Ralph Gene MOUNTS *v.* STATE of Arkansas

CA CR 93-993 888 S.W.2d 321

Court of Appeals of Arkansas
En Banc
Opinion delivered December 7, 1994
[Rehearing denied February 1, 1995.*]

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

[redacted]

Paul A. Schmidt, for appellant.

Winston Bryant, Att'y Gen., by: *Sherry L. Daves*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant Ralph Gene Mounts entered a conditional guilty plea to a charge of possession of a controlled substance with intent to deliver pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. He was sentenced to twenty years in the Arkansas Department of Correction, a $120,000.00 fine and court costs. He argues on appeal that the officers lacked probable cause to arrest him for driving under a suspended or revoked driver's license and consequently were precluded from inventorying his impounded vehicle in which 60 kilograms (130 pounds) of cocaine were discovered. Mounts appeals the denial of his motion to suppress the admission of the cocaine into evidence. Our review requires us to conclude that his motion to suppress should have been granted; therefore, we must reverse to permit appellant to withdraw his guilty plea as provided for in Rule 24.3(b).

Officer Ron Ball of the Arkansas State Police testified that on August 7, 1991, he stopped appellant because his vehicle's Georgia license plate did not have a monthly expiration sticker. After determining the vehicle was rented, Officer Ball issued appellant a warning ticket. Appellant produced what appeared to Officer Ball to be a valid Texas driver's license. Officer Ball then received appellant's permission to search the vehicle. During the search, Officer Ball asked appellant what was contained in a heavy suitcase, and appellant said it contained some books. Subsequently, appellant withdrew his consent to the search, and the search was terminated. Officer Ball said that he had reservations about the

information given to him, so he followed appellant while a background check was done on appellant's driver's license, vehicle registration, and criminal history. He testified that he subsequently contacted Officer Karl Byrd of the Arkansas State Police requesting additional information about appellant, and that the police radio operator advised him that appellant's Illinois driver's license was currently revoked. Officer Byrd then stopped appellant for driving with a revoked Illinois license. Officer Byrd said that appellant produced an apparently valid Texas driver's license and then he asked his communications center to verify that Texas law was the same as Arkansas law, and upon confirming that it was, he arrested appellant for driving under a revoked license. Officer Byrd testified that he believed that Texas law precluded issuance of a Texas driver's license if the applicant's driver's license in another state had been revoked or suspended and that he believed Texas erroneously issued a license to appellant because appellant had a revoked Illinois license. Officer John Scarberough of the Arkansas State Police was also at the stop. He testified that the only basis the officers had for believing that the Texas license was invalid was that appellant had a revoked Illinois license. However, Officer Byrd stated that the officers did not inquire of the Texas officials whether appellant's Texas license was valid or whether it had been cancelled, revoked or suspended.

After appellant was arrested for driving under a revoked license, his vehicle was impounded and an inventory conducted pursuant to Arkansas State Police policy and for purposes of safekeeping of the vehicle and its contents in accordance with Ark. R. Crim. P. 12.6(b). During the inventory, approximately sixty kilograms of cocaine were discovered in a suitcase in the trunk of the vehicle.

Appellant first argues that the officers did not have probable cause to arrest him for driving under a revoked license. A law enforcement officer may make a warrantless arrest of a person whom he has reasonable or probable cause to believe has violated the law in the officer's presence. Ark. R. Crim. P. 4.1(a)(iii). Although the officer at the time of the arrest is not required to have enough proof to sustain a conviction in order to have probable cause to make a warrantless arrest, the officer must possess reasonable, trustworthy information sufficient to warrant a prudent person to believe that the suspect had committed or

was committing an offense. *Vega* v. *State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988). An officer's mere suspicion or even a "strong reason to suspect" that an offense was committed is not enough to establish probable cause. *Roderick* v. *State*, 228 Ark. 360, 705 S.W.2d 433 (1986); *Vega* v. *State, supra. See Wong Sun* v. *U.S.*, 371 U.S. 471 (1963); *Henry* v. *U.S.*, 361 U.S. 98 (1959). Probable cause is determined by the officer's knowledge at the time of the arrest. *Roderick* v. *State, supra*. Further, the U.S. Supreme Court has held that the requirement of probable cause to make a warrantless arrest is to be strictly enforced. *Henry* v. *U.S., supra.*

Appellant was arrested for driving under a revoked driver's license in violation of Ark. Code Ann. § 27-16-303(a)(1) (Repl. 1994), which states:

> Any person whose driver's license or driving privilege as a nonresident has been *cancelled, suspended, or revoked as provided in this act* and who drives any motor vehicle upon the highway of this state while such license or privilege is cancelled, suspended, or revoked is guilty of a misdemeanor. [Emphasis added.]

Arkansas Code Annotated § 27-16-206(a) and (b) (Repl. 1994) provides in part:

> (a) "Suspend" means to temporarily withdraw, *by formal action*, a driver's license or privilege to operate a motor vehicle. . . .
>
> (b) "Revoke" means to terminate, *by formal action*, a driver's license or privilege to operate a motor vehicle. . . .[Emphasis added.]

Thus, under Arkansas law, a driver's license is not automatically revoked or suspended by operation of law when grounds therefore arise, but only after formal action is taken to revoke or suspend the license. The same is true under Texas law. *See* Vernon's Ann. Civ. St. of Tex., art. 6687b, sec. 22(a) (1994). Even though appellant produced what appeared to be a valid Texas license, the officers arrested him without inquiring as to whether Texas had revoked or cancelled the license. The arrest was made because *the officers surmised* the Texas license was erroneously issued and without any inquiry as to the status of appellant's license as determined by Texas officials.

Texas law precludes issuance of a Texas driver's license to an applicant whose license in another state has been suspended, revoked or cancelled, during the period of the suspension, revocation or cancellation. Vernon's Ann. Civ. St. of Tex., art. 6687b, sec. 4 (1994). Texas law also permits cancellation of the license if there is a subsequent determination that the applicant was not entitled to a license. Vernon's Ann. Civ. St. of Tex., art. 6687b, sec. 25A (1994). Simply put, appellant produced a Texas driver's license, and the officers had no knowledge that it had been cancelled, suspended or revoked by Texas. The officers merely verified Texas law on issuing a license to a person whose license in another state had been suspended or revoked, without inquiring into the status of appellant's driver's license *as determined by Texas officials*. There is no evidence in the record to indicate that appellant's Texas driver's license was invalid. We are compelled to conclude that appellant's arrest was without probable cause and, therefore, illegal.

A vehicle may be impounded and inventoried only as the consequence of a legal arrest. Ark. R. Crim. P. 12.6(b). Since we must conclude that the arrest was without probable cause and, therefore, illegal, an inventory of the vehicle was also improper. *Vega* v. *State, supra.* Evidence seized as a consequence of an illegal arrest must be excluded at trial. *Wong Sun* v. *U.S., supra.*

The dissent argues that the officers had probable cause to conduct a warrantless search of appellant's vehicle. Arkansas Rule of Criminal Procedure 14.1(a) provides that an officer is permitted to conduct a warrantless search of a moving vehicle located on a public way if the officer has reasonable cause to believe that the vehicle contains things subject to seizure. At the time of the second stop, the officers had no knowledge of illegal drugs in appellant's vehicle. The only knowledge the officers had was (1) that appellant withdrew his consent and terminated the search at the first stop (where he was stopped for failure to display a monthly expiration sticker on the license plate) and (2) that appellant had a heavy suitcase in the trunk of his vehicle. In addition, Officer Ball testified that he heard on the police radio that appellant had a prior narcotics violation, but he determined that that was incorrect after the second stop was made. Officer Byrd, who initiated the second stop, testified that "no drug related offense" was reported when the criminal history was

checked. He also stated that, "I did not have any suspicion that [appellant] might have something to hide." Reasonable cause to conduct a warrantless search of a vehicle requires more than mere suspicion, as the officers must possess reasonably trustworthy information sufficient to cause a person of reasonable caution to believe that the vehicle contains evidence subject to seizure. *Willett* v. *State*, 298 Ark. 588, 769 S.W.2d 744 (1989); *See* Ark. R. of Crim. P. 14.1(a). Based on the officers' testimony and the legal standard cited above, we cannot conclude that probable cause existed to conduct a warrantless search of appellant's vehicle. Any warrantless search of a vehicle is presumptively unconstitutional. *U.S.* v. *Ross*, 456 U.S. 798 (1982). The State has failed to sustain its burden to provide a legal justification for the search. *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985).

Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment right to be free from unreasonable searches and seizures, cannot be used against the accused. *U.S.* v. *Calandra*, 414 U.S. 338, 347 (1974); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Therefore, without a valid arrest and without probable cause to make a warrantless search of appellant's vehicle, we must conclude that the cocaine was illegally seized and should be excluded from evidence. *Mapp* v. *Ohio, supra; Henry* v. *U.S., supra.*

In reviewing the denial of a motion to suppress evidence, the appellate court makes an independent determination based on the totality of the circumstances and reverses the decision only if the trial court's decision is clearly erroneous or clearly against the preponderance of the evidence. *Houston* v. *State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993). Our review of the evidence compels us to conclude the trial court's denial of appellant's motion to suppress was clearly erroneous. The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Moreover, Arkansas criminal procedural rules and case law dictate the procedure that permits law enforcement officers to make warrantless arrests and searches.

Because we conclude that appellant's motion to suppress should be granted on the basis of an illegal arrest and an unjustified warrantless search, we decline to address appellant's arguments that his arrest was a pretext to search for contraband and

that an inventory subsequent to his arrest would not include the trunk of his vehicle.

Reversed and remanded.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached by the majority opinion in this case. The case comes to us from a conditional plea of guilty to the possession of approximately 60 kilograms (130 pounds) of cocaine with intent to deliver, which the appellant admits was found in "closed luggage" in the trunk of a vehicle he was driving. He was sentenced to twenty years for the Class Y felony, to run concurrent with time to be served in a federal penitentiary, plus a fine of $120,000 and court costs. The plea agreement, which required the fine to be paid on the day of the plea, was made pursuant to Ark. R. Crim. P. 24.3 which allows a defendant to appeal an adverse determination of a pretrial motion to suppress evidence. Therefore, the judgment of conviction should be affirmed if we affirm the trial court's denial of appellant's motion to suppress as evidence the cocaine and its discovery.

Corporal Ron Ball, of the Arkansas State Police, testified that on August 7, 1991, he was on patrol and observed the appellant driving a vehicle with a Georgia license plate that had no expiration-month decal on it. By radio, he requested a registration check of the license number and was informed that there was no information on that number on file. Corporal Ball then stopped the vehicle to examine the current registration and determine the registered owner. It turned out to be a rental car, and the appellant had what appeared to be a valid Texas driver's license. Ball issued a warning ticket to appellant for lack of the expiration-month decal on the tag. He testified that he asked if he could search the vehicle and appellant gave him permission. However, the appellant terminated the search after the officer asked what was in one "very heavy" suitcase, and the appellant said it contained books. Corporal Ball returned to his patrol car, and the appellant was allowed to leave. By radio, the officer then requested information on the driver's license, criminal history, and vehicle registration, and until he received that information, he kept appellant's vehicle in view.

During that time, Trooper Karl Byrd, who in another car

was sharing the information received by radio, heard the radio operator report that appellant's Illinois driver's license had been revoked. Since Trooper Byrd knew that it was against Arkansas law to drive on a suspended license, he stopped the appellant. Corporal Ball arrived shortly thereafter, and he told the other officers who had assembled at the stop that he had received radio information that the appellant had been charged with a narcotics violation in the past.

Trooper Byrd testified that when he stopped appellant, the appellant admitted he had a suspended license in Illinois but said he had applied for a driver's license in Texas, and it had been issued to him. Byrd testified that he then requested the radio dispatcher to inquire whether Texas law was the same as Arkansas law — that when a license is revoked in one state you cannot obtain one in another state — and after he was informed that the law was the same, he arrested the appellant for driving on a revoked driver's license. Byrd and Corporal Scarberough then conducted an inventory search of appellant's vehicle in keeping with Arkansas State Police policy, and in suitcases in the trunk of the car they found the cocaine.

On cross-examination Trooper Byrd admitted that he did not ask the dispatcher to check with Texas authorities to determine if appellant's driver's license, which was valid on its face, was in fact valid. He inquired only about Texas law. He also admitted that appellant had told him that when he applied for the Texas driver's license he had informed them of the revoked Illinois license.

On redirect examination Trooper Byrd testified that he, Corporal Scarberough, Corporal Ball, and another officer were the only state officers involved in the stop. However, federal secret-service agents also came to the scene because the criminal history returned over the radio also mentioned that appellant had been charged with a credit card offense.

Richard Eads, a state police radio operator stationed in Little Rock, testified that Corporal Ball asked him to run an inquiry on the appellant. He checked Texas and Illinois and was informed that appellant had a revoked Illinois driver's license. Trooper Byrd then asked him to check on Texas law to see if it was the same as Arkansas law regarding a revoked driver's license. The

communication from Texas was that their law was the same and that there had been some kind of charge against appellant involving credit cards.

I would first note that we know, from the evidence summarized above, that when Corporal Ball made the initial stop of appellant, he was authorized to do this under Ark. R. Crim. P. 4.1(a)(iii) which allows an officer to arrest without a warrant if there is reasonable cause to believe that there has been *any* violation of law committed in the officer's presence. This rule applied because Ark. Code Ann. § 27-14-1018 (Repl. 1994) provides for the issuance of a tab or decal annually, to be used in conjunction with the permanent license plate, and that the vehicle owner shall affix and display the tab or decal; and because Ark. Code Ann. § 27-14-1005 (Repl. 1994) makes it a misdemeanor to fail to affix and display the annual tab or decal. Officer Ball did not arrest appellant but gave him a warning ticket — perhaps because the officer was told that this was a rental car and the appellant was not the owner. But regardless of why he was not arrested, *Wilburn* v. *State*, 317 Ark. 73, 876 S.W.2d 555 (1994), holds that Ark. R. Crim. P. 4.1(a)(iii) authorizes a police officer to stop and arrest without a warrant when the officer has reasonable cause to believe that a misdemeanor traffic violation has been committed in the officer's presence. Moreover, the fact that Officer Ball did not actually arrest the appellant did not make the stop illegal.

In the second place, I would note that after Officers Ball and Byrd had received additional information from other law enforcement officers, Trooper Byrd stopped the appellant and arrested him for driving with a revoked driver's license.

I think the arrest was authorized by Ark. R. Crim. P. 4.1(a)(iii) and, if there was reasonable cause for the arrest, there seems to be no contention by the appellant that the discovery of the cocaine as a result of the inventory after appellant's arrest was illegal; however, the appellant contends that there was not probable cause for the arrest by Byrd. The commentary to Ark. R. Crim. P. 4.1(a)(iii) points out that the term "probable cause" is not used in the rule because "reasonable cause" is deemed more appropriate and is more generally used. However, *Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989), indicates that there is no "substantive distinction" between the terms.

Reasonable, or probable, cause for a warrantless arrest exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person to be arrested. *Hudson* v. *State*, 316 Ark. 360, 872 S.W.2d 68 (1994); *Crail* v. *State*, 309 Ark. 120, 827 S.W.2d 157 (1992). Reasonable, or probable, cause to arrest without a warrant does not require the degree of proof that would be sufficient to sustain a conviction. *Hudson* v. *State, supra; Burks* v. *State*, 293 Ark. 374, 738 S.W.2d 399 (1987). On appeal from a trial court's ruling on a motion to suppress evidence, the appellate court makes an independent determination based on the totality of the circumstances and reverses only if the trial court's ruling was clearly against the preponderance of the evidence. *Hudson* v. *State, supra; Edwards* v. *State, supra*. All presumptions are favorable to the trial court's ruling on the legality of the arrest and the burden is on the appellant to demonstrate error. *Hudson* v. *State, supra*. And reasonable, or probable, cause to arrest without a warrant may be evaluated on the basis of the collective information of the police. *Starr* v. *State*, 297 Ark. 26, 33, 759 S.W.2d 535, 538 (1988).

I would affirm this case based upon the evidence and applicable law. The initial stop was made by an officer for an apparent violation, committed in the officer's presence, involving the vehicle's license plate. Although the officer only issued a warning ticket, the appellant was subsequently stopped again, and arrested this time, for driving on a revoked license. At the time the appellant was arrested, the officers collectively had information that appellant's Illinois driver's license had been revoked, that he had a criminal background that involved narcotics, that he had been charged with a credit card offense, that he was driving a rental car with no expiration-month decal on the license plate, and that he had terminated his consent to search the car after Corporal Ball had asked about the contents of a suspiciously heavy suitcase found in the trunk. At that time, in my view, there was ample reasonable cause to arrest appellant. In addition, the trial judge could find from the evidence before him that the inventory search, conducted pursuant to impounding appellant's car, was in accordance with Arkansas State Police procedure. *See Stout* v. *State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Although I would affirm this case on the grounds that the

trial court could find that the officers had reasonable cause to arrest the appellant, there is another basis for affirming the trial court.

It is well established that we affirm the trial court if it was right for any reason. *West* v. *G.D. Searle & Co.* 317 Ark. 525, 527, 879 S.W.2d 412, 413 (1994); *Warren* v. *State*, 314 Ark. 192, 198, 862 S.W.2d 222, 225 (1993); *Chisum* v. *State*, 273 Ark. 1, 6, 616 S.W.2d 728, 731, (1981); *Gonce* v. *State*, 11 Ark. App. 278, 281, 669 S.W.2d 490, 491, (1984). Here, the trial court's order, which did not state any reason for denying the appellant's motion to suppress, could be also affirmed under Ark. R. Crim. P. 14.1(a)(i), which provides:

> (a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:
>
> > (i) on a public way or waters or other area open to the public;

The *unofficial* supplementary commentary to this rule cites *Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980), and states at page 118 that it

> appears to demonstrate that the showing of reasonable cause required by the Arkansas Supreme Court varies inversely with the mobility of the place to be searched. Since mobility is the *sine qua non* of an automobile, the Court can be expected to find diminished expectations of privacy and exigent circumstances in warrantless automobile search cases.

In *Tillman, supra*, the opinion states, "The test for probable cause for the stopping and searching of this automobile rests upon the collective information of the police officers. . . ." 271 Ark. at 556, 609 S.W.2d at 343. It also says, "The right to search and the validity of the seizure were not dependent upon the right to arrest . . . ." And that "the reasonableness of the search turns upon its propriety as the search of an automobile." *Id.* at 557 and 343-44.

In *Hudson* v. *State*, 316 Ark. 360, 872 S.W.2d 68 (1994), the appellant filed two motions to suppress evidence. The first one

was based upon lack of probable cause to arrest, and the second one was based on the lack of probable cause for a warrantless search following the stop. The court said, "The same standards govern reasonable (that is to say, probable) cause determinations, whether the question is the validity of an arrest or the validity of a search and seizure." The arrest and search were based on the same information, which was supplied to a Drug Task Force by an informant who said the appellant had cocaine in his possession and had just been seen traveling in a 1977 Buick Electra, with a certain tag number, in the Arkadelphia area. Officers stopped the vehicle within an hour, but no cocaine was found in the car or on the appellant's person. Our supreme court affirmed the trial court's denial of the motions to suppress based upon language from *Hines* v. *State*, 289 Ark. 50, 709 S.W.2d 65 (1986). As to the lack of cocaine in the car or on the person of the appellant, the court said "it was conceivable" that he could have disposed of it "in some fashion."

In the case now before us, the appellant was stopped the first time in a proper manner for a lawful purpose. He gave consent for the officer to search his car but terminated the consent when the officer asked what was in a "very heavy" suitcase. Under some circumstances, the Arkansas Supreme Court has considered the consent to search as suspicious. *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988). And we have held that the attempt to avoid a police roadblock could be evidence of trying to hide unlawful activity. *Coffman* v. *State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988). While I do not think the appellant's exercise of his right to terminate the search should be sufficient to constitute probable cause to continue the search, I think this, together with the matters observed by Officers Ball and Byrd and the information received from their radio operator, is sufficient when considered in light of the law I have discussed to constitute reasonable cause to detain and search the appellant's vehicle under Ark. R. Crim. P. 14.1(a)(i) — even if there was not reasonable cause to arrest appellant for driving on a revoked driver's license. I believe, as stated in *United States* v. *Cortez*, 449 U.S. 411, 418 (1981), that the evidence in this area of the law should "be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

I dissent from the reversal of the judgment of conviction.

COOPER, J., joins in this dissent.

William SIMPKINS *v.* STATE of Arkansas

CA CR 94-139 889 S.W.2d 37

Court of Appeals of Arkansas
Division I
Opinion delivered December 7, 1994

William R. Simpson, Jr., Public Defender, by: *Sandra S. Cordi*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of manslaughter for the stabbing death of Harold "Bimbo" Bush. He was sentenced to ten years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in prohibiting a witness for the defense from testifying about a specific instance of the victim's prior violent conduct and that the trial court erred in allowing a statement made by the victim to be introduced into evidence as a dying declaration. We find merit in the appellant's first argument and, therefore, reverse and remand.

A brief recitation of the testimony is necessary for an understanding of the appellant's arguments on appeal. At trial, Rodney White, the victim's brother, testified that on February 25, 1993, he and the victim were in a friend's backyard when they observed the appellant and another man, Gerald Sears, walking through an alley. He testified that the victim subsequently walked down the alley to talk to the appellant. Mr. White then started down the alley when he heard arguing and observed the victim walking slowly back toward him. He testified that the victim was

doubled over and stating that he could not breathe. The victim then collapsed, holding his chest. Mr. White stated that at this point the victim was "just about gone" and told Mr. White that the appellant stabbed him. He further testified that he did not witness the fight but that he did see the appellant walking away from the alley. Anthony Brown testified that he observed an altercation between a man and the victim. He stated that he observed a man sitting astride the victim, yelling, "why did you hit me with a stick" and hitting the victim with his fists. He stated that the man then appeared to take something into his hand and strike the victim in the chest several times while stating, "no one hits me with a stick and gets away with it." He then observed the man stand up, kick the victim, and walk away. Mr. Brown stated that the victim got up, staggered down the alley and collapsed. Officer Charles Simon testified that the appellant took him to an alley where he had discarded a knife which the appellant admitted was the weapon used to stab the victim. The autopsy of the victim revealed a fatal chest wound which penetrated the heart. The victim also suffered another stab wound to the lower front part of the neck and three superficial cuts to the left hand.

