, the Supreme Court has overruled that holding. *See Atlanta Casualty Co.* v. *Swinney*, 315 Ark. App. 565, 868 S.W.2d 501 (1994), where the Supreme Court held that, under § 23-89-306, whether a notice was received by the insured is irrevelant according to the statute, as "[p]roof of mailing is sufficient proof of notice." 315 Ark. App. at 567.

In *Swinney*, the Supreme Court noted that the appellee had presented no evidence to challenge the proof of mailing. However, in the case at bar, the appellant has presented evidence that the notice was sent to an address which the appellee had reason to know was incorrect. Under the circumstances of this case, we think a jury could have found that the appellee was aware that it had an incorrect address for the appellant when it mailed her notice of cancellation and, therefore, did not properly cancel her policy. *See Merrimack Mutual Fire Insurance Co.* v. *Scott*, 219 Ark. 159, 163, 240 S.W.2d 666 (1951); *see also National Investors Fire & Casualty Ins. Co.* v. *Chandler*, 4 Ark. App. 116, 121, 628 S.W.2d 593 (1982).

We hold that whether the appellee had knowledge or should have known that the appellant's address on the application was incorrect is a material question of fact for the jury's

determination which should have been answered before the trial court determined whether sufficient notice of cancellation was given. We therefore reverse and remand for trial.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

[redacted]