After the State rested, the appellant called James Foxx to testify regarding a statement made to him by the victim. The trial court sustained a hearsay objection by the State. The appellant contended the testimony was relevant to his theory of self-defense and was allowed to proffer the testimony of Mr. Foxx. Mr. Foxx testified that on the Tuesday before the victim's death on Thursday, he came into contact with the victim who informed him that he and the appellant had an argument over some whiskey they were drinking. Mr. Foxx testified that the victim informed him that he was going to buy the appellant a drink on Sunday and "when he get ready to turn it up to his throat, he was going to slash his throat. And, if he took off running every time he fall and try to get up that he was going to shoot him." Mr. Foxx testified that he informed the appellant of this conversation and advised him to "watch your back." Another witness, Gerald Sears, testified for the appellant and stated that the victim hit the appellant with a 2x4 board before the appellant pulled the knife in the fight.

The appellant contends that the proffered testimony of Mr. Foxx was relevant to his theory of self-defense and was admissible under Arkansas Rule of Evidence 405(b). We first note that

the testimony of Mr. Foxx was not hearsay in that it was not offered for the truth of the matter asserted. Ark. R. Evid. 801(c); *see also Owens* v. *State*, 318 Ark. 61, 883 S.W.2d 471 (1994).

Specific instances of conduct are only admissible under Rule 405(b) when the character or a trait of character of a person is an essential element of a charge, claim, or defense. Evidence of a victim's violent character is relevant to the issue of who was the aggressor and whether or not the accused reasonably believed he was in danger of suffering unlawful deadly physical force. *Thompson* v. *State*, 306 Ark. 193, 813 S.W.2d 249 (1991). Evidence of specific acts of violence that were directed at an accused or were within his knowledge is admissible as being probative of what the accused reasonably believed at the time and thus relevant to his plea of self-defense. *Bargery* v. *State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992); *Britt* v. *State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983). Communicated threats and declarations of hostile purpose made at a point close in time to the killing may be admissible as part of the res gestae in self-defense cases. *Jones* v. *State*, 1 Ark. App. 318, 615 S.W.2d 388 (1981). Thus, as an essential element of his defense, the appellant had the right to introduce specific instances of the victim's violent character that were directed at him or within his knowledge. *Johninson* v. *State*, 317 Ark. 431, 878 S.W.2d 727 (1994); *Thompson* v. *State, supra.*

Here, the appellant was not allowed to fully develop his theory of self-defense through Mr. Foxx's testimony to show whether or not he reasonably believed he was in danger of suffering unlawful deadly physical force. We find Mr. Foxx's testimony relevant to the appellant's theory of self-defense as being probative of what the appellant reasonably believed at the time of the altercation, and conclude that the trial court erred in excluding this testimony. *See Smith* v. *State*, 273 Ark. 47, 616 S.W.2d 47 (1981); *Pope* v. *State*, 262 Ark. 476, 557 S.W.2d 887 (1977).

We address the appellant's second argument because the issue is likely to arise on retrial. The appellant argues that the trial court erred in admitting into evidence, as a dying declaration, Rodney White's testimony that the victim told him that he had been stabbed by the appellant. We do not agree.

In order to qualify as a dying declaration, the state-

ment must be made by the declarant while believing that his death is imminent and must concern the cause or circumstances of his impending death. Ark. R. Evid. 804(b)(2). The trial court makes the preliminary determination of whether the evidence is admissible and on review, we will reverse that determination only if there is an abuse of discretion. *Bargery* v. *State, supra.* The fact that the victim was possessed of a sense of imminent and inevitable death need not be shown by the deceased's express words, but may be supplied by inferences drawn from his condition, imminent danger, and other circumstances that indicate an impending death. *Id.*

The evidence here shows that the deceased collapsed almost immediately after suffering a stab wound that severely damaged his heart. His statement that the appellant had stabbed him clearly referred to the cause and circumstances of his death. Considering the obvious severity of the wound, coupled with the victim's almost immediate collapse and his inability to breathe, we cannot conclude that the trial court abused its discretion in admitting the testimony.

Reversed and remanded.

PITTMAN and ROBBINS, JJ., agree.

James MASSENGALE *v.* STATE of Arkansas

CA CR 93-1258 888 S.W.2d 317

Court of Appeals of Arkansas
En Banc
Supplemental Opinion on Denial of Rehearing
December 7, 1994

Johnny Ray Putnam, for appellant.

No response.

JOHN B. ROBBINS, Judge. Appellant James Massengale was convicted in a jury trial of the crimes of driving while intoxicated and refusing to submit to a breathalyzer test. On appeal appellant argued that the trial court erred in allowing testimony about two portable breathalyzer tests which were administered at the scene of his arrest. By unpublished opinion filed September 21, 1994, we affirmed these convictions. Appellant has now petitioned for rehearing, which we deny.

In March of 1993, Officer Carey Lovaas stopped a truck Mr. Massengale was driving. Officer Lovaas testified that he decided to make the stop because Mr. Massengale squealed his tires and crossed the center line. Officer Lovaas detected the odor of intoxicants and Mr. Massengale admitted that he had been drinking beer. As Mr. Massengale exited his truck, he stated that he would be unable to perform some of the sobriety tests due to an injured leg. Officer Lovaas then administered a portable breathalyzer test and testified that the result of the test was unsatisfactory. Mr. Massengale was also given the horizontal gaze-nystagmus sobriety test and a fingertip sobriety test. Officer Lovaas indicated that he failed the first test and had trouble with the latter. Officer Lovaas then administered another portable breathalyzer test, which again yielded an unsatisfactory result. Mr. Massengale was taken to the police station, where he refused to submit to a breathalyzer test.

For reversal, Mr. Massengale contended that all testimony regarding the portable breathalyzer tests was erroneously admitted into evidence. Specifically, Mr. Massengale argued that the results of the tests should not have been admitted because the State was introducing them for the purpose of establishing that he was driving while intoxicated. The results of a portable breath test are not admissible for this purpose. *See Patrick* v. *State*, 295 Ark. 473, 750 S.W.2d 391 (1988). In addition, Mr. Massengale asserted that, pursuant to Arkansas Rule of Evidence 403, testimony surrounding the portable breath tests should have been excluded because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.

Prior to trial, Mr. Massengale filed a motion in limine requesting that any reference to the breathalyzer tests and their results be excluded from evidence. The judge did not grant the motion, but indicated that he would consider an objection if made in a timely fashion. The case then went to trial.

During the trial the State was examining Officer Lovaas when he testified that, after he stopped Mr. Massengale, he told Mr. Massengale he was going to administer a portable breathalyzer test. At this time Mr. Massengale objected and the objection was overruled. Officer Lovaas then proceeded to explain what a portable breathalyzer test was. He was later asked if he administered this test to Mr. Massengale and what it indicated. Without objection, he testified that he administered this test and that the result of the test was unsatisfactory. There was also no objection made when Officer Lovaas subsequently testified that he administered a second portable breathalyzer test and it also produced an unsatisfactory result.

Because no objection was made when Officer Lovaas testified that he administered a portable breathalyzer test and the result was unsatisfactory, nor was an objection made when he further testified that a second breathalyzer test was also administered with unsatisfactory results, we concluded that Mr. Massengale's first argument was not preserved for review. An argument for reversal will not be considered in the absence of an appropriate objection. *Cloird* v. *State*, 314 Ark. 296, 862 S.W.2d 211 (1993). The objection must be timely, affording the trial court an opportunity to correct the asserted error. *Pharo* v. *State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990). Since no timely objection was made to Officer Lovaas' testimony regarding the portable breathalyzer results, we did not address this argument on appeal.

Appellant contended that further objection was unnecessary because his motion in limine preserved this issue. While *Schichtl* v. *Slack*, 293 Ark. 281, 737 S.W.2d 628 (1987), and *Ward* v. *State*, 272 Ark. 99, 612 S.W.2d 118 (1981), support appellant's contention that a motion in limine which is denied or overruled preserves the issue for appeal purposes, the trial court here neither denied nor overruled appellant's motion. The court simply ruled that it would address objections to evidence concerning the portable breathalyzer tests if timely made during

the course of the trial. We fail to find error in a ruling by a trial court which requires evidentiary objections to be made as the evidence is offered so that the court can rule on the objection in the context of when and for what purpose admission of the evidence is sought.

As to Mr. Massengale's second argument on appeal, the trial court has broad discretion in deciding whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. *Mitchell* v. *State*, 281 Ark. 112, 661 S.W.2d 390 (1983). We can not conclude that the trial court abused its discretion under the circumstances presented.

COOPER, MAYFIELD and ROGERS, JJ., would grant rehearing.

JAMES R. COOPER, Judge, dissenting. The appellant in this criminal case has filed a petition for rehearing asserting that our decision of September 21, 1994, is erroneous because a timely objection was in fact made to Officer Lovaas' testimony regarding the results of the portable breathalyzer test, and because the trial court's denial of the appellant's pretrial motion in limine regarding the test results preserved the argument for appeal. The majority has denied the appellant's petition for rehearing, and I dissent because I believe that the appellant's argument was preserved and should therefore have been addressed on its merits.

Our opinion of September 21, 1994, held that the appellant's argument was not preserved for review because no objection was made when Officer Lovaas testified concerning the test results. However, the appellant filed a pretrial motion in limine requesting exclusion of the test results which was denied.[1] Our opinion was therefore in error; our Supreme Court has made it clear that no objection at the time of introduction is required where a motion in limine has been made to specific evidence and denied. *Schichtl* v. *Slack*, 293 Ark. 281, 737 S.W.2d 628 (1987), *citing Ward* v. *State*, 272 Ark. 99, 612 S.W.2d 118 (1981). Furthermore, it is worth mentioning that, although no objection at

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[1]The trial judge ruled as follows: "I'll just take up the objection. It will be timely made. I'm not going to grant the motion in limine." Although the supplemental opinion characterizes this as a "ruling . . . which requires evidentiary objections to be made as the evidence is offered," that is really only another way of saying that the motion in limine was denied. *See generally* 75 Am. Jur. 2d *Trial* § § 94, 109 (1991).

the time of introduction was necessary, the appellant did in fact object to the testimony at the first opportunity.

I would grant rehearing on the basis of this error of law, and I respectfully dissent.

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

ARKANSAS POWER & LIGHT CO. *v.*
Frank and Linda BOLLS and Joe and Judy Clark

CA 93-1248 888 S.W.2d 319

Court of Appeals of Arkansas
Division II
Opinion delivered December 7, 1994

Friday, Eldredge & Clark, by: *Scott J. Lancaster*, for appellant.

Ramsay, Bridgforth, Harrelson & Starling, by: *William M. Bridgforth*, for appellees.

MELVIN MAYFIELD, Judge. Appellant, Arkansas Power & Light, brings this appeal from the trial court's order granting appellees' motion for a new trial.

The appellees Frank and Linda Bolls and Joe and Judy Clark, represented by William Bridgforth of the Ramsay law firm, brought suit against the appellant for damages resulting from a fire. After a jury trial, the jury returned a verdict in favor of the appellant. On April 5, 1993, a judgment was entered in appellant's favor and the appellees' complaint dismissed with prejudice.

On April 9, 1993, the appellees filed a Motion for New Trial or, alternatively, Motion for Judgment Notwithstanding the Verdict pursuant to Ark. R. Civ. P. 59 and 50, based upon irregularity in the proceedings or misconduct of the jury. The motion alleged that during voir dire counsel for the appellees asked whether any potential juror had ever been sued by the Ramsay law firm or been adverse in a lawsuit to a party represented by that firm; that in 1985 Wanda Bateman, one of the potential jurors, had been sued by the firm in federal court; that the lawsuit in federal court was extensive and concluded by consent judgment in favor of Ms. Bateman's adversary; that Ms. Bateman failed to disclose these facts on voir dire in the present case; and as a direct result of this failure Ms. Bateman was seated as a juror and made foreperson. Attached to the motion was a copy of the federal court complaint filed by the plaintiff by its attorney, John G. Lile, III, of the Ramsay firm against Ms. Bateman.

In an affidavit filed May 6, 1993, Ms. Bateman stated, among

other things, that the previous legal action did not cross her mind at any time during the questioning of the jurors or at any time during the trial and subsequent deliberations; that had it come to mind and had she associated John Lile with Mr. Bridgforth's firm and felt any doubt or concern regarding her ability to serve as a fair and impartial juror, she would have spoken up; that it played no part in the jury's deliberations or decision; and that it did not bias or prejudice her involvement in the case.

On May 25, 1993, the trial court entered an order setting aside the judgment for appellant and granted appellees a new trial.

On appeal, the appellant contends the trial judge abused his discretion in granting appellees' motion for new trial. Appellant argues that Mr. Lile represented the plaintiffs in federal court, but here Mr. Bridgforth was the representing attorney; that there is no reason to doubt that after seven years Ms. Bateman did not associate these two attorneys as being from the same firm; and because she did not associate the prior lawsuit with the current suit there was no prejudice to the appellees.

Appellant also points out that Ark. Code Ann. § 16-31-107 (Repl. 1994) provides, in part, as follows:

> No verdict or indictment shall be void or voidable because any juror shall fail to possess any of the qualifications required in this act unless a juror shall knowingly answer falsely any question on voir dire relating to his qualifications propounded by the court or counsel in any cause.

Appellant contends Ms. Bateman's unintentional failure to respond was not done knowingly, and it argues this case is analogous to *Big Rock Stone & Material Co.* v. *Hoffman*, 233 Ark. 342, 344 S.W.2d 585 (1961), and *Moody Equipment & Supply Co.* v. *Union National Bank*, 273 Ark. 319, 619 S.W.2d 637 (1981).

In *Big Rock*, the appellees filed a motion for a new trial alleging they had learned that one of the jurors failed to disclose on voir dire that he was then being represented in a pending case by the appellant's attorneys. The trial judge found that the juror had *no knowledge* of the pending case but granted the new trial. The supreme court reversed because the juror's lack of knowl-

edge made it "impossible" for that case to prejudice him and said "his conduct in failing to respond to [the] inquiry can only be regarded as truthful and candid." 233 Ark. at 345, 344 S.W.2d at 587. Appellant argues here, as in *Big Rock*, there is no reason to believe that the juror was not answering truthfully or knew the appellees' law firm had been previously adverse to her.

In *Moody Equipment*, the trial judge granted the appellee's motion for a new trial on the basis of misconduct of a witness. Our supreme court held that it is not the place of the appellate court to set aside the trial judge's decision granting a new trial unless it can say with confidence that the trial court "markedly abused" its discretion. The court also said it is fundamental that the trial court's discretion increases proportionately as the situation presents to it a question that cannot equally well be presented to the appellate court by the printed record. Because the issue could not be "equally well presented" by the printed record, our supreme court affirmed the trial court. The appellant argues that in the present case the trial judge's discretion is not as high as in *Moody Equipment* because all the evidence necessary to make the determination in the present case is in the record.

In *Diemer* v. *Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993), the court said that when a new trial is requested because of juror misconduct under Ark. R. Civ. P. 59(a), the moving party must show that the party's rights have been materially affected by demonstrating that a reasonable possibility of prejudice has resulted from the misconduct; prejudice, in such instances, is not presumed; trial courts, however, are vested with great discretion in acting on motions for new trial, and in a case in which a new trial is requested on the ground of juror misconduct, the appellate court will not reverse the trial court's decision unless there is a manifest abuse of that discretion. *See also Trimble* v. *State*, 316 Ark. 161, 871 S.W.2d 562 (1994).

In *Razorback Cab of Ft. Smith, Inc.* v. *Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993), the court said that abuse of discretion in granting a new trial means a discretion improvidently exercised, that is, exercised without due consideration, and a showing of abuse is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail.

Here, we are unwilling to say that the trial court abused its discretion in granting a new trial. Even the appearance of juror misconduct has been held enough to warrant relief. *Zimmerman* v. *Ashcraft, Administrator*, 268 Ark. 835, 597 S.W.2d 99 (Ark. App. 1980).

Affirmed.

COOPER and ROBBINS, JJ., agree.

Linda Louise BRANTLEY *v.* TYSON FOODS, INC.

CA 94-37 887 S.W.2d 543

Court of Appeals of Arkansas
Division II
Opinion delivered December 7, 1994
[Rehearing denied January 11, 1995.]

Trafford Law Firm, by: *G. Ray Howard*, for appellant.

Bassett Law Firm, by: *Earl Buddy Chadick*, for appellee.

MELVIN MAYFIELD, Judge. Linda Louise Brantley has appealed a decision of the Workers' Compensation Commission denying her benefits for an allegedly work-related injury.

At the hearing before the administrative law judge appellant testified that she went to work for Tyson Foods at its new plant in Pine Bluff in March, 1991. This was the first factory job she had ever held. Tyson provided orientation training for about two weeks then started production. Appellant was assigned to the skinning line where a "blow stick" blew the skin of the chicken away from the meat, then the person who skinned the chicken would turn the chicken around and pull the skin off all in one piece. One chicken was processed every five to six seconds.

Appellant testified she began having swelling in her hands

and pain in her arms and back in early April. She went to the plant nurse who dipped her hands in hot wax and gave her aspirin. Appellant said on Saturday, April 13, 1991, she awoke at around 4:30 a.m. with her left hand and arm swollen, "I would say it appeared to be double in size." She went to the plant, arriving around 5 a.m., because there was supposed to be a nurse on duty on every shift, but no nurse was there. Marilyn Seymore was called but did not get there until around 9 a.m. and by that time most of the swelling was gone. According to appellant, Ms. Seymore gave her an ice pack and some Epsom salt and told her to report in on Monday morning to start on a therapy program. Appellant said she asked Ms. Seymore to send her to a doctor but Ms. Seymore refused.

On Monday morning appellant went to the nurse's office where again her hands were dipped in wax and she was sent back to work skinning chickens. Appellant said nothing more was mentioned about starting her on a therapy program, and during that week she asked four times to be referred to a doctor but was refused. Finally, on April 19, appellant made an appointment with Dr. Kenneth A. Martin, a knee and sports medicine specialist, and stopped working because of the pain.

Dr. Martin examined appellant on May 1, 1991, diagnosed possible carpal tunnel syndrome, ordered a nerve conduction study, and started appellant on an anti-inflammatory drug. The nerve conduction study was normal so Dr. Martin referred appellant to Dr. Jacquelyn Sue Frigon, a neurologist. Dr. Frigon ordered an MRI, which was normal. In her notes dated August 27, 1991, she stated:

> [Appellant] is rather upset with me because I cannot state that this is all related to Workman's Comp injury. I have explained to her that it is really not in her best interests to say it is because I am looking at a collagen vascular type abnormality and I can say it occurred while she was working at Shoney's but cannot completely relate it to this.

At the same time Dr. Frigon noted that she had obtained an appointment for appellant in the Medicine Department at the University of Arkansas Medical Center.

On December 6, 1991, Dr. Eleanor A. Lipsmeyer, a rheuma-

tologist at the medical center, wrote a letter to Dr. Marsha Hixson, an orthopaedist at the medical center, stating that all laboratory work and x-rays of appellant's hands were normal and Dr. Lipsmeyer stated it was her opinion that appellant has "straight-back syndrome and muscle pain in her back secondary to that." Dr. Hixson then wrote a letter to appellant's attorney on January 8, 1992, in which she stated:

> I am sorry that I am really not familiar with the diagnosis of straight-back syndrome. I think that the muscle pain that Ms. Brantley is having may be consistent with other muscle strains that I have seen following repetitive work situations. Since Ms. Brantley states that she did not have any problems before she began working at Tyson, it appears reasonable that this problem could be related to her work there. Ms. Brantley's examination in my clinic was entirely subjective, and I have no objective and measurable physical findings. Without any measurable physical findings, I cannot assign any impairment rating.

Sharon Lybrand, who was Tyson's nurse in April, 1991, testified that appellant came to her complaining of soreness in her wrists. She noted no swelling, although an emergency medical technician who also worked there told her she had seen some swelling in appellant's wrists on April 16. According to Ms. Lybrand, Tyson had expected problems with the newly hired employees at the new plant and Dr. Tanner, the plant doctor, had devised a protocol for treating the complaints. He formulated a two-week therapy program of hot wax treatments for pain, cold soaks to reduce swelling, wrist wraps to prevent injury, and Advil. These treatments were offered to appellant and she was transferred to light duty. Ms. Lybrand said appellant originally agreed to go through the therapy program but never began the therapy.

Marilyn Seymore, Tyson's safety director and workers' compensation coordinator, also testified that Dr. Tanner had devised the therapy program for wrist pain and swelling, and said that if an employee had gone through the therapy without good success, the employee was sent to a physician. Ms. Seymore stated that appellant had agreed to start treatments and conditioning but never showed up.

The administrative law judge held that the appellant had

sustained a compensable injury and was temporarily totally disabled from April 22, 1991, through December 6, 1991. The Workers' Compensation Commission reversed. It held:

> The only evidence that claimant suffered a work-related injury is claimant's self-serving complaints of pain and swelling. None of claimant's treating physicians have corroborated claimant's complaints of the swelling. Additionally, no one is able to corroborate claimant's complaints of pain. In light of the fact that the nerve conduction study, the MRI, x-rays, blood tests and other sophisticated medical tests did not establish a physical source for claimant's complaints of pain and swelling, we find that the preponderance of the credible evidence does not indicate claimant sustained a work-related injury.

The appellant argues on appeal that the evidence was not sufficient to support the Commission's finding. She complains that the Commission has added the requirement that there be objective and measurable physical findings to substantiate compensability. In *Arkansas Department of Health* v. *Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993), we cited a previous case for its holding that Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1991) provides objective and measurable findings are necessary to support a determination of physical impairment, but "they are not necessary to support a determination of wage loss disability." 43 Ark. App. at 178, 863 S.W.2d at 588. However, because the Commission's opinion appears to refer to the lack of objective and measurable findings in the attempt to explain its factual decision rather than as a legal requirement, we will not reverse or remand this case. For the same reason, we will not reverse or remand this case because of the Commission's reference to the claimant's "self-serving complaints of pain and swelling." It is obvious that her testimony is self-serving, but it is not, for that reason only, insufficient to support a finding in her favor.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark 489, 579 S.W.2d 360 (1979). The weight and cred-

ibility of the evidence is exclusively within the province of the Commission. *Morrow* v. *Mulberry Lumber*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). In cases where a claim is denied on the basis that a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). The resolution of conflicting medical testimony is a question of fact to be determined by the Commission. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981).

In this case, all the medical tests performed on appellant were normal and no doctor diagnosed appellant with any treatable condition. Therefore, we must affirm the Commission's denial of benefits.

Appellant also argues that there is no substantial evidence to support the Commission's finding that she received unauthorized medical care because there was evidence she was never given a Form A-29 and that meant she could see any doctor she wanted to. Since the Commission found that appellant failed to prove she had sustained a compensable injury, and we are affirming that finding, the employer was not required to furnish appellant medical treatment.

Affirmed.

ROBBINS and COOPER, JJ., agree.

Mike MARCOE *v.* BELL INTERNATIONAL

CA 93-1379 888 S.W.2d 663

Court of Appeals of Arkansas
En Banc
Opinion delivered December 14, 1994

David H. McCormick, for appellant.

Rieves and Mayton, by: *William J. Stanley*, for appellee.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case filed a claim for temporary total disability and medical benefits alleging that he sustained a compensable injury in the course and scope of his employment as a diesel mechanic for the appellee, Bell International. After a hearing, the administrative law judge found that the appellant failed to prove that he sustained a compensable injury. On appeal to the full Commission, the decision of the administrative law judge was adopted as the decision of the Commission. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that he failed to prove that he sustained a compensable injury in the course and scope of his employment. We agree, and we reverse and remand.

In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Grimes* v. *North American Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). In cases where a claim is denied because a claimant fails to show entitlement to compensation by a preponderance of the evidence, the substantial evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

The opinion of the administrative law judge, which was adopted by the Commission as its own, noted that the appellant sought medical treatment after experiencing shoulder pain at work on March 1, 1992. The appellant's condition worsened, and he underwent surgery for a cervical disc herniation on July

24, 1992. The opinion further noted that the appellant's duties as a mechanic required lifting, extension of the arms, and torquing ability. The appellant's supervisor testified that diesel mechanic work requires lifting heavy weights and assuming awkward positions in order to work on trucks. The appellant testified that he injured his left shoulder while lifting weights as a teenager. The opinion noted that the injury for which the appellant sought compensation was to his right shoulder, that the appellant's medical reports show no history of an injury to the right shoulder, that the appellant complained about pain at work, and that the appellant attributed the injury to his job since he did not injure himself through sports, hobbies, or personal accidents. The opinion further noted that the appellant's supervisor testified that the appellant never reported a specific work-related accident, so the appellant's medical bills were submitted to Blue Cross-Blue Shield.

Although the Commission made an express finding that the appellant's testimony was candid, benefits were denied on the ground that the appellant failed to meet his burden of proof. That conclusion was based on the following statement of the law:

> While the claimant is not expected to diagnose the etiology of their [sic] injury, (relating arm pain to a cervical disc), the Commission does expect the claimant to make a report of some traumatic incident or relate some job duties to the onset of gradually increasing symptoms in order to meet their burden of proof . . . .

However, the Commission's statement of the law is erroneous. As we noted in *St. Vincent Infirmary* v. *Carpenter*, 268 Ark. 951, 597 S.W.2d 126 (Ark. App. 1980), Arkansas law has long upheld the compensability of gradual injuries which arise out of and in the course of employment:

> We have long adhered to the rule that an accidental injury may stem not only from a specific incident or a single impact, but also may result by a continuation of irritation upon some part of the body. - Neither do we require the injured workman to make inescapable proof that said accidental injury occurred on a date certain. A reasonably definite time is all that is required.

Id., citing W. Stanhouse & Sons, Inc. v. *Simms*, 224 Ark. 86, 272 S.W.2d 68 (1954).

The testimony before the Commission in the case at bar was that the appellant never had problems with his right shoulder until he began experiencing pain at work in March 1992; that his employment required him to lift heavy weights while in awkward positions; that the appellant engaged in no other activities to which the pain could be attributed; and that the pain steadily increased until surgery was required. Given this testimony and the Commission's misstatement of the law, we conclude that the opinion of the Commission fails to display a substantial basis for the denial of relief. Therefore, we reverse and remand to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

JENNINGS, C.J., and PITTMAN, J., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent. I would affirm the Commission's decision to deny benefits because I think that there is substantial evidence to support the Commission's finding that appellant failed to show that he sustained an injury in the course and scope of his employment. While appellant was not required to show a specific incident or single impact to sustain his burden to establish a compensable injury, it was necessary for him to show at least a continuation of irritation upon some part of his body that developed gradually in the course and scope of his employment. *Lockeby* v. *Massey Pulpwood, Inc.*, 35 Ark. App. 108, 812 S.W.2d 700 (1991).

Appellant testified that he first noticed pain in his right shoulder in early March 1992. When he first received medical treatment from Dr. Stanley Bradley on March 9, 1992, he did not relate his injury to work. Appellant said that he first related his injury to work only after a diagnosis of a herniated disc was made on May 28, 1992. After surgery on the herniated disc, Dr. Robert D. Dickins, Jr. released appellant on September 21, 1992, to return to work as a diesel mechanic without any restrictions. None of the physicians who have treated appellant related his injury to his work. *See St. Vincent Infirmary* v. *Carpenter*, 268 Ark. 951, 597 S.W.2d 126 (1980). In fact, Dr. Dickins stated that

he believed appellant could return to work as a diesel mechanic.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Ark. Dep't of Health* v. *Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). I would affirm as there is substantial evidence to support the Commission's finding that appellant failed in his burden of proof.

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

Janet PRICE *v.* STATE of Arkansas

CA CR 93-1085 889 S.W.2d 40

Court of Appeals of Arkansas
Division II
Opinion delivered December 14, 1994

Robert Meurer, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a bench trial of driving while intoxicated second offense, driving

on a suspended driver's license, and speeding. She was fined $52.00 for speeding, sentenced to ten days in jail for driving on a suspended license and sentenced to ten days in jail and fined $1,100.00 for DWI II. Her driver's license was suspended for sixteen months and she was ordered to attend DWI school for multiple offenders. On appeal, she argues the trial court abused its discretion by admitting into evidence proof of her first DWI conviction. We disagree and affirm.

At trial, the prosecutor introduced City's Exhibit 6 as evidence of the appellant's prior DWI conviction and her waiver of counsel. The appellant objected and argued that Exhibit 6 was not sufficient evidence of the prior conviction because it was not a certified document, not an instrument signed by a judge, and not a judgment, but merely a data compilation by the Clerk. The appellant also subsequently objected to the Exhibit's authenticity. Exhibit 6 consists of three pages. The first page is a copy of a History Violation Inquiry from the Jacksonville Municipal Court. It reflects that the appellant was convicted of DWI and waived her right to an attorney in Case No. 92-5-00366. The Inquiry also contains a certification by Carol Belote, Deputy Court Clerk, that it is a true and correct copy of the docket entry on file. The second page of the exhibit, also certified by Carol Belote, is a plea statement and waiver of counsel in Case No. 92-5-00366 initialed and signed by the appellant indicating that she waived her right to counsel and entered a plea of guilty to DWI. The third page is a notarized certification by Charles Lacefield, Manager of the Driver Control Section of the Arkansas Department of Finance and Administration, that the two prior pages were true and correct copies of records maintained by the Department of Finance and Administration.

The appellant contends that the trial court erred in admitting City's Exhibit 6 as evidence of her prior conviction because it was not properly authenticated nor was it self-authenticating. Arkansas Rule of Evidence 902(4) provides that the following documents are self-authenticating:

> Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in

> any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3), or complying with any law of the United States or of this State.

Arkansas Code Annotated § 5-65-110(b) (Repl. 1993), part of the Omnibus DWI Act, provides:

> Within thirty (30) days after sentencing a person who has been found guilty, or pleaded guilty or nolo contendere on a charge of violating any provision of this act, every magistrate of the court or clerk of the court shall prepare and immediately forward to the Office of Driver Services an abstract of the record of the court covering the case in which the person was found guilty, or pleaded guilty or nolo contendere, which abstract shall be certified by the person so required to prepare it to be true and correct.

The first two documents of Exhibit 6 were certified by the Deputy Clerk of the Jacksonville Municipal Court and filed with the Department of Finance and Administration as required by § 5-65-110(b). The documents were duly certified as true and correct copies of the records of the Office of Driver Control by the Manager of the Driver Control Section. Thus, Exhibit 6 was admissible as a self-authenticating document pursuant to Rule 902(4). We find no error and affirm the appellant's convictions.

Affirmed.

PITTMAN and MAYFIELD, JJ., agree.

Martha LESTER (Colby) *v.* Dwight P. LESTER, Jr.

CA 93-1411 889 S.W.2d 42

Court of Appeals of Arkansas
En Banc
Opinion delivered December 14, 1994
[Rehearing denied January 11, 1995.*]

Honey & Honey, P.A., for appellant.

Tim A. Womack, P.A., for appellee.

JOHN B. ROBBINS, Judge. Appellant Martha Lester Colby and appellee Dwight P. Lester were divorced in Arkansas by decree entered in the Columbia County Chancery Court on October 17, 1991. The decree awarded Ms. Colby custody of the parties' minor child, Kimberly Ann Lester, subject to Mr. Lester's specified visitation rights. Shortly before the decree was entered, Ms. Colby moved with Kimberly to Shreveport, Louisiana and

*Mayfield, J., would grant rehearing.

has lived there ever since. On August 23, 1993, Mr. Lester filed a petition to change custody in the Columbia County Chancery Court. On the basis of affidavits which accompanied the petition, the court immediately entered an ex parte order granting a temporary change of custody. Mr. Lester then removed Kimberly from Shreveport without Ms. Colby's knowledge and brought her to his home in Magnolia, Arkansas. On September 7, 1993, Ms. Colby filed a motion to set aside the ex parte order, arguing that the Columbia County Chancery Court lacked jurisdiction. The court denied the motion, stating that the Columbia County Chancery Court had original jurisdiction in the divorce action and retained jurisdiction to make orders pertaining to the best interest of the child. Ms. Colby now appeals, arguing that the Columbia County Chancery Court lacked jurisdiction. Alternatively, she argues that even if the court had jurisdiction, the chancellor's failure to decline jurisdiction due to an inconvenient forum was clearly against the preponderance of the evidence. Finally, Ms. Colby argues that proper notice of the custody action was not provided in accordance with the Uniform Child Custody Jurisdiction Act.

Although Mr. Lester has not raised the issue, we cannot review this case on appeal because the order appealed from, the denial of appellant's motion to set aside the ex parte order for lack of jurisdiction, is not an appealable order. It is not a final decree within the meaning of Ark. R. App. P. 2(a)(1). In order to be final for purposes of appeal, a decree must in some way determine or discontinue the action and put the chancellor's directive into immediate execution, ending the litigation or at least a separable portion of it. *Harper* v. *Harper*, 21 Ark. App. 255, 731 S.W.2d 241 (1987). Nor does this order fit within any of the other provisions of Ark. R. App. P. 2(a). While the trial court's jurisdiction of the subject matter is essential to an action, a ruling by the trial court that it has proper jurisdiction, even if erroneous, does not render such order appealable. *Signa Ins. Co.* v. *Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988). Because a final order is a jurisdictional requisite the appellate court should raise the issue on its own motion. *Id. And see Mueller* v. *Killam*, 295 Ark. 270, 748 S.W.2d 141 (1988). Although some might characterize jurisdiction as only a technicality, without it we are powerless to act.

The temporary custody order which Ms. Colby sought to

set aside was entered ex parte on the basis of affidavits submitted by Mr. Lester. An ex parte custody order, without notice, requires prompt notice and an opportunity for the absent party to present proof. Before a final custody determination is made, an opportunity to be heard must be given to the contestants, Ark. Code Ann. § 9-13-204 (Repl. 1993), and the matter must be given priority and handled expeditiously. Ark. Code Ann. § 9-13-224 (Repl. 1993). Ms. Colby has an absolute right to be heard on the merits of this custody dispute and, as far as we can determine from the record, she has not presented any proof on that issue. This appeal is dismissed without prejudice to Ms. Colby's right to obtain review after a final order has been entered and filed.

Appeal dismissed.

PITTMAN and ROGERS, JJ., concur.

MAYFIELD, J., dissents.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the result reached in the majority opinion. However, I believe that the decision fails to explain that the appealability of the order denying the post-trial motion depends on whether appellant could have appealed from the ex parte order (which the post-trial motion had sought to set aside). Based on the facts presented, I believe the ex parte order would have been unappealable. *See Chancellor* v. *Chancellor*, 282 Ark. 227, 667 S.W.2d 950 (1984); *Jones* v. *Jones*, 41 Ark. App. 146, 852 S.W.2d 325 (1993). Therefore, I believe that the order denying the post-trial motion was unappealable.

JUDITH ROGERS, Judge, concurring. Reluctantly, I concur in the dismissal of this appeal although I commend the dissenting opinion's recitation of the law with regard to custody cases. However, I believe that, under existing law, dismissal is in order here since the award of custody was temporary in nature with a final decision pending, upon further presentation of proof.

Historically, cases which focused on the appealability of custody orders concerning children held that a decree awarding or changing custody of children is a final decree from which an appeal may be taken. *See Walker* v. *Eldridge*, 219 Ark 35, 240 S.W.2d 43 (1951) and *Wood* v. *Wood*, 226 Ark. 52, 287 S.W.2d 902 (1956). However, beginning with the decision in *Chancellor* v. *Chancellor*, 282 Ark. 227, 667 S.W.2d 433 (1984), and

later in *Sandlin* v. *Sandlin*, 290 Ark. 366, 719 S.W.2d 433 (1986), this rule has been modified such that a temporary order of custody is not appealable if further presentation of proof on the issue of custody is contemplated. Unfortunately, these decisions focus more on legalities, and less on the family.

Cases of this kind should be subject to an immediate appeal. Permanency in the eyes of a child is a much shorter and meaningful period than we as adults may realize. At issue is the best interest of the child, which is best served by proceeding expeditiously.

The majority in the instant case chooses to continue placing ever expanding technical rules over substance, and therefore, further widens the gap between justice and law, especially in the area of children's interests. Moreover, the instant case now seems to tacitly approve of an *ex parte* change of custody even after a "final" custody award in a divorce decree.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to the dismissal of this appeal. The majority opinion states "we cannot review this case on appeal because the order appealed from, the denial of appellant's motion to set aside the ex parte order for lack of jurisdiction, is not a final order."

Before discussing the merits of this statement, I would point out that at the hearing on the appellant's motion, evidence was presented which disclosed that the parties had been divorced by the trial court in October of 1991, and the appellant had been awarded custody of a child who was then ten years old; that the appellant then moved to Louisiana with the child, and in August of 1993 the appellee obtained the ex parte order which granted temporary custody of the child to the appellee who resides in Arkansas.

After hearing the evidence and the arguments presented by the attorneys — which focused upon the application of Ark. Code Ann. § 9-13-203 (Repl. 1991) and the jurisdiction of the Arkansas court to decide custody of the child involved — the trial court denied the appellant's motion.

The appellant's notice of appeal states that she "hereby appeals . . . from the Order Denying Motion to Set Aside Ex Parte Order entered herein on September 29, 1993." Her argument

in this court is that (1) the Arkansas court did not have jurisdiction to enter the ex parte order, (2) alternatively, if it did have such jurisdiction, it should have declined to exercise it because Arkansas was an inconvenient forum to make the custody determination and the case should have been transferred to Louisiana, and (3) the ex parte order should be set aside for failure to give the appellant proper notice of the hearing which granted the order.

Thus, the appeal to this court does not involve the issue of which parent should have custody of the child of the parties in the case. Moreover, the chancellor's order does not touch on the merits of the custody question. The order finds the Arkansas court did not lose jurisdiction because the appellant moved to Louisiana with the child or because of the passage of time since the move. It also states that there was no pending custody action in Louisiana when the ex parte order was granted in Arkansas. The order concludes:

> IT IS, THEREFORE, THE OPINION AND ORDER OF THIS COURT that the Court of original jurisdiction, the Columbia County Chancery Court, retained and retains jurisdiction of these proceedings to make such Orders pertaining to the best interest of the child, Kimberly Ann Lester, until such time as it declines to assert continuing jurisdiction. The Motion to Set Aside Ex Parte Order is, therefore, denied.

I think this is an appealable order. The majority opinion concludes with the statement that this appeal is dismissed without prejudice to appellant's right to obtain review after a final order has been entered and filed. But the record does not disclose that there is anything pending before the trial court which asks that an additional order be entered. It seems clear enough that the appellee is content with the ex parte order granting him custody of the child. Although the order states the custody is temporary, unless the appellant files a motion in the Arkansas court seeking to change that order the appellee's temporary custody is in fact as permanent as a child custody order can be. Of course, every custody order is temporary in the sense that it is subject to change under proper circumstances.

Here, there is no issue, no pleading, no case, in which a decision as to "final" custody is pending. The majority opinion

states that "in order to be final for purposes of appeal, a decree must in some way determine or discontinue the action and put the chancellor's directive into immediate execution, ending the litigation or at least a separable part of it." I certainly agree. In *Festinger* v. *Kantor*, 264 Ark. 275, 277, 571 S.W.2d 82, 84 (1978), the Arkansas Supreme Court said: "To be final the decree must also put the court's directive into execution, ending the litigation *or a separable branch of it*." (Emphasis added.) And when this concept is applied, I think the order appealed from in this case is a final, appealable order.

The *Festinger* case was relied upon in *Alberty* v. *Wideman*, 312 Ark. 434, 850 S.W.2d 314 (1993), for the statement that "a decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under Ark. R. App. P. 2(a)(1)." 312 Ark. at 437, 850 S.W.2d at 316. The final paragraph in *Alberty* concludes, however, that the chancellor's order in that case had only determined that the property involved "shall be sold" and "the chancellor must still appoint a commissioner and set a day and place for the sale, and, perhaps, set an attorney's fee, before the directive can be placed into execution." Thus, the order there was not appealable, but *Alberty* clearly recognized that the language in *Festinger* was correct in principle when it stated: "To be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it." I would also point out that the rule in *Festinger* has been applied by the Arkansas Court of Appeals in determining whether an order of the Arkansas Workers' Compensation Commission was appealable. *See Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989).

Moreover, in *Cupples Farms Partnership v. Forrest City Production Credit Association*, 310 Ark. 597, 839 S.W.2d 187 (1992), the court held that the denial of a motion to intervene as a matter of right in ongoing litigation constituted an appealable order under Ark. R. App. 2(a)(2) which allows the appeal of an order that "in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action." The appellant sought to intervene in order to be subrogated to the cross-claim of the appellee against another party. It was argued that intervention was "the only practical and effective means" for the appellant to "protect its claimed interest in the litigation."

The appellate court agreed, held that the denial of the motion to intervene was an appealable order, and held that the fact the appellant "claimed an interest in the litigation which was found wanting by the circuit court does not undercut appealability." 310 Ark. at 602, 839 S.W.2d at 190.

In *Gipson* v. *Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986), the court also relied upon Ark. R. App. P. 2(a)(2) in holding that an appeal from the trial court's interlocutory order granting a discovery request to require the elders of a church to disclose financial data and other business information relating to the church was properly taken because the order "in effect determines the action and prevents a judgment from which an appeal might be taken." 288 Ark. at 426, 706 S.W.2d at 372.

The reasoning of the last two cases allowing the appeals under Ark. R. App. P. 2(a)(2) also applies to the instant case. Here, the appellant questioned the jurisdiction and propriety of the trial court's order denying the appellant's motion to set aside the ex parte order granting appellee temporary custody of the parties' child. The appellant did not ask the trial court to grant her custody of the child. She had custody of the child until the court granted the ex parte order giving custody of the child to the appellee. The only issue before the trial court was whether the ex parte order should have been granted. The trial court's refusal to set aside its ex parte order concluded the case before the court and whether we say the trial court's order was appealable under the theory of the *Festinger* case or under Ark. R. App. P. 2(a)(2) is of no import. Under either theory, this appeal should not be dismissed.

This case is clearly distinguishable from the case (cited by the majority opinion) of *Cigna Ins. Co.* v. *Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988), and its supplemental opinion on rehearing at 294 Ark. 506A, 746 S.W.2d 558. The only application that *Cigna* could have to the present case is the holding in the original opinion (rendered moot by the supplemental opinion) that the granting of a motion to modify or set aside an order dismissing a case (which was treated in the appellate opinion as the denial of a motion to dismiss) is not appealable if made within 90 days of the order of dismissal. In *Cigna*, however, the order (which was treated as a denial of a motion to dismiss) would have left issues to be determined, if the order had been made within 90 days.

That is the very reason that the order would not be appealable. But that is a very different situation from the case now before us where the denial of the motion to set aside the ex parte order (which the majority opinion treats as a motion to dismiss) did not leave any action pending.

A concurring opinion has also been filed which agrees with the result of the majority opinion but for a different reason. The concurring opinion relies upon *Chancellor* v. *Chancellor*, 282 Ark. 227, 667 S.W.2d 950 (1984), and *Jones* v. *Jones*, 41 Ark. App. 146, 852 S.W.2d 325 (1993). *Chancellor* refers to *Wood* v. *Wood*, 226 Ark. App. 52, 287 S.W.2d 902 (1956), which stated, "[i]n *Walker* v. *Eldridge*, 219 Ark. 35, 240 S.W.2d 43, we held that any decree awarding or changing the custody of a child is sufficiently final to permit an appeal." The *Chancellor* opinion also pointed out that *Walker* v. *Eldridge* stated "this is not a mere temporary award of custody pending a trial of the case upon its merits . . . we can determine from the record the parties had completed their proof and submitted the matter to the court." However, the *Wood* opinion also stated, "So, even though the order in this case was expressly stated to be temporary, nevertheless it was appealable." And in a case decided more than two years after *Chancellor*, our supreme court cited *Chancellor* as support for the statement that, "Even though an order of temporary custody is appealable, . . . there can be no appeal, as we held in that case, until the proof has been completed and the order entered." *Sandlin* v. *Sandlin*, 290 Ark. 366, 367, 719 S.W.2d 433, 434, (1986). Our decision in *Jones* v. *Jones, supra*, simply relied upon *Chancellor*. It seems clear to me that the cases of *Walker, Wood, Chancellor, Sandlin*, and *Jones* all recognize that the use of the words "temporary custody order" does not necessarily mean that the order is not appealable. In the present case, as I have already pointed out, the record does not disclose that there is any pleading or issue pending before the trial court which asks that the court make an additional — or "final" — order on custody. Thus, the simple fact that the trial court has made a "temporary" custody order does not mean that the order is not appealable.

The situation in this case may be unusual, but we have to go outside the record and engage in sheer speculation to conclude that all the issues pending in the trial court have not been determined and that the case before us is therefore not an appeal-

able order. The majority opinion concluded with the statement that appellant "has an absolute right to be heard on the merits of this custody dispute." However, the simple fact is that if the Arkansas court does not have jurisdiction to decide the jurisdiction of the custody of the child involved in this case — the appellant does not need a hearing on the "merits of this custody dispute" because she has already had one such hearing and was granted custody of her child. She obviously only wants to set aside the ex parte order and leave the matter as it was before that order was entered. It is also, as stated earlier in this dissent, very apparent that the appellee is content with the ex parte order granting him custody.

Thus, the effect of our decision is to require the parties to try a custody issue that it appears they do not want to try. The concurring opinion of Judge Rogers recognizes that dismissing this appeal does not serve the best interest of the child. And I think we are going out of our way to reach a result that is not justified by the record before us, not desired by the parties, and not in the best interest of the child involved.

Therefore, I dissent.

Norman O. DEAL and Jean Deal *v.* FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, INC.

CA 93-1129 889 S.W.2d 774

Court of Appeals of Arkansas
Division II
Opinion delivered December 14, 1994
[Rehearing denied March 1, 1995.*]

*Bullion, S.J., joins; Whitmore, S.J., would grant rehearing.

David P. Rawls, for appellant.

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Richard N. Watts* and *Brian Allen Brown*, for appellant.

MELVIN MAYFIELD, Judge. This is an appeal from a summary

judgment. On May 17, 1989, appellant Norman Deal made application with the appellee Farm Bureau Mutual Insurance Company of Arkansas, Inc. (Farm Bureau) for fire insurance in the amount of $20,000.00 to cover a mobile home and its contents belonging to him and his wife, appellant Jean Deal. A policy was subsequently issued naming Norman and Jean Deal as insured.

On September 15, 1990, the mobile home and its contents were destroyed by fire. Farm Bureau advanced appellants $2,000.00 under the policy. Later, after receiving several anonymous phone calls to the effect that in 1976 Norman Deal had intentionally set fire to a mobile home in which he resided, Farm Bureau filed a complaint against Normal Deal for declaratory judgment asking for a declaration that the policy was void.

In its complaint Farm Bureau alleged that the application for the policy asked "Has anyone in household had any fire losses?"; that Norman Deal responded "no"; that he signed the application certifying all statements were true and correct; and that based upon his responses a policy of insurance was issued. Farm Bureau alleged that after it issued the policy, it learned that Norman Deal had made a material misrepresentation regarding his prior fire losses; that it would not have issued the policy had it been advised of the fire loss; and that the misrepresentation was intentional and material and voided coverage.

Appellant Norman Deal filed an answer and counterclaim denying any material misrepresentation regarding the 1976 fire and requesting payment under the policy. He stated that no claim was made to any insurance company for the items destroyed in the 1976 fire and that, based upon his understanding of the information requested, his answer on the 1989 policy application was truthful and correct.

Appellant Jean Deal, as a co-owner of the property covered by the policy, filed a motion to intervene, which was subsequently granted by the court, and a counterclaim for sums due under the policy.

Both parties filed motions for summary judgment. In support of its motion Farm Bureau filed a brief arguing that had it known the true facts of Norman Deal's loss history, it would not have issued the policy; that his misrepresentation was material

to the risk involved; and that it had relied upon the misrepresentation. Further it argued no coverage is provided for the applicant, or his spouse, who acts fraudulently, makes false statements, or conceals or misrepresents any material fact or circumstance relating to the insurance coverage.

Appellants, on the other hand, argued the term "fire losses" is ambiguous as a matter of law and was reasonably interpreted by Norman Deal to mean damages that were claimed from an insurance company. Because he was not asked any questions about previous fires or previous burning until after the September 15, 1990 fire, Deal argued he made no material misrepresentation. Moreover, appellants argued Jean Deal's rights should not be voided because she made no representations; did not sign or ratify the application; and neither concealed nor misrepresented any material fact or circumstance.

After a hearing held June 8, 1993, the trial court granted Farm Bureau's motion for summary judgment and held the term "fire losses" is not ambiguous and Norman Deal was acting as Jean Deal's agent in making application.

On appeal appellants argue the trial court erred in finding Norman Deal made a material misrepresentation because the term "fire losses" is ambiguous.

Motions for summary judgment are governed by Ark. R. Civ. P. 56 which provides that a judgment may be entered if the pleadings, depositions, answers, interrogatories, and admissions on file, in addition to affidavits, show there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy and should be granted only when it is clear that there is no issue of fact to be decided. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. *Prater* v. *St. Paul Insurance Company*, 293 Ark. 547, 739 S.W.2d 676 (1987).

If the language in a policy is ambiguous, or there is doubt or uncertainty as to its meaning and it is fairly susceptible of two or more interpretations, one favorable to the insured

and the other favorable to the insurer, the one favorable to the insured will be adopted. *Drummond Citizens Ins. Co.* v. *Sergeant*, 266 Ark. 611, 588 S.W.2d 419 (1979). *See also Farm Bureau Mutual Ins. Co.* v. *Milburn*, 269 Ark. 384, 601 S.W.2d 841 (1980).

Among other definitions, *Websters Third New International Dictionary* 338 (1976) defines the word "loss" as: "6: the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event (death, injury, destruction or damage) in such a manner as to charge the insurer with a liability under the terms of the policy." Definitions for the word "loss" included in *The American Heritage Dictionary* 743 (2nd college ed. 1982) include: "7. The amount of a claim on an insurer by an insured."

And, in construing a statute regarding the proper venue in which to bring suit for loss against an insurer, our supreme court said that the word "loss" has an established meaning in the field of insurance which is "Death, injury, destruction, or damage in such a manner as to charge the insurer with a liability under the terms of the policy." *American Republic Life Insurance Co.* v. *Cummings, Judge*, 218 Ark. 888, 890, 239 S.W.2d 10, 11-12 (1951).

The initial determination of the existence of an ambiguity rests with the court, and if ambiguity exists then parol evidence is admissible and the meaning of the ambiguous term becomes a question for the fact-finder. *C & A Construction Co.* v. *Benning Construction Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974). In the instant case, we believe the word "loss" used in the appellee's application for insurance is at least ambiguous and the trial court erred in holding to the contrary and in granting summary judgment.

The appellee has cited *Home Insurance Company of New York* v. *Cavin*, 137 So. 490 (Miss. 1931), and *Sirvint* v. *Fidelity & Deposit Co. of Maryland*, 242 App. Div. 187, 272 N.Y.S. 555 (N.Y.1934), aff'd, 195 N.E. 164 (1934), in support of its argument that the word "loss" is clear and unambiguous. But, in *Sirvint* it was the phrase "loss or damage" that was found to be unambiguous. The case of *Home Insurance*, where the court held the question "Have you ever suffered loss by fire" presents a closer case, but we are not bound by a decision of the Mississippi court.

Appellants have also argued that the trial court erred in voiding the policy as to Jean Deal because there was no evidence she was a party to any misrepresentation or that Norman Deal had the authority to act as her agent.

The appellees argue the trial court was correct in voiding the policy as to Jean Deal. In support of this contention appellees cite *Johnson* v. *Truck Insurance Exchange*, 285 Ark. 470, 688 S.W.2d 728 (1985), in which appellee says "a somewhat similar circumstance arose." In that case the appellants, a mother and son, obtained a jury verdict in a suit brought on their homeowners policy to recover the value of a dwelling destroyed by fire. The insured son had three fires prior to the one in question and there was proof that he may have knowingly given a false answer when asked whether similar insurance had ever been canceled or denied. The trial court granted a new trial and the supreme court affirmed. There was an argument that the insured mother should have had a directed verdict in her favor because she was innocent of wrongdoing. Our supreme court discussed the issue in some detail and then stated:

> We will not attempt to settle that issue here. For one thing, apart from the separate consideration of her innocence with respect to arson, the jury could have concluded this policy would not have been issued in the first instance if Charles Johnson, acting for himself and Laura Johnson, had given truthful answers concerning the cancellation of similar insurance.

285 Ark. at 476, 688 S.W.2d at 732.

Likewise, we will not decide this issue in this appeal. We do not know what will happen on retrial; we do not know what proof will be presented; we do not know what instructions will be offered or given; and we do not know that this issue will even arise again.

Reversed and remanded for a new trial on the issues.

COOPER and ROBBINS, JJ., agree.

Margaret MORRELL *v.* L.C. MORRELL

CA 93-1350 889 S.W.2d 772

Court of Appeals of Arkansas
Division I
Opinion delivered December 14, 1994

Witt Law Firm, P.C., for appellant.

Turner & Mainard, for appellee.

JUDITH ROGERS, Judge. Margaret Morrell has appealed from an order of the Franklin County Probate Court dismissing her petition to appoint a guardian of the person and the estate of her mother, Bethel Mae Morrell. On appeal, appellant does not question the sufficiency of the evidence supporting the probate judge's finding that Mrs. Morrell is competent. Instead, appellant simply argues that the probate judge erred in entering an order denying the guardianship petition after announcing from the bench at the conclusion of the hearing that he would appoint a guardian for Mrs. Morrell. We affirm.

Appellant petitioned the probate court for the appointment of a guardian of her mother's person and estate in April 1993. Mrs. Morrell, who was born in 1909, resides in a nursing home in Mulberry, Arkansas. Appellant lives in Ozark, and her sister, Kathryn Kelleher, lives in Kansas City, Missouri. Their brother, L.C. Morrell, who is the appellee, lives in Mulberry and regularly assists Mrs. Morrell in her business affairs. In response to the petition, L.C. Morrell denied that his mother needed a guardian.

In May 1993, Mrs. Morrell's physician, Dr. Robert R. Baker, wrote a letter "to whom it may concern," stating that Mrs. Morrell, although under treatment for hypertension, congestive heart failure, and a mild stroke sustained in December 1992, is well-oriented to time, place, and person and is not incompetent. This letter was introduced into evidence at the hearing in June 1993.

At the hearing, appellant testified that she had filed the petition seeking a guardianship because she was concerned about her mother's financial assets. She stated that her mother had given her brother a durable power of attorney. She said that she wanted a guardian appointed, and the power of attorney dissolved, because she wanted everything to be on the "up and up." She admitted on cross-examination that she had filed a separate lawsuit against her brother over a piece of property and that her mother does not like her. Other than stating that Mrs. Morrell had reported seeing rats and black cats in the ceiling over her bed, appellant offered no evidence of Mrs. Morrell's incapacity.

L.C. Morrell testified that his mother was fully aware of his actions in regard to her money. He testified that, although his mother has trouble walking, she can write her own checks. He stated that, as far as he is concerned, the money is hers and he only does as she directs.

Kathryn Kelleher testified that, at the time of trial, her mother was doing very well. She said she had no problems with her brother having her mother's power of attorney because her mother wanted him to have it. She testified that she did not think it was necessary to have a guardian appointed.

The probate judge also met with Mrs. Morrell in the presence of the court reporter. Mrs. Morrell stated that she had suffered a stroke the previous December but that she was better and

hoped to be back in her own home someday. She stated that she trusts her son; that he does what she tells him to do; and that she would "throw him out" if he didn't. She stated that she does not get along with appellant. She testified that, sometimes, she writes her own checks and does not feel like she needs a guardian. Mrs. Morrell also discussed her bank accounts in detail.

At the conclusion of the hearing, the probate judge stated that he did not believe that Mrs. Morrell was incompetent, although she had some physical problems that prevented her from taking care of all of her business. He went on to add that he did have some concern about the future, and he stated that he would order a conservatorship if Mrs. Morrell would approve of it. Otherwise, he said that it would save a lot of "squabb[ling] down the road" to go ahead and appoint L.C. Morrell as guardian.

A few months after the trial, however, the probate judge sent a letter to the attorneys, stating that he had, on reflection and consideration of the expenses inherent in guardianships, decided not to appoint a guardian. He also stated that he found Mrs. Morrell to be mentally alert and competent. A few days later, appellant filed a request for findings of fact. The order dismissing the petition for appointment of a guardian was filed on September 14, 1993. On September 24, 1993, the probate judge filed his findings of fact in response to appellant's request:

> First, based on the testimony at trial and the report of the physician of Ms. Morrell, I specifically find that she is mentally alert and competent. I further find that her son, L.C. Morrell, is fully able to care of the needs of Ms. Morrell and that he is doing so. I further find that the expense and problems that arise in a guardianship are unnecessary in this case and that any incapacity that this lady may have does not necessitate the appointment of a guardian.
>
> The law of the State of Arkansas requires that the appointment of a guardian for an incapacitated person be such that it would constitute the minimum restraint on that person and that there must be substantial proof that the guardianship is necessary. Under the law there simply is no substantial proof of incapacity in such amount as would necessitate a guardianship.

Again, appellant does not argue in this appeal that the probate judge's findings of fact are clearly erroneous. She simply argues that the probate judge could not enter an order denying the guardianship after announcing from the bench at the conclusion of the trial that he would appoint a guardian. We disagree.

Rule 58 of the Arkansas Rules of Civil Procedure provides that a judgment or decree is effective only when set forth on a separate document and entered in the docket as provided in Arkansas Supreme Court Administrative Order 2. Administrative Order 2 sets forth the procedure to be followed by the clerk in entering orders and judgments. The supreme court has made it clear that a judgment or decree is not effective until it has been "entered" as provided in Rule 58 and Administrative Order 2. In *Standridge* v. *Standridge*, 298 Ark. 494, 497, 769 S.W.2d 12 (1989), the supreme court relied on Rule 58 to hold that a decree that had been announced from the bench did not become effective until the date of filing.

Since the probate judge's ruling from the bench was not reduced to writing and filed of record, it would appear that he was free to alter his decision upon further consideration of the matter. Appellant has cited no authority to indicate otherwise, and we know of none. 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. *Smith* v. *Smith*, 41 Ark. App. 29, 848 S.W.2d 428 (1993).

Affirmed.

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

Kevin KELLEHER *v.* CITY OF RUSSELLVILLE

CA CR 94-72 891 S.W.2d 802

Court of Appeals of Arkansas
En Banc
Opinion delivered December 21, 1994
[Rehearing denied January 18, 1995.*]

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

Jonathan P. Shermer Jr., for appellant.

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

JOHN B. ROBBINS, Judge. On June 8, 1993, appellant Kevin Kelleher was convicted of resisting arrest and driving on a suspended driver's license. He was sentenced to two weeks and two days, respectively, in the Pope County Jail. Appellant contends on appeal that the trial court erred in bifurcating the guilt and punishment stages of the trial proceedings on these charges. We find no error and affirm.

Appellant was tried before a jury on the charges of DWI second offense, resisting arrest, and driving on a suspended driver's license. During discussions with counsel concerning the jury instructions, the court made it known that the jury deliberations would be bifurcated, i.e., the jury would first be instructed to determine guilt or innocence on each of the three charges, and after the jury rendered a verdict on guilt or innocence the court would further instruct them to decide upon a sentence on each offense for which the jury had returned a guilty verdict. Appellant's counsel argued against the court bifurcating the proceedings. Appellant argued that the trial court should allow the jury to decide the guilt and sentence on the charges of resisting arrest and driving on a suspended driver's license at the same time the jury decided guilt or innocence on the DWI. Consequently, appellant's previous DWI conviction would not be disclosed to the jury until only sentencing for the DWI conviction remained. Counsel's argument was stated as follows:

> Defense Counsel: I think it would be prejudicial because if they found him guilty of the DWI and then came back they might increase the punishment on the other two offenses whereas if they go out now then they might find him guilty or they might find him not guilty of the DWI as an option and go ahead and find him guilty of resisting arrest and on the other charge.
>
> * * *

> I think that will be prejudicial, Your Honor, because I think it puts the Jury — it — if they find him guilty of the DWI, then they are going to increase the punishment on the other two. . . .
>
> * * *
>
> They might just because they want to throw the book at him. I think they ought to be able to find guilty or not guilty of the DWI on the first and then go ahead and decide the sentence and the guilt on the other two.

The trial court rejected appellant's argument and bifurcated the proceedings on all of the charges, reserving sentencing on all charges for the second phase of the proceedings. The jury dead-locked on the charge of DWI, which resulted in a mistrial on this charge, but found him guilty on the charges of resisting arrest and driving on a suspended license.

Appellant's concern revolved around the possibility that he could be prejudiced during the sentencing phase for DWI 2nd because the jury might sentence him to more time on the other two misdemeanor charges after the jury learned of appellant's prior DWI conviction. This simply did not occur. Therefore, appellant's specific argument before the trial court became moot at that point. The argument appellant raises now on appeal is not the same specific argument he raised before the trial court. He now argues that bifurcation was error because there is simply no authority for a circuit judge to bifurcate misdemeanor charges.

The supreme court in *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985), held that in felony DWI cases the proceeding should be bifurcated, separating the guilt or innocence stage from the sentencing stage. The supreme court held that this procedure protects the defendant from prejudice by preventing the jury from considering the prior convictions during their initial determination of guilt or innocence. *See also, Heard* v. *State*, 272 Ark. 140, 612 S.W.2d 312 (1981). We believe the same rationale would apply to protect a defendant from possible prejudice in a DWI 2nd trial.

Appellant alleges that he was somehow prejudiced by the court bifurcating the two misdemeanor charges along with the DWI 2nd charge. However, appellant fails to support his con-

tention with any convincing argument or authority. We do not consider assignments of error which are unsupported by convincing argument or citation to proper authority. *Womack* v. *State*, 36 Ark. App. 133, 819 S.W.2d 306 (1991). Appellant is simply speculating that he was prejudiced somehow by the bifurcated proceedings. When error is alleged, prejudice must be shown because we do not reverse for harmless error. *Tallant* v. *State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993). We cannot presume some impropriety on the bare allegation that the procedure was unusual. *See Hines* v. *State*, 289 Ark. 50, 709 S.W.2d 65 (1986). Because the appellant was not found guilty of DWI in the first stage, and therefore the fact of his earlier DWI was not made known to the jury during the sentencing phase on the other two misdemeanors, there could have been no prejudice to appellant.

Appellant also alleges that the city attorney was allowed to make an additional argument between the two phases. However, appellant failed to abstract any such argument, and failure to abstract precludes review of any such error. Rules of Supreme Court and Court of Appeals 4-2(6). Appellant was sentenced to only a minimal time in jail for the two violations. Because the appellant was not found guilty of DWI, we conclude that appellant was not prejudiced in any way as a result of the bifurcated proceeding.

Affirmed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I would reverse the appellant's convictions for resisting arrest and driving on a suspended driver's license and remand for a new trial on those charges.

The majority opinion concedes that the appellant objected to the trial court's bifurcation of the guilt and punishment phases of the trial on these charges. Moreover, the majority opinion does not contend that there is any legislative statute or judicial rule which authorizes such procedure.

To justify the procedure used in this case the majority opinion points out that our supreme court held in *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985), that the trials of felony DWI cases should be bifurcated into guilt and punishment phases so

that the jury would not know of previous DWI convictions before determining the guilt issue in the case being tried. Therefore, the majority opinion says, "We believe the same rationale would apply to protect a defendant from possible prejudice in a DWI 2nd trial." This, however, does not answer the argument made by the appellant in this appeal. On pages 32-33 of appellant's brief he states:

> At the time Appellant was tried for the misdemeanor charges of resisting arrest and driving on suspended driver's license, both misdemeanors, the proper procedure would have been for the Court to instruct the jury to find guilt or innocence and fix punishment the first time they retired to deliberate. This is exactly what Appellant requested.

Turning to appellant's abstract, at page 14 of his brief, I find where he told the trial court:

> Now I think it would be inappropriate to give them just a guilty or not guilty on the DWI; but on the other two, they are not bifurcated so they should already have the benefit of knowing what the punishment is and they should decide guilt or innocence and the punishment for the two offenses that aren't DWI's. I don't think you can bifurcate the other two offenses.

It therefore seems clear to me that the appellant raised the same question in the trial court that he argues on appeal, but the majority opinion says the argument on appeal "is not the same specific argument he raised before the trial court." The majority opinion does not contend that the appellant did not use the words I have quoted above; the majority opinion deals with what it views as the appellant's "concern." It states that "appellant's concern revolved around the possibility that he could be prejudiced during the sentencing phase for DWI 2d because the jury might sentence him to more time on the other two misdemeanor charges after the jury learned of appellant's prior DWI conviction."

It is true that the appellant did tell the trial court that this was a way in which he could be prejudiced by the bifurcation of his trial on the charges of resisting arrest and driving on a suspended driver's license. However, he also told the trial judge that "I don't think you can bifurcate the other two offenses. I just

don't think the law allows for it." Furthermore, as it turned out, the procedure used by the trial court — unauthorized by statute or rule and over appellant's objection — resulted in the opportunity for those jurors who wanted to find him guilty of DWI to vote for more punishment for the other two offenses than they would have if he had been found guilty of DWI.

The scenario that appellant described to the trial judge was only slightly different than the one actually played out. The majority opinion thinks the appellant "is simply speculating that he was prejudiced" by the bifurcated proceedings but faults him for not speculating correctly about the exact scenario that could cause him prejudice. Also, the majority opinion says that the $500 fine and two weeks in jail fixed by the jury were "minimal." Apparently the appellant — who must pay the fine and serve the time — regards the sentence so harsh that he has appealed. And while I have no way to scientifically measure the prejudice to appellant, it is difficult for me to believe that those jurors who wanted to convict appellant for DWI were completely able to fix his punishment for the other two offenses without giving some thought to the fact that he was not getting any punishment for the DWI of which they thought he was guilty.

The state's brief in this case recognizes that *Holt* v. *State*, 300 Ark. 300, 778 S.W.2d 928 (1989), stated that in an appropriate case it would decide whether its decision in *Peters* v. *State, supra*, was sound. But regardless of whether that decision was sound, the appellant in the present case is not complaining of the bifurcation of the DWI charge. The appellant in this case contends that it was error to bifurcate his trial on the other two charges. Although the majority opinion suggests that the procedure used by the trial judge protected appellant from "possible prejudice," I do not think this was factually true in this case and do not think we should approve the trial court's use of an unauthorized procedure to submit, over appellant's objection, his case to the jury.

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

Jamshed KHAN *v.* DIRECTOR, Employment Security Department

E 93-155 892 S.W.2d 513

Court of Appeals of Arkansas
En Banc
Opinion delivered December 21, 1994

David A. Carroll, for appellant.

Allen Pruitt, for appellee Employment Security Department.

Everett O. Martindale, for appellee Lofland Co.

JOHN B. ROBBINS, Judge. Appellant Jamshed Khan worked for Lofland Steel Company for approximately six years before quitting on February 1, 1993. He filed a claim for unemployment benefits, asserting that he left his employment for good cause connected with the work. The Board of Review denied benefits, and Mr. Khan now appeals. For reversal, he argues that substantial evidence does not support the Board's finding that he voluntarily left his employment with Lofland Steel Company without good cause connected with the work. We find no error and affirm.

Arkansas Code Annotated § 11-10-513 (1987) provides that an individual shall be disqualified for benefits if he, voluntarily and without good cause connected with the work, leaves his employment. In determining whether a claimant is disqualified because he left work without good cause connected with the work, the question of what constitutes "good cause" must be determined by the facts in each particular case. *Haig* v. *Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983). On review, we review the findings of fact of the Board of Review in a light most favorable to the successful party and affirm if supported by substantial evidence. The credibility of witnesses and the drawing of inferences from the testimony is for the Board of Review, not this court. *Baker* v. *Director*, 39 Ark. App. 5, 832 S.W.2d 864 (1992).

In the case at bar the Board of Review agreed with the decision of the Appeal Tribunal and adopted its findings of fact and conclusions of law. Mr. Khan testified before the Appeal Tribunal that he refused to accept a transfer to supervise a night shift because it would be staffed with untrained employees, and as a consequence he was unfairly demoted. Furthermore, for the following three months he was harassed by his employer for the purpose of forcing his resignation. This culminated in his resignation on February 1, 1993, after he was reprimanded by the plant superintendent in the presence of other employees. Mr. Bill Farzley, the company president, and Mr. Alex Bhatti, the plant superintendent, also testified to the circumstances leading up to Mr. Khan's resignation.

On this proof, the Appeal Tribunal found the following facts:

> At the time of the claimant's hire, he was the night-shift supervisor. Shortly after his hire, the employer did away with its night shift and the claimant was a supervisor on the day shift for approximately six years. In October 1992, the claimant was asked by the president and the plant superintendent to return to his position as a night supervisor. The claimant did not wish to return to that position because he was going to be required to supervise a staff which consisted mostly of new workers. The claimant did not believe the workers could perform the jobs properly and that he would be demoted or discharged if the job was not performed properly. The claimant was given the option of accepting the transfer or being demoted from supervisor to a shearer. The claimant chose to take the demotion. This constituted a $3.50 per hour cut in pay. Between October and late January, the claimant worked in that position. For the last three days of the claimant's employment, he worked as a chain man. The claimant was transferred to that position because the employer needed his services there. It was not a demotion from the shearer position.
>
> The claimant had a meeting with the plant superintendent and the president shortly before he quit his job on February 1. During that meeting, the claimant listed demands that he wished to be met if he was to accept the night-shift supervisor position. The president and plant superintendent still wished for the claimant to accept the position. The claimant was told by the president that he would get back to him on February 1 with an answer. On February 1, the plant superintendent reprimanded the claimant because the claimant was talking to other employees in the shearing area. The plant superintendent instructed the claimant to go to the area where [he] was performing work as a chain man and to quit talking with everybody. The claimant became upset and quit.

The Appeal Tribunal concluded that it was not unreasonable for the employer to request Mr. Khan to go to the night shift, nor was it unreasonable to demote Mr. Khan for refusing to do so. The Tribunal noted that Mr. Khan did not immediately resign

after his demotion. Furthermore, the Appeal Tribunal concluded that Mr. Khan failed to demonstrate that he was unfairly reprimanded at any time after failing to take the transfer. The Appeal Tribunal held that Mr. Khan voluntarily left his last work without good cause connected with the work.

In *Teel* v. *Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980), this court stated that "good cause" to terminate one's own employment is defined as "a cause which would reasonably impel the average able-bodied, qualified worker to give up his or her employment." The claimant has the burden of proving, by a preponderance of the evidence, that he terminated his employment for good cause. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978). In the instant case, substantial evidence supports the finding that Mr. Khan failed to prove that an average worker in his position would have been impelled to give up his employment. Therefore, we affirm.

COOPER and MAYFIELD, JJ., dissent.

895 S.W.2d 561

MELVIN MAYFIELD, Judge, dissenting. I would reverse and remand this case for new or additional findings of fact and conclusions of law because I think the factual findings and the legal conclusions are conflicting and inconsistent. The majority opinion affirms the Board of Review's denial of unemployment benefits to the appellant based upon the conclusion of the majority of the court that the appellant voluntarily left his work without good cause connected with his work. More than forty years ago the Arkansas Supreme Court held that when an administrative body fails to make findings of fact, it is not the province of the courts to make those findings, and the cause is remanded to the agency so a finding can be made on that issue. *Reddick* v. *Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950). "For instance," the *Reddick* court said, "[I]t has been our consistent practice under the Workmen's Compensation Act to remand the cause to the Commission if that body fails to make a finding upon a pertinent issue of fact." 217 Ark. at 41, 228 S.W.2d at 1010. The Arkansas Court of Appeals followed this decision in *Lawrence* v. *Everett, Director*, 9 Ark. App. 138, 653 S.W.2d 140 (1983), where we said the Board of Review had failed to make a finding on an issue essential to our decision of the case. In *Helena-West Helena School*

District v. *Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985), we remanded the case to the Board of Review for it to determine whether the appellant had notice of a hearing held by an appeals referee. In *Alcoholic Beverage Control Board* v. *Hicks*, 19 Ark. App. 212, 217, 718 S.W.2d 488, 491 (1986), we said the "long-standing rule is that when an administrative agency fails to make a finding upon a pertinent issue of fact. . . . [t]he cause is remanded to the agency so that a finding can be made on that issue." In *Wright* v. *American Transportation*, 18 Ark. App. 18, 22, 709 S.W.2d 107, 110 (1986), we remanded a case to the Arkansas Workers' Compensation Commission because "we are simply unable to tell from the record upon what factual basis the claim was denied." And in *Cook* v. *Alcoa*, 35 Ark. App. 16, 811 S.W.2d 329 (1991), we said:

> Moreover, it is our duty to review the decision of the Commission to determine whether it is supported by the facts found by the Commission. In appeals from the Commission, we cannot indulge the presumption used in appeals from trial courts that even if the court states the wrong reason, we will affirm if the judgment is correct.

35 Ark. App. at 20-21, 811 S.W.2d at 332. (Citations omitted.)

In the case now before us, the Board of Review merely stated that the decision of the Appeal Tribunal was correct and that decision was adopted by the Board and affirmed without any additional findings. Therefore, the majority opinion quotes from the Tribunal's opinion, but the findings of fact and conclusions of the Tribunal which I cannot reconcile are the following:

> [Findings of Fact]
>
> The claimant had a meeting with the plant superintendent and the president shortly before he quit his job on February 1. During that meeting, the claimant listed demands that he wished to be met if he was to accept the night-shift supervisory position. The president and plant superintendent still wished for the claimant to accept the position. The claimant was told by the president that he would get back to him on February 1 with an answer. On February 1, the plant superintendent reprimanded the claimant because the claimant was talking to other employees in the shearing area. The plant superintendent instructed the

> claimant to go to the area where [he] was performing work as a chain man and to quit talking with everybody. The claimant became upset and quit.
>
> [Conclusions]
>
> Although various testimony was given at the hearing as to why the claimant is no longer employed, the testimony and the evidence in the file indicate the main reason the claimant eventually quit his job was that he did not think he was treated fairly in regards to the demotion and because he thought he was treated unfairly after he chose not to accept the night supervisory position. It was not unreasonable for the employer to request the claimant to go to the night shift. It is understandable that the claimant would have wanted a more experienced staff, but the employer's failure to provide that was, in part, caused by the tough work situation the employer was in. The average person would not have quit his job at that point. It is noted that the claimant did not quit either. However, it was not unreasonable for the employer to demote the claimant if he would not accept the transfer. The claimant has failed to show that he was treated in an unreasonable manner by the employer. The claimant has not demonstrated that he was unfairly reprimanded or demoted after failing to take the transfer. It is noted that the claimant made efforts to solve his problems before quitting. However, the claimant voluntarily left his last work without good cause connected with the work within the meaning of the law.

The findings say the claimant "became upset and quit" after he was reprimanded by the plant superintendent for "talking to other employees in the shearing area." But the first sentence in the conclusions says "the main reason the claimant eventually quit his job was that he did not think he was treated fairly in regards to the demotion and because he thought he was treated unfairly after he chose not to accept the night supervisory position." Then the conclusions say that "the average person would not have quit at that point." Then follows the odd statement "It is noted that the claimant did not quit either." I simply do not understand what all this means. These statements conflict with each other and, in addition, conflict with the finding that he

"became upset and quit" after he was reprimanded for "talking to other employees in the shearing area."

So, why did the claimant quit? Until we know, we cannot determine if he quit for good cause connected with his work. That is the issue. Under the law as cited at the beginning of this dissent, we cannot make the factual finding of why the claimant quit — it is only our duty to determine if the Board's factual finding is supported by substantial evidence and then if the Board's decision on the facts follows the law. We are not permitted to say the Board is right even if its findings are wrong.

I think we must remand for the Board to make the necessary factual findings. Therefore, I dissent from the majority opinion's affirmance.

JUDGE COOPER joins in this dissent.

Thurman Louis VALUE *v.* STATE of Arkansas

CA CR 93-1274 891 S.W.2d 798

Court of Appeals of Arkansas
En Banc
Opinion delivered December 21, 1994
[Rehearing denied January 25, 1995.*]

*Jennings, C.J., and Pittman, J., would grant rehearing.

Ralph M. Cloar, Jr., for appellant.

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

MELVIN MAYFIELD, Judge. The issue in this criminal case is whether the trial judge committed error in refusing to grant appellant's motion for mistrial when the prosecution asked one of appellant's character witnesses if he was aware of appellant's 1988 conviction for possession of cocaine. We think the motion should have been granted.

The facts are not in dispute. On February 2, 1993, detectives of the Pulaski County Sheriff's Department executed a search warrant at 1910 West 29th Street in Little Rock. They burst in upon several people, including appellant, who were in the kitchen rolling dice and gambling. A quantity of marijuana was found in appellant's sock, several rocks of crack cocaine were discovered lying loose on some money near appellant, and on the floor behind appellant was a McDonald's cup which contained plastic bags of crack cocaine. Officers testified that they observed appellant place the cup behind him. In a bifurcated jury trial, the appellant was found guilty of possession of cocaine and possession of marijuana, and he was sentenced to twenty years in the Arkansas Department of Correction for possession of the cocaine and one year in the county jail for possession of marijuana. Appellant's only argument on appeal is that the trial court erred in denying his motion for a mistrial.

The questions asked by the prosecution and the objections made by appellant's counsel, which gave rise to the motion for mistrial, are abstracted very thoroughly in the appellant's brief. Some of the questions and answers are also quoted in the argument portion of his brief. The following proceedings are disclosed by the brief.

A witness, Keith Walker, called by appellant, testified on direct examination as follows:

Q. How well do you know Thurman Value?

A. Good enough to know that he don't mess around with drugs right now. Any more now I know of.

The next important occurrence, after appellant's attorney finished his direct examination, was when the prosecuting attorney in a bench conference told the judge that on cross-examination he wanted to make further inquiry concerning the testimony that appellant "doesn't mess with drugs any more," and the judge said counsel could ask only "with respect to a time frame." The prosecutor then asked how long the witness had known the appellant and was told "about three or four months." The specific questions and answers causing the problem in this case were as follows:

Q. From today, you've known him three or four months today?

A. Yes, sir.

. . . .

Q. When did he mess around with drugs?

A. I never knew of him messing around with drugs.

Q. Were you aware that he had a previous conviction for possession of cocaine?

At this point, appellant's counsel objected and moved for a mistrial, and the matter was discussed by the court and counsel. The prosecuting attorney argued that the witness's testimony that he never knew of the appellant messing with drugs was sufficient for the State to inquire whether the witness was aware of appellant's drug conviction in 1988. Then, after the court expressed the opinion that a curative instruction might not be enough because of "the emotional impact" of the evidence about the drug conviction and that the question was a "close call," the judge said he felt the door had been opened by the testimony of the witness, and the motion for mistrial was overruled.

Appellant argues on appeal that Ark. R. Evid. 404(b) prohibits the introduction of evidence of other crimes unless it has independent relevance to the issues being tried and probative value which is not substantially outweighed by the danger of unfair prejudice. He contends that the evidence of his prior drug conviction had no independent relevance, and the danger of unfair prejudice greatly outweighed the probative value of the evidence and unfairly placed before the jury during the guilt phase of the trial the fact that appellant had a prior conviction for possession of cocaine. He says that this effectively destroyed the purpose of the bifurcated trial.

The appellee has no quarrel with appellant's law as stated, but relies upon Ark. R. Evid. 405(a) which provides:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

The appellee cites *Reel* v. *State*, 288 Ark. 189, 702

S.W.2d 809 (1986), where the Arkansas Supreme Court explained Ark. R. Evid. 405(a) as follows:

> The purpose of the cross examination of a character witness with respect to a prior offense is to ascertain the witness' knowledge of facts which should have some bearing on the accused's reputation. If the witness does not know that an accused was previously convicted of a crime, the witness' credibility suffers. If he knows it but then disregards it in forming his opinion of the accused, that may legitimately go to the weight to be given the opinion of the witness. . . .
>
> . . . By presenting a character witness an accused opens the door which would otherwise be closed. If he wants us to know what his reputation is, we must be able to determine the witness' awareness of the relevant facts.

288 Ark. at 191-92; 702 S.W.2d at 810-11 (citations omitted). And the appellee also cites *Lee* v. *State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), where we said:

> Rules 404(a)(1) and 405(a) of the Arkansas Rules of Evidence permit an accused to initiate evidence of his character or a pertinent character trait by reputation or opinion evidence. However, when he puts his character in evidence, inquiry into relevant, specific instances of conduct is allowable on cross-examination. Ark. R. Evid. 405(a). The purpose of cross-examination of a character witness is not to attack the character or credibility of the accused, but to ascertain the witness's awareness of things having a bearing on the reputation for which the witness has vouched. The only limitation this rule places on cross-examination is that the facts inquired into be relevant to the issue of character. If the witness has never heard that the accused has previously been convicted of a crime or engaged in violent misconduct, then the witness's credibility suffers. If he has heard or knows of such facts but disregards them in forming his opinion or testifying to one's reputation, that may legitimately go to the weight to be given the opinion or reputation evidence.

27 Ark. App. at 209, 770 S.W.2d at 153. Other cases cited by

appellee are *Morris* v. *State*, 300 Ark. 340, 779 S.W.2d 526 (1989); *Clark* v. *State*, 292 Ark. 69, 727 S.W.2d 853 (1987); *Wilburn* v. *State*, 289 Ark. 224, 711 S.W.2d 760 (1986); and *Barker* v. *State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

We have no quarrel with the cases cited by the appellee; however, we think — under the exact circumstances involved in this case — the trial court erred in not granting the motion for mistrial.

First, we consider that the witness said he knew the appellant well enough to know that "he don't mess around with drugs right now." The trial was held on July 29, 1993. The charge against appellant arose from an event that occurred on February 2, 1993. The witness said he had only known the appellant for about three or four months before the trial, but the witness testified he was present when the search warrant was executed on February 2, 1993, and four months from that date would be June 2, 1993. Thus on the day of trial, July 29, 1993, the witness would have known the appellant about six months; however, there is no evidence that the witness knew the appellant in 1988 when the prior drug conviction was obtained. In fact, the State's brief says:

> Even though Walker may not have known appellant in 1988, it was certainly possible that he may have known appellant had a drug conviction at some time in the past. Whether or not Walker possessed such knowledge was relevant to test his credibility in opining that appellant never "messed around" with drugs and to clarify his testimony that appellant did not use drugs "right now."

This statement clearly reveals the weakness in the appellee's position. Assume that the witness had *heard* of that conviction — or had *known* of it by some means or method; the next question is *what did the witness say*. He said that the appellant "don't mess around with drugs right now. Any more now I know of." And what is the purpose of allowing the cross-examination under Ark. R. Evid. 405 (a)? *Reed* v. *State* and *Lee* v. *State, supra*, say the purpose is to test the credibility of the character witness. If the witness has heard or knows of the prior conviction, then the opinion of the witness that the character or reputation of the defendant is good may not be credible. But here, the witness *did*

not say that the appellant did not mess around with drugs in 1988. To the contrary, the witness said "he don't mess around with drugs right now. Any more now I know of." So rather than denigrate the witness's testimony, the evidence of the 1988 conviction supports the credibility of the witness who said in effect that the appellant *did* mess around with drugs but does not any more — at least as far as the witness knows.

Therefore, it seems clear that evidence of the drug conviction was not admissible under Ark. R. Evid. 405(a), because its only effect was to cause the jury to consider the conviction as evidence of guilt on the present drug charge, and this is contrary to Ark. R. Evid. 404(b) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

In *McCoy* v. *State*, 270 Ark. 145, 603 S.W.2d 418 (1980), the Arkansas Supreme Court reversed a conviction on the holding that Rule 404(b) does not permit the introduction of other crimes to prove that the appellant was guilty of the crime charged. The court said:

> It is well-settled that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused. *Moser* v. *State*, 266 Ark. 200, 583 S.W.2d 15 (1979); *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). Even if the events comprising the objectionable testimony were considered to be a part of the same transaction or proof of knowledge, opportunity, etc., there are instances where evidence of other offenses should not be admitted, particularly where its prejudicial impact substantially outweighs its probative value. *U.S.* v. *Moody*, 530 F.2d 809 (8th Cir. 1976); *Moser*, supra. Ark. Stat. Ann. § 28-1001, Uniform Rules of Evidence, Rule 403 (Repl. 1979), provides, in part:
>
> > Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . .

> Here, as there was no positive proof that appellant actually swallowed the substance or proof by laboratory analysis that it was actually heroin, we think the testimony about it was prejudicial and of little or no probative value in determining appellant's guilt of possession of the PCP and marijuana. Accordingly, we think the trial court committed reversible error in admitting this testimony, and we reverse and remand this case for retrial.

270 Ark. at 148, 603 S.W.2d at 420. *See also Slavens* v. *State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981); *Lincoln* v. *State*, 12 Ark. App. 46, 670 S.W.2d 819 (1984); *Smith* v. *State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986).

Because of the trial error, as discussed above, we reverse and remand this case for a new trial. For additional information on the issue involved, see *Awkard* v. *United States*, 352 F.2d 641 (D.C. Cir. 1965); *Gross* v. *United States*, 394 F.2d 216 (8th Cir. 1968); and the *relevant* portion of *United States* v. *Wallach*, 935 F.2d 445 (2nd Cir. 1991).

Reversed and remanded.

JENNINGS, C.J., and PITTMAN, J., dissent.

JOHN E. JENNINGS, Chief Judge, dissenting. I would affirm. In my view this case is governed by the supreme court's decision in *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986). The appellant in *Reel* was charged with murder and he called as a witness his employer who testified that he had always regarded the appellant as a truthful and honest employee. On cross-examination the trial judge permitted the prosecutor to question the witness with respect to an earlier misdemeanor conviction of the appellant. The rule the court stated in *Reel* is: if the accused has presented a witness to testify as to his good character, cross-examination may inquire "into relevant specific instances of conduct." The reason for the rule is set forth in the quotation from *Reel* in the majority opinion. The issue is whether the appellant had opened the door to this line of questioning.

In the case at bar the essence of the witness's testimony on direct is that the appellant was not a drug user. His knowledge, or lack of knowledge, about the appellant's prior drug conviction therefore, under *Reel*, becomes relevant.

Finally, once the door is opened by the appellant's own witness on direct, I do not think that it can then be "closed" by the witness's subsequent statements on cross-examination.

For the reasons stated I respectfully dissent. I am authorized to state that Judge Pittman joins.

Leonard WATKINS and Shirley Watkins
v. Donna HADAMEK and Tina Adams

CA 93-1286 892 S.W.2d 515

Court of Appeals of Arkansas
En Banc
Opinion delivered December 21, 1994

R. Gunner Delay, for appellants.

Davis Charles Gean, for appellees.

MELVIN MAYFIELD, Judge. Leonard and Shirley Watkins appeal from an order quashing writs of garnishment.

On February 23, 1993, appellants obtained a judgment against appellees Donna Hadamek and Tina Adams in the amount of $20,289.00. The judgment was unpaid and on June 4, 1993, appellants served the third in a series of writs of garnishment on Tyson Foods, Inc., garnishee, alleging that Tyson was "indebted to the Defendant or have in your possession goods, chattels, moneys, credits, or effects belonging to the Defendant." A copy of the writ of garnishment was served on the appellees.

On July 21, 1991, Tyson filed an answer stating it "is obligated to the Defendant for $13,075.45."

On August 9, 1993, the appellees filed a motion to quash the writ of garnishment in which they alleged that on September 27, 1991, Donna Hadamek assigned 100 percent of the net proceeds from her poultry service contract with Tyson to the Bank of Wal-

dron (Bank) to pay off an outstanding loan; that the garnishment did not have priority over the prior assignment; and that Tyson had money in its hands which belongs to the Bank. Appellees asked that the writ of garnishment or any subsequent writs of garnishment filed on Tyson be quashed and that Tyson be ordered to release the money it held to the Bank.

At a hearing held August 10, 1993, the appellants argued that Ms. Hadamek had no standing to challenge the writ of garnishment because she had conveyed her interest to the Bank; that Ms. Hadamek was a disinterested party; and that only the Bank could challenge the writ. Appellants also argued that the assignment was invalid for want of consideration.

On August 30, 1993, the trial court entered an order quashing the writ of garnishment and ordering Tyson to pay to the Bank the money it was holding. The court found that, prior to the filing of the Writ of Garnishment, Ms. Hadamek had made a valid assignment of the proceeds of her poultry service contract to the Bank to pay off an outstanding loan; that Ms. Hadamek had standing to file the motion to quash; and that the garnishee Tyson had no "goods, chattels, moneys, credits, and effects belonging to the plaintiff, Donna Hadamek."

Appellants argue on appeal that the trial court erred in finding a valid assignment had been made to the Bank because Ms. Hadamek had not relinquished all rights to the fund. At the hearing on the motion to quash, Ms. Hadamek testified that she never sees the check, that her name is not on it, that she does not get to sign it, and the Bank uses the check to pay her debts at the Bank. She testified that the Bank told her they can do anything with the money that they choose; that they do that; and that anything left over goes in her account at the Bank. Appellants argue that this testimony "clearly shows that the Plaintiffs had access to the funds which were deposited at the Bank" and that the transaction is not an assignment but is "more akin to an automatic deduction."

All contracts in writing for the payment of money are assignable. Ark. Code Ann. § 4-58-102 (1987). An assignment is generally interpreted or construed under the rules governing the construction of contracts, the primary object being to ascertain and carry out the parties' intentions; to insure validity

the assignment must adequately describe or identify the thing to be assigned, but when such a description is inserted, the assignment ordinarily passes to the assignee all the rights, title, or interest of the assignor in the property. *Northwest National Bank* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 25 Ark. App. 279, 757 S.W.2d 182 (1988).

Here, an "Assignment of Proceeds of Poultry" dated September 27, 1991, and signed by Donna Hadamek and Tyson Foods, Inc. was received into evidence. It states that Donna Hadamek authorizes Tyson to pay the Bank the net proceeds per pay period payable to her as a result of her services to Tyson in raising and caring for poultry belonging to Tyson; that the assignment supersedes and voids any prior assignment; and that payment by Tyson shall be made by check payable and mailed to the Bank. Ms. Hadamek testified that the assignment was still in effect; that she could not stop it; that the Bank uses the check to pay her debts at the Bank; that it's 100 percent; and that the funds being held do not belong to her but belong to the Bank.

Under the evidence, we cannot say the trial court erred in quashing the garnishment and paying the money to the Bank.

Appellants also argue that if the assignment was valid, the Bank is the only party who can challenge the writs of garnishment. Appellants contend that the appellees lacked standing to challenge the writs and cannot assert the Bank's rights. In support of this argument appellants cite *Smith* v. *National Cashflow Systems. Inc.*, 309 Ark. 101, 827 S.W.2d 146 (1992). But that case, which involved an original action, did not involve garnishment. There the appellee, a licensed collection agency obtained assignments of debts and brought an action on the debts in its own name. The appellant argued the appellee was not the real party in interest. Our supreme court held that because the appellee was the assignee of a properly assigned account it is the entity which can discharge the claim, is the real party in interest, and as such can bring the action.

Ark. Code Ann. § 16-110-134(a) (1987) provides:

> Before sale of any attached property, or before the payment to the plaintiff of the proceeds thereof or of any

> attached debt, any person may present his complaint verified by oath to the court. This complaint shall dispute the validity of the attachment, or state a claim to the property or an interest in, or lien on it under any other attachment, or otherwise, and set forth the facts upon which the claim is founded, and his claim shall be investigated.

In *Lawrence* v. *Ford Motor Credit Co.*, 247 Ark. 1125, 449 S.W.2d 695 (1970), our supreme court held that statute is applicable to garnishment proceedings. The court stated:

> Arkansas Statutes Annotated § 31-157 (Repl. 1962) [now Ark. Code Ann. § 16-110-134 (1987)] permits any person disputing the validity of an attachment, or stating a claim to, interest in, or lien upon attached property to present his complaint at any time before the payment to the plaintiff of the proceeds of an attached debt. There can be no doubt about the applicability of this statute to this case. A garnishment is only a species of attachment. Service of a writ of garnishment upon a debtor is an attachment of the debt or a form of levy thereupon.

247 Ark. at 1129, 449 S.W.2d at 697-98 (citations omitted). *See also G.A.C. Trans-world Acceptance Corp.* v. *Jaynes*, 255 Ark. 752, 755-56, 502 S.W.2d 651, 653, (1973) (Fogleman, J.A., concurring).

Here, appellees were served with a copy of the writ of garnishment and disputed its validity, and under the statute cited above *any* person is permitted to present his complaint to the court and may "dispute the validity of the attachment [or garnishment]." We also think it obvious that Ms. Hadamek had "an interest" in the money to the extent of being heard on whether it should be applied to credit her debt to the bank. The concurring opinion is concerned about a problem the bank might have had if its assignment had not been upheld. Of course it could have presented its claim to the court, and Ms. Hadamek testified that it knew of the garnishment.

Affirmed.

ROBBINS, JJ., concurs.

JOHN B. ROBBINS, Judge, concurring. I agree that the trial

court's decision upholding the validity of the assignment made by appellee Donna Hadamek to the Bank of Waldron was not clearly erroneous. However, I disagree with that portion of the majority opinion which affirms the trial court's determination that Ms. Hadamek had standing to seek to quash the appellant's writ of garnishment.

The majority opinion relies on Ark. Code Ann. § 16-110-134(a) (1987) in concluding that Ms. Hadamek had standing to move to quash the writ of garnishment. The quoted subsection (a) should be read, however, in context with the other subsections of § 16-110-134, especially subsection (d) which provides:

> (d) If it is found that the claimant has a title to, a lien on, or any interest in the property, the court shall make such order as may be necessary to protect his rights.

When read in proper context it becomes clear that the "any person" referred to in subsection (a) is a "claimant" who claims "title to," "a lien on," or an "interest in" the property. The only relief available under § 16-110-134 is such order of the court "as may be necessary to protect his [the claimant's] rights."

Ms. Hadamek can not be a claimant, for she successfully contended before the court that she had made an absolute assignment of 100 percent of her interest in the garnished funds to the Bank of Waldron. It is wholly inconsistent to find the funds in issue to belong to the Bank of Waldron rather than Ms. Hadamek, but yet also find that Ms. Hadamek has standing under § 16-110-134 as a "claimant" to present her complaint to quash the garnishment.

Rule 17 of the Arkansas Rules of Civil Procedure provides that every action shall be prosecuted in the name of the real party in interest. It has generally been held that the real party in interest is the person who can discharge the claim which is the subject of an action and not necessarily the person who may ultimately receive some benefit from a recovery on the claim. *House* v. *Long*, 244 Ark. 718, 426 S.W.2d 814 (1968). Although a garnishment was not involved in *Smith* v. *National Cashflow Systems. Inc.*, 309 Ark. 101, 827 S.W.2d 146 (1992), the issue of standing was. The supreme court held:

> Since Cashflow, as the assignee of a properly assigned

> account, is the entity who can discharge the claim, it is the real party in interest and, as such, is entitled to bring this action.

Id. at 148. *See also* Ark. Code Ann. § 4-58-106 (Repl. 1991).

Rule 17 of the Federal Rules of Civil Procedure also requires an action to be prosecuted by the real party in interest. In the course of amending Rule 17 in 1966 the advisory committee noted:

> In its origin the rule concerning the real party in interest was permissive in purpose; it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

U.S.C.A. Rules of Civil Procedure, Rule 17(a). The question of proper standing in this case should be considered in the light of this function of Rule 17.

Because the trial court upheld the validity of the assignment, appellants will not be put to the effort of litigating the validity of Ms. Hadamek's assignment twice. However, had the trial court found that the assignment was invalid, appellants would surely have faced an attempt by the Bank of Waldron to establish the validity of the assignment. Since the Bank of Waldron was neither noticed to appear nor appeared as a party at the hearing on the motion to quash it would not have been barred by res judicata from relitigating the assignment's validity.

But inasmuch as the trial court upheld the validity of the subject assignment and we are affirming that holding, it does not appear that appellant has been prejudiced by the defect in the party plaintiff. Therefore, I concur in the result of this appeal. However, a determination of whether an objection to standing has merit should not depend upon the outcome of the underlying action.

Douglas L. KING *v.* Carl W. KNOX

CA 93-1220 890 S.W.2d 277

Court of Appeals of Arkansas
Division II
Opinion delivered December 28, 1994

Estes, Estes & Gramling, by: *J. Douglas Gramling*, for appellant.

Matthews, Campbell & Rhoads, P.A., by: *Richard J. Stocker*, for appellee.

JOHN MAUZY PITTMAN, Judge. Douglas L. King appeals from a Benton County Circuit Court order granting appellee, Carl W. Knox, revivor of a judgment rendered in favor of appellee for $3,444.00. Appellee and appellant were previously sued as guarantors on a bank debt, and the bank obtained a judgment against both of them in which they were jointly and severally liable. Appellee then obtained a judgment against appellant for contribution in the amount of $3,444.00. Both judgments remained unsatisfied when appellee filed for bankruptcy, listing his judgment against appellant on his schedule of assets. Subsequently, appellee received a discharge in bankruptcy; however, upon the closing of the bankruptcy estate, the judgment against appellant had not been pursued or specifically abandoned by the bankruptcy trustee.

Appellant resisted appellee's petition for *scire facias* to revive the judgment against appellant on the ground that appellee lacking standing to bring the petition as the judgment was part of the bankruptcy estate to be pursued by the bankruptcy trustee alone. The circuit judge found that appellee had standing to revive his judgment and entered an order of revivor from which this appeal follows.

Appellant first argues that appellee lacked standing to bring the revivor action because the judgment remained as an asset of the bankruptcy estate and that only the bankruptcy trustee may pursue it. Specifically, appellant relies on 11 U.S.C. § 554(a) (1993), and *Vickers* v. *Freyer*, 41 Ark. App. 122, 850 S.W.2d 10 (1993), which require that notice be given to creditors before an asset may be abandoned. Appellant states that a failure to give notice, as here, leaves the asset in the bankruptcy estate as the statutory procedure to abandon the asset was not followed. Our holding in *Vickers* v. *Freyer, supra*, was that § 554(a) outlines the requisite procedure for the bankruptcy trustee to abandon an asset when the bankruptcy case remains *open*. In the case before us, appellee's bankruptcy case was closed before institution of the present litigation. Since the bankruptcy case had been closed,

we hold that 11 U.S.C. § 554(c) (1993) applies. Section § 554(c) provides: "Unless the court orders otherwise, any property scheduled under Section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of Section 350 of this title." The record indicates that appellee's judgment against appellant was a scheduled asset in his bankruptcy proceeding. Also, it is undisputed that this asset was not administered or specifically abandoned during the pendency of the bankruptcy matter. Therefore, under § 554(c), the asset was abandoned to the debtor [appellee] at the close of the bankruptcy estate. *In Re McCoy*, 139 B.R. 430 (Ohio 1991). Appellant's further argument that the bankruptcy court has exclusive jurisdiction to govern this asset as part of the bankruptcy estate is without merit. This revivor proceeding was properly maintained in state court by appellee after the asset was deemed abandoned under § 554(c).

Appellant also argues that he was a "contingent creditor" in appellee's bankruptcy in that his payment on the judgment against himself and appellee in favor of the bank would entitle him to contribution from appellee. As a "contingent creditor," he asserts that he was entitled to notice of abandonment under § 554(a) that provides for notice to be given to creditors. The premise of appellant's argument is flawed. There is no dispute that appellant was a *debtor* of appellee at the time appellee filed for bankruptcy and at the time the bankruptcy estate was closed. There is also no dispute that appellant has not paid the bank or appellee. Appellant cannot change the fact that he is a debtor, and not a creditor, of appellee. Because he is not a creditor, he was not entitled to notice and appellee is entitled to rely upon 11 U.S.C. § 554(c) in considering his claim against appellant to have been abandoned to him by the trustee.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

William C. FORREST *v.*
GENERAL INSURANCE COMPANY OF AMERICA

CA 94-87 890 S.W.2d 612

Court of Appeals of Arkansas
Division I
Opinion delivered December 28, 1994
[Rehearing denied January 25, 1995.*]

Keith Blackman, for appellant.

Butler, Hicky & Long, by: *Fletcher Long, Jr.*, for appellee.

JOHN B. ROBBINS, Judge. Appellant's airplane was insured under a policy issued by appellee, General Insurance Company of America, when it sustained damage during a wind and hail storm. The insurance policy provided in part:

> In the event of partial loss, the Company's liability, when repairs are made by the Insured shall not exceed the actual cost less discounts, if any, of parts and materials of a like kind and quality plus the actual cost to the Insured of labor (with no additional for overhead or overtime) plus fifty percent (50%) of such labor costs . . . .

Appellant obtained two estimates for the repair of his airplane. Sharp Aviation's estimate was $10,058.92, and Mid-Continent Aircraft's estimate was $10,197.93. At the request of appellee's adjuster, appellant obtained a third estimate from Razorback Fabrics, Inc., for $5,819.71.

The parties were unable to reach a settlement of appellant's claim because appellant did not want to have his plane repaired by Razorback, and appellee refused to pay more than the $5,819.71 Razorback estimate less his deductible. Appellant claimed that he had used Razorback for repair work in the past and the repairs cost a third more than the estimate he had been given and that Razorback was very slow to complete the repairs. Appellant's subject loss occurred during peak aerial application time, and appellant maintained that he needed his plane repaired as quickly as possible.

Appellant had his plane repaired by Sharp Aviation for $10,118.64 and then sued appellee for his cost of repairs, penalties, interest, attorney's fees, and punitive damages because of appellee's bad faith in attempting to force a settlement on him. Appellee responded that its liability did not exceed the Razorback estimate and that appellant's complaint should be dismissed because appellant did not comply with the terms of the policy which required a written proof of loss.

Appellant testified that he had some work done by Razorback to his plane in late 1989 at a quoted estimate of $7,500.00. It stated that the final bill was over $10,000.00 and that it took Razorback three months to make the repairs. He stated that he told appellee's adjuster that he was concerned about the amount of

time it would take Razorback to repair his plane. He stated that his loss occurred during peak aerial application time and he needed his plane repaired quickly. He stated that Razorback told him it was going to be slow and their estimate was a minimum of one week to locate and get the parts and a minimum of two weeks after that to finish the repair. He stated it would have taken Razorback four weeks to rebuild his wing, whereas Sharp Aviation was able to replace it in one week and the cost was about the same. On cross-examination, appellant also testified that he was not totally satisfied with the quality of work Razorback had previously performed but that they did what he considered an average job.

Dale Sharp testified that he owned and managed Sharp Aviation and he has been a licensed mechanic and in the business for eighteen years. He described the damage to appellant's airplane and the repairs that Sharp Aviation made to it. He stated that, in order to save time, he replaced the wing with a rebuilt wing rather than repairing the wing itself. He also testified that he had some personal experience with Razorback Fabrics when his own plane sustained wind damage in 1989 or 1990 and that Razorback's estimate was so low that he knew Razorback could not possibly repair it. He also stated that Razorback told him it would take at least ninety days to repair his aircraft.

Appellant rested at the conclusion of this testimony, and appellee moved for a directed verdict, which was granted by the trial court. A judgment was entered, awarding appellant $5,319.71 plus interest at 4% per annum from the date of the judgment. On appeal, appellant contends that the trial court erred in directing a verdict for appellee. We agree.

The insurance policy provided: "The Company's liability . . . shall not exceed the actual cost less discounts . . . ." Appellee argues that the Razorback estimate of $5,819.71 is the actual cost of repairs; however, there was also evidence from which a jury could have found it was not a reliable estimate. Appellant testified that, on a previous occasion, the cost of Razorback's repairs had exceeded the amount of its estimate by 30%. Dale Sharp of Sharp Aviation testified that the cost of repairing appellant's plane was $10,118.64. There was also testimony that Mid-Continent Aircraft had estimated the cost of repair as being approximately $50.00 more than the estimate of Sharp Aviation.

Because the evidence was in dispute on this point, a question was presented for the factfinder to determine. *See First Marine Ins. Co.* v. *Booth*, 317 Ark. 91, 96, 876 S.W.2d 255 (1994); *Insureds Lloyds* v. *Mayo*, 244 Ark. 802, 804-05, 427 S.W.2d 164 (1968); *Southern Farm Bureau Cas. Ins. Co.* v. *Gaither*, 238 Ark. 50, 52, 378 S.W.2d 211 (1964); *Motors Ins. Corp.* v. *Lopez*, 217 Ark. 203, 207, 229 S.W.2d 228 (1950); *Home Ins. Co.* v. *Williams*, 201 Ark. 460, 467, 145 S.W.2d 743 (1940).

Moreover, contrary to appellee's assertion, the factfinder should have been allowed to consider the time it would take to repair the airplane in determining whether an estimate was reasonable. In *Resolute Insurance Co.* v. *Mize*, 221 Ark. 705, 711-12, 255 S.W.2d 682 (1953), the supreme court held that an award was not limited to the lowest estimate where the lowest estimate was from a concern in a distant city. If the insurer elects to make repairs, there is an implied obligation to perform within a reasonable time. *Accord Resolute Ins. Co.* v. *Bailey*, 221 Ark. 419, 423, 253 S.W.2d 771 (1952). Here, there was evidence that, in the past, Razorback had taken as long as three months to repair appellant's plane.

In determining whether a directed verdict should have been granted, the appellate court views the evidence in the light most favorable to the party against whom the verdict is sought and gives it its highest probative value, taking into account all reasonable inferences deducible from it. *Mankey* v. *Wal-Mart Stores, Inc.*, 314 Ark. 14, 16, 858 S.W.2d 85 (1993). A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict, and where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Id.*

Giving appellant's evidence its highest probative value, we find that appellant presented substantial evidence to dispute the Razorback estimate as the actual cost of his damages and that this issue should have been decided by the factfinder. We therefore reverse the award and remand for trial.

Reversed and remanded.

PITTMAN and COOPER, JJ., agree.

Robert WAGNER *v.*
DIRECTOR, Arkansas Employment Security Division

E 93-145 890 S.W.2d 614

Court of Appeals of Arkansas
En Banc
Opinion delivered January 11, 1995

W. Hunter Williams, Jr., for appellant.

Ronald A. Calkins, for appellee.

JAMES R. COOPER, Judge. The appellant in this unemployment compensation case filed a claim for benefits which was denied by the Board of Review on a finding that he voluntarily left his last employment without good cause connected with the work. Subsequently, he filed a motion for remand with the Board in order to present additional evidence before the Appeal Tribunal. The Board denied his motion. From that decision, comes this appeal.

For reversal, the appellant contends that the Board erred in denying his motion for remand to present additional evidence. We find no error, and we affirm.

The Board of Review issued its decision denying benefits on May 20, 1993. The appellant's motion for remand was not filed until June 8, 1993. Despite several opportunities to do so, the appellant failed to raise the issue for which he now seeks a remand until nineteen days after the Board issued an adverse

decision. This is so despite the fact that the appellant was informed at a hearing before the Board on May 11, 1993, that any request to take additional evidence would have to be made "right away." Given that the appellant waited until 28 days had passed and an adverse decision had been issued before raising this issue, we cannot say that the Board erred in denying the motion for remand.

Affirmed.

Odes Lee HAMPTON *v.* STATE of Arkansas

CA CR 94-233 890 S.W.2d 279

Court of Appeals of Arkansas
Division I
Opinion delivered January 18, 1995

William R. Simpson, Jr., Public Defender, *C. Joseph Cordi*, Jr., Deputy Public Defender, by: *Latrece E. Gray*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Acting Deputy Att'y Gen., for appellee.

JOHN E. JENNINGS, Chief Judge. Odes Lee Hampton was charged with three counts of delivery of a controlled substance, cocaine, in Pulaski County Circuit Court. He pled guilty and was sentenced to a term of ten years in the department of correction. On appeal, Hampton contends that the court erred in declining to sentence him under Act 378 of 1975, which Act was in effect on the date that he was sentenced but was repealed effective January 1, 1994. The State contends that the appeal must be dismissed and we agree.

The general rule is that there is no right to appeal from a guilty plea. Ark. Code Ann. § 16-91-101(c) (1987); *Henagan* v. *State*, 302 Ark. 599, 791 S.W.2d 371 (1990); *Jenkins* v. *State*, 301 Ark. 20, 781 S.W.2d 461 (1990); *Redding* v. *State*, 293 Ark. 411, 783 S.W.2d 410 (1987). There are exceptions to the rule. Arkansas Rules of Criminal Procedure 24.3(b) permits an appeal from a conditional plea of guilty following the denial of a motion to suppress. An appeal on the issue of the application of jail time credit appears to be permissible. *See Jones* v. *State*, 301 Ark. 510, 785 S.W.2d 217 (1990); *Cox* v. *State*, 288 Ark. 300, 705 S.W.2d 1 (1986). The denial of a post-judgment motion, filed after a guilty plea to correct an illegal sentence, is appealable. *See State* v. *Sherman*, 303 Ark. 284, 796 S.W.2d 339 (1990); *Brimer* v. *State*, 295 Ark. 20, 746 S.W.2d 370 (1988). A defendant may also appeal after a guilty plea when a jury sets punishment under the bifurcated procedure established by Ark. Code Ann. § 16-97-101(6). *Hill* v. *State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

Henagan v. *State*, 302 Ark. 599, 791 S.W.2d 371 (1990), seems directly in point. There the defendant pled guilty and was sentenced to a term of ten years imprisonment. On appeal he contended that the circuit judge erred in concluding that he was not eligible for probation. The court dismissed the appeal under the general rule that one may not appeal from a guilty plea.

In *State* v. *Sherman, supra*, the court distinguished

Henagan from *Jones* v. *State* involving credit for jail time. The court said that the key was whether the appeal was from "the sentencing procedure which was an integral part of the acceptance of the plea of guilty." In the case at bar, the circuit court's consideration of Act 378 was an integral part of the acceptance of the guilty plea.

For the reasons stated the appeal must be dismissed.

Dismissed.

ROBBINS and ROGERS, JJ., agree.

George DAVIS *v.* Webb DAVIS, et al.

CA 94-3 890 S.W.2d 280

Court of Appeals of Arkansas
Division I
Opinion delivered January 18, 1995

Guy Jones, Jr., for appellant.

Richard Parker, for appellee Lottie Yancey.

Coxsey & Coxsey, by: *J. Kent Coxsey*, for appellees.

JUDITH ROGERS, Judge. This appeal results from a decree of the Searcy County Chancery Court which found that a warranty deed to thirty acres situated in Searcy County was in fact an equitable mortgage and denied appellant's petition for quiet title. Appellant argues that the chancellor erred in holding that the deed was an equitable mortgage. We find no error and affirm.

Appellant, George Davis, filed a complaint, seeking to quiet title to thirty acres in Searcy County against his brother and sisters, Webb Davis, Lottie Bell Yancey, Oma Dale Smith, and Juanita Warren, hereinafter referred to as appellees.[1] In his complaint, appellant claimed that the parties' parents, Noah and Minnie Davis, were the owners of the thirty acres when, in 1944, they conveyed the property to Grace Alton by warranty deed, recorded in 1945. He asserted that he had adversely claimed this property for more than thirty-six years.

Appellee Juanita Warren responded to appellant's complaint by a general denial. She later counterclaimed, contending that the deed from her parents to Grace Alton was intended as security for payment of a debt and not transfer of title and requested that the deed be declared an equitable mortgage. She also denied that appellant had adversely possessed against her. Appellees Lottie Yancey and Webb Davis filed similar pleadings.

A trial was held on the parties' complaints, at the conclusion of which the chancellor made detailed findings of fact. He found that, by clear, convincing and unequivocal evidence, the warranty deed from appellees' parents to Grace Alton was in fact an equitable mortgage and declared the deed void. He also found that appellant had occupied the thirty acres with permission and denied his claim for adverse possession.

The law presumes that a deed absolute on its face is what it appears to be, *Marshall* v. *Marshall*, 227 Ark. 582, 585,

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[1]Grace Alton, decedent, was also named as a defendant in the heading of the complaint; however, there is no evidence that either her estate or her heirs were made a party to the suit. A motion was filed by appellant's attorney stating that Grace Alton died over thirty-six years ago and requesting the court to appoint a personal representative on her behalf; however, the record does not indicate that an appointment was made. Testimony produced at trial indicated that the probate of her estate had been closed June 12, 1959, and that there were no surviving heirs.

300 S.W.2d 933 (1957), and the party claiming that a deed is in fact a mortgage has the burden of proof, both to show that there was an indebtedness and that the deed was intended to secure the debt. *Brown* v. *Cole*, 27 Ark. App. 213, 215, 768 S.W.2d 549 (1989). In order to establish that a deed absolute on its face is in fact a mortgage, the evidence must be clear, unequivocal, and convincing, *Brown* v. *Cole*, 27 Ark. App. at 215; however, any evidence, written or oral, tending to show the real nature of the transaction is admissible. *Wensel* v. *Flatt*, 27 Ark. App. 5, 8, 764 S.W.2d 616 (1989). The test on review is not whether the court is convinced that there is clear and convincing evidence to support the chancellor's finding but whether it can say the chancellor's finding that the disputed fact was proved by clear and convincing is clearly erroneous, and the appellate court defers to the superior position of the chancellor to evaluate the evidence. *See Akin* v. *First Nat'l Bank*, 25 Ark. App. 341, 345, 758 S.W.2d 14 (1988). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *RAD Razorback* v. *B.G. Coney Co., Ltd.*, 289 Ark. 550, 553, 713 S.W.2d 462 (1986).

Appellant contends that the evidence presented was not clear, unequivocal, and convincing to prove that a debt existed between his parents and Grace Alton and that the warranty deed was intended to secure such a debt. The parties' parents were unable to read or write, and there was no writing evidencing such a debt, and no party had any actual knowledge of the transaction between Grace Alton and the parties' parents. There was evidence, however, that the parties' parents had borrowed money using the thirty acres as collateral and that their parents borrowed money every spring on their crops and paid the money back later that year. There was also evidence that Grace Alton owned quite a bit of property and loaned money.

The parties to the transaction are deceased, and there was no evidence presented of their intentions at the time the deed was executed except the deed itself. Melinda Cash, an abstractor of twenty-one years with Searcy County Title Company, testified that there were ninety-six instruments with Grace Alton's name but only one notation where a deed was for a debt and it was dated July 20, 1944, and that most evidence of indebted-

ness had been satisfied by marginal notations on the record. She testified that there was no filed record which would affect the thirty acres after the warranty deed had been filed in 1945. She also testified that she checked the probate records on Grace Alton, which contained some forty-five orders that dealt with her property, but she did not find anything in the record pertaining to the thirty acres or indicating that Grace Alton claimed an interest in the thirty acres. The deed from the parties' parents was absolute on its face and had been recorded; however, the reverse side of the deed bore the handwritten notation "PAID DECEMBER 2—1945 IN FULL GRACE M. ALTON." The deed was also in the possession of the parties' mother prior to her death, then in the possession of appellee Juanita Warren. It was also undisputed that Grace Alton had never occupied the property, that the property taxes had always been invoiced to the parties' father, Noah Davis, and that, since his death, all the parties had contributed to the payment of the taxes through their brother, appellee Webb Davis.

Clearly, all the parties involved in this lawsuit thought their parents held legal title to the property. Even appellant, George Davis, testified that he figured his father owned the thirty acres because his father offered him a deed to it. Grace Alton's estate has been closed since 1959, and there is no evidence that anyone other than the Davis family has claimed the property.

In reviewing the decisions of chancery courts on questions of this nature, great weight should be given the opinion of the trial court, as the chancellor may be apprised of the existence of circumstances which but dimly appeared to us from an examination of the record alone. *Brown* v. *Cole*, 27 Ark. App. at 216. The chancellor held that any thought that the deed was anything other than a mortgage is "ridiculous," and we cannot say this holding is clearly erroneous.

Nor do we disagree with the court's finding that appellant's use of the property had not become adverse to any of the parties herein. A tenant in common is presumed to hold in recognition of the rights of his cotenants, *Mitchell* v. *Hammons*, 31 Ark. App. 180, 184-85, 792 S.W.2d 333, 335 (1990), and until an actual ouster is shown, the law presumes that the possession of one co-owner is the possession of all. *Baxter* v. *Young*, 229 Ark.

1035, 1039, 320 S.W.2d 640, 643 (1959). Appellant admitted at trial that there were no acts of ouster.

Affirmed.

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

WEYERHAEUSER COMPANY *v.* Jerry Don JOHNSON

CA 94-277 891 S.W.2d 64

Court of Appeals of Arkansas
Division I
Opinion delivered January 18, 1995

Wright, Lindsey & Jennings, for appellant.

Lane, Muse, Arman & Pullen, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's opinion finding that appellee's failure to provide notice of his injury was excused under Ark. Code Ann. § 11-9-701(b)(1)(B) (1987); and that appellant was liable for temporary total disability benefits accruing between June 19, 1991 and February 2, 1992, and all reasonable and necessary medical expenses incurred. On appeal, appellant argues that the Commission erred as a matter of law in awarding appellee benefits under Ark. Code Ann. § 11-9-701(a)(1) and (b)(1)(B) (1987). We disagree and affirm.

On February 2, 1992, appellee filed a workers' compensation claim alleging that his pulmonary problems were work related.

Appellant accepted the claim as compensable and paid all benefits beginning on February 2, 1992. Appellee then filed a claim contending that he was due benefits which he incurred beginning from June 19, 1991, the date he began having pulmonary problems, until February 2, 1992, the date he became aware that his pulmonary problems were work related. Appellant, however, denied responsibility for benefits for that period of time. The administrative law judge found appellant liable for benefits, and the Commission affirmed.

Appellant argues on appeal that the Commission erred as a matter of law in its interpretation and application of Ark. Code Ann. § 11-9-701(a)(1) and (b)(1)(B). Appellant contends that the failure of appellee to report the injury as set forth in Ark. Code Ann. § 11-9-701(a)(1) relieved it of the responsibility for the payment of benefits for the period of time before they received notice of the injury.

Arkansas Code Annotated § 11-9-701(a)(1) provides that:

> (a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the commission and to a person or at a place specified by the employer, and *the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.* (emphasis added)

Arkansas Code Annotated § 11-9-701(b)(1)(B) provides:

> (b)(1) Failure to give the notice shall not bar any claim:
>
> . . .
>
> (B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment.

Appellant contends that Ark. Code Ann. § 11-9-701(a)(1) provides in part that an employer is not responsible for benefits prior to the receipt of notice of an injury. Appellant further argues that the exceptions in Ark. Code Ann. § 11-9-701(b)(1) do not apply to hold an employer responsible for benefits prior to receipt

of notice because the exceptions in subsection (b)(1) only apply to cases where there is an attempt to bar an entire claim. Appellant submits that it is not trying to bar appellee's claim in its entirety, but is only maintaining that it is not responsible for benefits for the period of time before it received notice of appellant's injury. We disagree with appellant's interpretation of Ark. Code Ann. § 11-9-701(a)(1) and (b)(1).

The first rule of interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. *Farnsworth* v. *White County*, 312 Ark. 574, 851 S.W.2d 451 (1993). Statutes relating to the same subject should be read in a harmonious manner if possible. *City of Fort Smith* v. *Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993). All statutes on the same subject are *in pari materia* and must be construed together and made to stand if capable of being reconciled. In interpreting a statute and attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the matter. *Id.* Provisions of our Workers' Compensation Act are to be construed liberally in accordance with the chapter's remedial purposes. Ark. Code Ann. § 11-9-704(c)(3).[1]

Subsections (a) and (b) of Ark. Code Ann. § 11-9-701 are both contained in the same statute which is titled "Notice of injury or death." When reading subsections (a)(1) and (b)(1), giving the words their ordinary meaning, it is clear that these subsections are to be read together. Subsection (a)(1) requires in part that the employee provide the employer with notice of an injury, whereas subsection (b)(1) provides excuses for an employee's failure to provide notice as required in subsection (a)(1). This conclusion that subsections (a)(1) and (b)(1) are to be read together is supported by both the legislative history of Ark. Code Ann. § 11-9-701 and prior case law.

Arkansas Code Annotated § 11-9-701 is the codification of Ark. Stat. Ann. § 81-1317, which provided that:

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[1]We note that Act No. 796, § 29 of 1993 amended § 11-9-704(c)(3) by requiring that provisions of this chapter are to be strictly construed. This case predates the 1993 amendment; therefore, we have not applied the new standard of construction.

> (a) Notice of injury or death for which compensation is payable shall be given within sixty (60) days after the date of such injury or death to the employer, or written notice to the Commission which shall notify the employer immediately.
>
> (b) Failure to give such notice shall not bar any claim (1) if the employer had knowledge of the injury or death, (2) if the employee had no knowledge that the condition or disease arose out of and in the course of the employment, or (3) if the commission excuses such failure on the grounds that for some satisfactory reason such notice could not be given. Objection to failure to give notice must be made at or before the first hearing on the claim.

Under previous case law, the exceptions in (b) were consistently applied to section (a) to excuse a claimant's failure to provide notice of an injury. *See Gunn Distributing Co.* v. *Talbert*, 230 Ark. 442, 323 S.W.2d 435 (1959); *Quality Service Railcar* v. *Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991); and *Calion Lumber Co.* v. *Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985). In *Calion Lumber* v. *Goff*, the claimant injured his back and did not report the injury until over a year later. He believed that he had suffered only a minor injury and continued working for over a year until he was unable to continue. The Commission found under Ark. Stat. Ann. § 81-1317(b) (Supp. 1983) there was a satisfactory reason for the claimant's failure to timely report the injury, in that the claimant thought that he had suffered a relatively minor injury and because the disabling consequences of the injury developed over a prolonged period of time. We affirmed the Commission's decision. Although Ark. Stat. Ann. § 81-1317(a) has been modified since the *Calion Lumber* decision by removing the sixty day limitation, by adding excuses for an employee's failure to report an injury, and by adding that an employer shall not be responsible for benefits prior to notice; subsection (b) has not been changed and there is no indication that the exceptions set forth in subsection (b) would not continue to apply to Ark. Code Ann. § 11-9-701(a)(1).

In the present case, the Commission found that:

> . . . Ark. Code Ann. § 11-9-701(a) appears to set forth excuses for claimant's failure to report a work-related injury

> to the employer on a form prescribed or approved by the Commission and in accordance with any reasonable reporting procedures specified by the employer. This section, by necessity, assumes that claimant or the employer already knows that a work-related injury has been sustained. Ark. Code Ann. § 11-9-701(b)(1) provides excuses for the failure to give written notice of injury according to the requirements of Ark. Code Ann. § 11-9-701(a). To interpret the statute in any other manner would render Ark. Code Ann. § 11-9-701(b) totally meaningless. Claimant certainly cannot be expected, or required, to report a work-related injury until he knows, or should reasonably be expected to know, that he has sustained one.

After reviewing the legislative history, prior case law, and the plain meaning of the statute; we find the Commission's interpretation and application of § 11-9-701 persuasive. Therefore, we hold that Ark. Code Ann. § 11-9-701(b)(1) provides excuses for a claimant's failure to give written notice to an employer according to the requirements set forth in Ark. Code Ann. § 11-9-701(a)(1).

Affirmed.

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

Jeffrey INGRAM *v.* STATE of Arkansas

CA CR 94-240 891 S.W.2d 805

Court of Appeals of Arkansas
Division II
Opinion delivered January 25, 1995

John F. Gibson, Jr., for appellant.

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

JOHN MAUZY PITTMAN, Judge. Appellant was convicted of two counts of delivery of a controlled substance and sentenced to 10 years in the Arkansas Department of Correction. He argues that the conviction is void as the information was brought in the name of the deputy prosecuting attorney, that certain testimony

was inadmissible hearsay, and that a facsimile copy of a crime lab report was inadmissible. We find no error and affirm.

The information was brought in the name of a deputy prosecuting attorney and signed by the deputy prosecutor on behalf of "Sam Pope, Prosecuting Attorney." Appellant argues that the information must be brought in the name of the prosecuting attorney and should begin with the name of the prosecuting attorney to be valid. We need not address this as appellant failed to object to the information in the proceedings below. Arkansas Code Annotated § 16-85-705 (1987) states, "Upon the arraignment or upon the call of the indictment for trial, if there is no arraignment, the defendant must either move to set aside the indictment or plead to it." An objection to the form or sufficiency of an information must be made prior to trial. *Meny* v. *State*, 314 Ark. 158, 861 S.W.2d 303 (1993); *Prince* v. *State*, 304 Ark. 692, 805 S.W.2d 46 (1991); *Ferguson* v. *State*, 257 Ark. 1036, 521 S.W.2d 546 (1975). As appellant failed to object prior to trial, he failed to preserve error.

Secondly, appellant argues that Officer Dennis Roberts' testimony that he believed that his investigative report erroneously stated the time that the drug purchase occurred, was inadmissible hearsay. Officer Roberts was the supervisor of Officer Rita Hoover, who testified that she purchased cocaine from appellant on December 2, 1992, at 7:25 p.m. Officer Hoover reported to Officer Roberts the details of the December 2, 1992, drug purchase. Officer Roberts did not participate in the purchase and testified that he did not have any independent recollection as to what Officer Hoover told him as to the time that the purchase transpired. Officer Roberts' investigative report stated the purchase occurred at 10:25 p.m. Officer Roberts testified that he believed that 10:25 p.m. was incorrect, perhaps a typographical error, as his cover sheet and Officer Hoover's report stated 7:25 p.m. Appellant introduced the reports of both officers to show the discrepancy, but argued that Officer Roberts be prohibited from testifying that he believed that his report stated an incorrect time because Officer Roberts had no personal knowledge concerning the drug purchase and was relying on Officer Hoover's report. Although Officer Roberts said he believed 7:25 p.m. to be correct, he also stated that he believed his report stating 10:25 p.m. accurately reflected what Officer Hoover told

him. The time of the occurrence was for the jury to decide, and appellant has not demonstrated any error or prejudice by Officer Roberts' testimony.

Thirdly, appellant argues that a facsimile copy of a crime lab report was inadmissible. Arkansas Code Annotated § 12-12-313(a) (1987) states:

> The records and reports of autopsies, evidence analysis, drug analysis, and any investigations made by the State Crime Laboratory under the authority of this subchapter shall be received as competent evidence as to the matters contained therein in the courts of this state subject to the applicable rules of criminal procedure when duly attested to by the executive director or his assistants, associates, or deputies.

Before the trial, appellant waived his right to require the presence of the analyst. At trial he agreed to the admission of an attested copy of the analyst's report but objected to admission of a facsimile of the attested copy. The court, however, admitted into evidence a facsimile copy of the crime lab report that contained the analyst's attestation. Arkansas Rule of Evidence 1003 (1994) provides:

> A duplicate is admissible to the same extent as the original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Appellant never questioned the authenticity or continuing effectiveness of the original drug analysis report, and the court noted that there was no question about the report's accuracy. Therefore, we find no error. *Robinson* v. *State*, 317 Ark. 512, 879 S.W.2d 419 (1994).

Appellant's conviction is affirmed.

MAYFIELD and COOPER, JJ., agree.

John DOSSEY and Debbie Dossey, Husband and Wife
v. HANOVER, INC., and Hanover, Inc.
Architectural Control Committee

CA 93-1250 891 S.W.2d 67

Court of Appeals of Arkansas
Division II
Opinion delivered January 25, 1995
[Rehearing denied February 22, 1995.*]

*Jennings, C.J., not participating.

Lloyd C. Burrow, Jr., for appellants.

Kelley Law Firm, by: *Eugene T. Kelley*, for appellees.

JAMES R. COOPER, Judge. The appellants in this chancery case purchased a lot in Hanover subdivision which was subject to various recorded protective covenants and restrictions, including a requirement that no building should be erected in the subdivision until the construction plans had been approved by the Architectural Control Committee. In April 1990, the appellants delivered to the Architectural Control Committee plans for construction of a home on their lot. Subsequently, the appellants had revised plans prepared, but the revised plans were never delivered to the Committee. On September 3, 1990, the Committee approved the original plans. Construction of a home employing the revised plans began in October 1990. In January 1991, the Chairman of the Architectural Control Committee confronted the appellants concerning the unapproved revisions and insisted on compliance with the approved plans. A Violations Committee provided for by amendment to the covenants found the appellants to be in violation of the covenants because the house as constructed deviated from the approved plan. The appellees filed

suit to enforce the covenants and, after a hearing, the chancellor found in favor of the appellees and ordered that the house be completed in conformance with the original plans. From that decision, comes this appeal.

For reversal, the appellants contend that the chancellor erred in awarding specific performance, in considering the lot's location in the subdivision in enforcing the covenant, and in finding that the appellants waived any objection to procedural irregularities by the Architectural and Violations committees. We reverse.

We first address the appellants' contention that the chancellor erred in ordering that the covenants be specifically performed by completing the house in conformance with the original plans. Specific performance is an equitable remedy which compels the performance of a contract on the precise terms agreed upon by the parties. *McCoy Farms, Inc.* v. *McKee*, 263 Ark. 20, 563 S.W.2d 409 (1978). Because specific performance is an equitable remedy, courts of equity are allowed some latitude in granting or withholding that relief depending upon the equities of a particular case. *Langston* v. *Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981). Whether or not specific performance should be awarded in a particular case is a question of fact for the chancellor; on appeal, the question before the appellate court is whether the chancellor's decision to grant specific performance was clearly erroneous. *Stacy* v. *Lin*, 34 Ark. App. 97, 806 S.W.2d 15 (1991).

The record shows that the appellant's property was subject to a protective covenant establishing an Architectural Control Committee. The covenant established an Architectural Control Committee consisting of three members, and further provided that no buildings should be erected in this subdivision until the construction plans and specifications were approved in writing by the Architectural Control Committee. The covenants likewise established a Violations Committee to receive complaints concerning alleged violations of the protective covenants and restrictions and to determine whether any violation in fact occurred.

The appellants purchased their lot in the subdivision in July 1989 and submitted construction plans for a residence calling for an exterior with a substantial amount of brick. After these plans were delivered to the Architectural Control Committee, the appellants had revised plans prepared which deleted two areas of brick

veneer above the foundation level of the residence on either side of the front porch. The appellants assert that, due to a unilateral mistake, the Architectural Control Committee was not provided with the revised plans. In any event, it is clear that a second set of the original plans was delivered to the Architectural Control Committee and approved on September 3, 1990. Construction was begun in the following month. In January 1991, Arnold Lehman, president of the appellee, Hanover, Inc., and chairman of the Architectural Control Committee, confronted the appellants concerning the deviation of the residence as constructed from the plans approved by the committee. On January 31, 1991, a written request was submitted to the Architectural Control Committee asking that the committee approve the change and apologizing for the oversight. The Architectural Control Committee declined to consider the request on the grounds that the matter had already been turned over to the Violations Committee. Subsequently, the Violations Committee determined that a violation of the covenants existed, and the appellees brought suit to enforce the covenants. Although the chancellor declined to decide whether the residence as constructed utilized good quality materials or was compatible with other dwellings in the subdivision, he ordered specific performance on the grounds that the revised plans were not approved by the Architectural Control Committee. We hold that the chancellor erred in finding that the appellees established their entitlement to specific performance under the facts of this case.

Restrictions on the use of land are not favored, and restrictive covenants are strictly construed against limitations upon the free use of property with all doubts resolved in favor of the unfettered use of land. *Baldischwiler* v. *Atkins*, 315 Ark. 32, 864 S.W.2d 853 (1993). In construing covenants, the intention of the parties, as shown by the covenants, shall govern. *McGuire* v. *Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988). In the case at bar, the covenants themselves plainly state that the Architectural Control Committee was established "[t]o insure that all dwellings and accessory buildings constructed or erected in Hanover Subdivision shall have good quality materials and workmanship and are compatible with other dwellings and accessory buildings constructed or to be constructed in Hanover Subdivision . . . ." Nevertheless, the chancellor expressly declined to decide whether or not the residence as constructed utilized good quality materials, or was compatible with other dwellings in the subdivision. Furthermore,

we think that the record shows that the appellant's residence was in fact well-built and compatible with the other dwellings and accessory buildings in the subdivision.

Dennis Becker testified that he held a Masters of Architecture from Harvard University and had been a practicing architect for twenty-five years. He stated that he had inspected the appellants' home and was familiar with the subdivision in which it was located. He described the subdivision as a marriage of various traditional styles of architecture, and stated that the appellants' home was constructed in traditional style and was one of the best executed houses in the subdivision. He further testified that the deletion of the brick veneer from the side wings of the residence did not detract from the other traditional style houses in the subdivision, and that the residence as constructed was very compatible. Finally, he testified that there were at least six other homes in the subdivision which were similarly composed of brick masonry work up to the finish floor, with framework and siding finish above that.

John Mack testified that he was a professional architect, and that he had previously been employed by the appellees. He testified that the appellants' house, as constructed, substantially deviated from the approved plans, but that he could not characterize it as an aesthetic downgrade. He further testified that, in his opinion, the appellants' residence as constructed was still compatible architecturally with the other homes he had observed in the subdivision.

Given that both of the architects who testified were of the opinion that the materials and designs of the appellants' residence were of good quality and compatible with other buildings in the subdivision, and in light of our examination of the photographic exhibits and other evidence which indicates that the deviation from the approved plan had no substantial effect on the home's relative value, we hold that the chancellor's decision granting specific performance was clearly erroneous. The granting or withholding of specific performance depends on the equities of a particular case, *Langston* v. *Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981), and it has long been held that specific performance should be ordered only where the importance of the remedy to one party outweighs the oppressiveness to the other. *Shields* v. *Trammell*, 19 Ark. 51 (1857). Here, it is clear that the

award of specific performance was based solely on the fact that the covenants were breached; in light of the evidence that the interests the covenants were intended to protect were not substantially harmed by the technical breach, we reverse and remand. Given our resolution of this issue, we need not address the remaining issues advanced by the appellants.

Reversed and remanded.

PITTMAN and MAYFIELD, JJ., agree.

James Melvin KEESEE *v.* Nellie Ruth KEESEE

CA 94-121 891 S.W.2d 70

Court of Appeals of Arkansas
Division I
Opinion delivered January 25, 1995

Baxter, Wallace, Jensen & McCallister, by: *Ray Baxter*, for appellant.

Richard L. Mattison, for appellee.

JUDITH ROGERS, Judge. The appellant, James Melvin Keesee, appeals from an order of the Saline County Chancery Court which extended his obligation to make the payments on the parties' former marital home until their child graduated from high school, even though the child turned eighteen in November of his senior year. For reversal, appellant contends that the chancellor's decision was in error because the order worked a modification of a contractual agreement entered into by the parties at the time of the divorce, which provided that his obligation to make the house payments would cease when their child reached eighteen. We affirm.

The parties' 1981 divorce decree awarded custody of their children, then ages eleven and four, to appellee, Nellie Ruth Keesee, and appellant was required to pay $25 a week in support for the children. The decree also awarded appellee possession of the home and directed appellant to make the monthly mortgage payments until any of the following events occurred: the younger child reached eighteen years of age; appellee remarried; an adult male established a permanent residence on the premises; or until appellee died. The decree further provided that, upon the happening of any one of these events, the property would be sold and the proceeds equally divided.

In December of 1981, appellee petitioned for an increase in child support. In resisting this petition, appellant referred to his obligation to make the house payments in arguing that he could not afford to pay any additional child support. The chancellor denied appellee's petition at that time. Later in August of 1990, however, the chancellor increased appellant's child support obligation, while also ordering that he continue to make the house payments.

In October of 1993, appellee filed the present petition requesting that she be awarded continued possession of the home and that appellant be ordered to continue making the house payments and paying child support until their younger child, who would turn eighteen in November 1993, graduated from high school in the spring of 1994. At the hearing, appellee testified that, at the time she agreed to have the house sold when her son turned eighteen, he was not yet in school and that the timing of his graduation did not occur to her. She also testified that the child had lived in the house all of his life and that she would like for him to be able to live there until he finished high school. She also testified that, before the divorce decree was entered, the attorneys worked out a settlement and that she agreed with the decree's terms.

In response, appellant argued that the provision of the divorce decree regarding the house payments was contractual, and thus not subject to modification by the chancellor. Appellee disagreed, arguing that appellant had paid only $25.00 a week in support for years because the use and possession of the home was considered as part of the child support award. The chancellor agreed with appellee's position, saying, "The only reason the house was maintained was for the child. It wasn't maintained for Ms. Keesee." The chancellor then ordered appellant to make the house payments and pay child support until the child graduated from high school.

On appeal, appellant maintains that the provision of the divorce decree with regard to the house payment was contractual in nature, and thus could not be modified by the chancellor. In making this argument, appellant argues at length that the decree reflected an independent contract between the parties, and not simply their approval of the terms of the decree.

Appellant is correct in his assertion that, in cases in

which the parties' contract is incorporated into the decree, the general rule is that the court cannot alter or modify it. *See McInturff* v. *McInturff*, 7 Ark. App. 116, 644 S.W.2d 618 (1983). However, our courts have recognized an exception to this rule in child custody and support matters, and have held that provisions in such independent contracts dealing with child custody and support are not binding. *Id. See also Lake* v. *Lake*, 14 Ark. App. 67, 684 S.W.2d 833 (1985). In *Crow* v. *Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988), we held that the chancellor always retains jurisdiction and authority over child support as a matter of public policy, and that, no matter what an independent contract states, either party has the right to request modification of a child support award. *See also Williams* v. *Williams*, 253 Ark. 842, 489 S.W.2d 744 (1973).

We need not decide in this instance whether or not the terms of the decree constituted an independent contract, since the chancellor's decision rests on his finding that the house payments were made for the benefit of the child and were an integral part of the award of child support. Although we review chancery cases *de novo* on the record, we do not reverse unless the chancellor's findings are clearly against the preponderance of the evidence or clearly erroneous. *Dodson* v. *Dodson*, 37 Ark. App. 86, 825 S.W.2d 608 (1992). We cannot say that the chancellor's interpretation of the decree was in error.

First, the length of time appellant was required to make the house payment was plainly tied to the younger child's eighteenth birthday. Secondly, appellant paid only a minimal amount of child support for a number of years. Also, appellant resisted the requested increase in 1981 because of his payment of the mortgage. One can easily infer that appellant understood that he made the house payment on behalf of the child.

We also observe that, in *McFarland* v. *McFarland*, 318 Ark. 446, 885 S.W.2d 897 (1994), the supreme court affirmed the chancery court's order refusing to terminate the appellant's child support obligation when the child turned eighteen, since the child would not graduate from high school until about a year after his eighteenth birthday. In doing so, the supreme court rejected the appellant's argument that Ark. Code Ann. § 9-12-312(a)(5)(A) (Repl. 1993), is unconstitutional. That statute pro-

vides: "The court may provide for the payment of support beyond the eighteenth birthday of the child to address the educational needs of a child whose eighteenth birthday falls prior to graduation from high school so long as such support is conditional on the child remaining in school." *See also Matthews* v. *Matthews*, 245 Ark. 1, 430 S.W.2d 864 (1968) (where the supreme court affirmed the chancellor's decision to continue child support payments until the child finished high school about six months after reaching the age of majority.)

The chancellor here, therefore, had the authority to direct appellant to continue making the house payments until the parties' younger child graduated from high school.

Appellant also argues that appellee neither pled nor proved a change in circumstances so as to justify any modification of the award. However, appellant never made this argument below. Because appellant failed to raise this issue, we do not consider it on appeal. *Irvin* v. *Irvin*, 47 Ark. App. 48, 883 S.W.2d 862 (1994).

Affirmed.

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

Robert IDEKER *v.* Missy SHORT, et al.

CA 94-606 892 S.W.2d 278

Court of Appeals of Arkansas
Division I
Opinion delivered February 1, 1995
[Rehearing denied March 1, 1995.*]

Dennis R. Molock, for appellant.

Malcolm R. Smith, P.A., for appellees.

*Mayfield, J., would grant rehearing.

JOHN E. JENNINGS, Chief Judge. This is a child custody case. The sole argument on appeal is that the chancellor's decision to permit primary custody of the minor child, Whitney Ideker, to remain jointly in both the maternal grandmother, Tipi Word, and the child's father, Robert Ideker, rather than to award primary custody to the father alone was clearly erroneous. We agree and reverse and remand.

On May 2, 1989, Whitney was born to Missy Short, an unmarried woman. Ms. Short immediately left the child with her mother, Tipi Word, to care for. Six months after the child's birth the appellant, Robert Ideker, filed a petition asking that his paternity be established. On February 5, 1990, an order was entered determining that Ideker was the father of the child. Soon thereafter, Ideker sought custody of the child in chancery court.

On April 19, 1990, and prior to a hearing on the merits, a settlement was reached and an agreed order was entered. The order provided in part:

> 1. Custody of the minor child shall be jointly held between Robert Ideker and Tipi Word.
>
> 2. Robert Ideker shall have physical custody of the minor child each week beginning Sunday after church and continuing through Wednesday night. Tipi Word shall have custody of the minor child beginning Thursday morning and extending until after church on Sunday. The child shall be delivered to Ms. Word by Mr. Ideker.
>
> . . .
>
> 4. Ms. Short's visitation with the minor child shall occur during the periods that the minor child is with Ms. Word except for special occasions.
>
> . . .
>
> 7. There shall be no child support payment per se, it being the express intent of the parties that each party shall provide for the minor child during his or her custodial periods. The purchase of clothing and other major items shall be made jointly.
>
> 8. In the event that Mr. Ideker's living arrangements

should change, for example, Mr. Ideker no longer residing with his parents or in the event of Mr. Ideker's marriage or when the minor child begins school, the parties agree to make a diligent good faith effort to modify the arrangements as set forth herein.

9. The parties acknowledge that it is in the minor child's best interest to implement the above described arrangements gradually. The parties shall make a diligent effort to cooperate with each other with their ultimate goal being to have the above described arrangements fully implemented on May 1, 1990.

In August 1993, appellant filed a petition seeking primary custody of his daughter. After a hearing in November 1993, the court entered an order denying the petition. The court specifically found:

1. That the joint custody arrangement in the April 19, 1990, Order has worked remarkably well for three and-a-half years and there is no reason offered why it should not continue to work.

2. That the parties live in close proximity and the evidence is that the child is very well adjusted to the arrangement.

3. It is in the best interest of the child for the present arrangement to continue, and, therefore, the Plaintiff's Petition for modification of the April 19, 1990 Order should be dismissed.

At the hearing, Robert Ideker testified that after the agreed order in 1990 he gradually increased the period of time he spent with the child over the first month or two, as he thought this would be best for the child. He was then living with his parents and testified that they were a great help to him in learning to take care of the child.

In March of 1993, Mr. Ideker married Amanda Cotton. They purchased a three bedroom home in Stuttgart. Ideker testified that the child has her own room and that she and his wife have a good relationship. He testified that the child's maternal grandmother, Mrs. Word, has taken excellent care of Whitney and that

he wants the child to continue having a relationship with both her mother and Mrs. Word. He also testified that the child was very happy and well-adjusted.

Amanda Ideker testified that she recognized the need for the child to continue to have a good relationship with her maternal grandparents.

Susie Hildebrand, a day care director in Stuttgart, testified that the child was happy and well-adjusted. Tipi Word testifed that she opposed the petition because of how well the child was doing under the joint custody arrangement. She also testified that Robert and Amanda had separated once while they were living together prior to their marriage.

In a child custody case, the chancellor's findings will not be reversed unless they are clearly erroneous or clearly against a preponderance of the evidence. Ark. R. Civ. P. 52(a); *Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). We give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Ark. R. Civ. P. 52(a). We give special deference to the superior position of the chancellor to determine the facts in child custody cases. *Jones* v. *Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979); *Anderson* v. *Anderson*, 43 Ark. App. 194, 863 S.W.2d 325 (1993).

The primary consideration in awarding the custody of children is the welfare and best interest of the children involved; other considerations are secondary. *Anderson* v. *Anderson, supra*; *Scherm* v. *Scherm*, 12 Ark. App. 207, 671 S.W.2d 224 (1984). The welfare of the child is the polestar in every child custody case. *Jones* v. *Strauser, supra; Hickey* v. *Hickey*, 9 Ark. App. 281, 658 S.W.2d 411 (1983). However, as between a parent and a grandparent, the law prefers the former unless the parent is incompetent or unfit. *Feight* v. *Feight*, 253 Ark. 950, 490 S.W.2d 140 (1973); *Perkins* v. *Perkins*, 266 Ark. 957, 589 S.W.2d 588 (1979); *Baker* v. *Durham*, 95 Ark. 355, 129 S.W. 789 (1910); *Hickey* v. *Hickey, supra.*

In the case at bar the agreement entered into between the maternal grandmother and the father of the child contemplated a modification of the joint custody arrangement should Mr. Ideker's living arrangements change or should he marry. Both of these

things have happened. In the case at bar the chancellor's finding that the child has adjusted very well to the joint custody arrangement is certainly supported by the evidence. We do not think that this fact alone, however, is sufficient to overcome the law's preference for the parent in a custody case.

While *Jones* v. *Strauser, supra*, bears considerable similarity to the case at bar, we find it distinguishable. There the supreme court affirmed a chancellor's decision to continue custody in the maternal grandmother, rather than award primary custody to the father. The most striking difference between *Jones* and the case at bar is that in *Jones* the natural father had abandoned the child for the first five years of her life. In the case at bar, appellant promptly sought to have his own paternity established then made reasonable efforts to establish a relationship with his daughter. Furthermore, the custody agreement in the case at bar, unlike that in *Jones*, contemplated a change in the arrangement when certain circumstances changed.

We conclude that on the facts of the case at bar the law's preference for a parent in a child custody action requires that primary custody be awarded to the father. We remand the case to the trial court to enter an order of custody. The order should provide for such reasonable visitation rights for the maternal grandparents as the chancellor may deem appropriate.

Reversed and Remanded.

ROBBINS, J., agrees. ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I concur in this decision because of the importance of recognizing the preference of a natural parent in custody matters and because the opinion provides encouragement for parents to take all necessary measures to complete the family unit. However, I join this decision with some misgivings because, given the chancellor's findings, this case may represent the unusual situation where the general preference favoring a natural parent may not precisely coincide with the best interest of the child.

I would encourage the chancellor to monitor the progress of this family and to provide adequate visitation of the child with appellee as is necessary to protect the child's best interest.

Clyde David MORRIS *v.* Jerry SOLESBEE

CA 94-292 892 S.W.2d 281

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1995

Hardin, Jesson, Dawson & Terry, by: *Robert M. Honea* and *Kirkman T. Daugherty*, for appellant.

Skinner Law Firm, P.A., by: *Jack Skinner*, for appellee.

JOHN MAUZY PITTMAN, Judge. In February 1993, appellant, Clyde David Morris, obtained a judgment against appellee, Jerry Solesbee. After writs of garnishment and execution were issued, appellee filed a claim of exemption for all property that he held with his wife as tenants by the entirety. The circuit judge sustained appellee's claim of exemption and ordered that the writs of garnishment and execution as to that property be quashed.

On appeal, appellant argues that the long established law in Arkansas is that a judgment creditor of one spouse can levy upon, and sell at public sale, a judgment debtor's right of survivorship in and entitlement to one-half the rents and profits from property held as tenants by the entirety. We agree.

In *Branch* v. *Polk*, 61 Ark. 388, 33 S.W. 424 (1895), the supreme court held that a wife who held property with her husband in a tenancy by the entirety had the power, by a separate deed, to mortgage her interest in land she held with her husband as tenants by the entirety. In making this decision, the court noted that, in Arkansas, a married woman has full control over her separate property, including her interest in an entirety estate, and may convey and dispose of it as if she were single. 61 Ark. at 394. The court stated:

> The right of the wife to control and convey her interest, we think, is now equal to the right of the husband over his interest. That each are entitled to one-half of the rents and profits during coverture, with power to each to dispose of or to charge his or her interest, subject to the right of survivorship existing in the other.

Id. at 395-96. The court added that, in making such a conveyance,

the spouse does not change the estate which is granted; the question of survivorship is in abeyance. *Id.* at 396.

It has long been held, however, that an entirety estate is not subject to partition after a spouse's conveyance of his or her interest to a third party. In *Davies* v. *Johnson*, 124 Ark. 390, 187 S.W. 323 (1916), the supreme court explained that, where land is conveyed to husband and wife, they do not take by "moieties," but both are seized of the entirety — the whole in contradistinction to a part:

> Neither tenant by entirety can convey his or her interest so as to affect the right of survivorship in the other. The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survive, the conveyance becomes as effective to pass the whole estate as it would had he been sole seized at the time of the conveyance. The husband may do what he pleases with the rents and profits during coverture, but he cannot dispose of any part of the inheritance, without his wife's consent.

Id. at 304, 187 S.W. at 325 (quoting *Roulston* v. *Hall*, 66 Ark. 305, 309, 50 S.W. 690 (1899)).

Execution against a spouse's interest in a tenancy by the entirety has long been permitted even though partition has not. *Moore* v. *Denson*, 167 Ark. 134, 139, 268 S.W. 609 (1924), held that real property owned by the husband and wife as tenants by the entirety may be sold under execution to satisfy a judgment against the husband, subject to the wife's right of survivorship. In that case, the court held that the trial court had correctly refused to quash an execution levied against the husband's interest in the property. *See also Franks* v. *Wood*, 217 Ark. 10, 13, 228 S.W.2d 480 (1950); *Pope* v. *McBride*, 207 Ark. 940, 184 S.W.2d 259 (1944). *Moore* v. *Denson* was followed in *Ellis* v. *Ashby*, 227 Ark. 479, 481, 299 S.W.2d 206 (1957). There, the court affirmed the principle that property owned by husband and wife as tenants by the entirety may be sold under execution to satisfy a judgment against the husband, subject to the wife's right of survivorship. Arkansas law was applied in *Sieb's Hatcheries, Inc.* v. *Lindley*, 111 F. Supp. 705, 716 (W.D. Ark. 1953), *aff'd*, 209 F.2d 674 (1954), where the district court stated:

> Thus, a purchaser of the interest of one tenant by the entirety cannot oust the other tenant from possession, and can only claim one-half of the rents and profits. *Simpson* v. *Biffle*, 63 Ark. 289, 38 S.W. 345; *Roulston* v. *Hall*, 66 Ark. 305, 50 S.W. 690. The remaining tenant is not only entitled to possession plus one-half of the rents and profits, but the right of survivorship is not destroyed or in anywise affected. *Pope* v. *McBride, supra.*

111 F. Supp. at 716.

In *Ford* v. *Felts*, 3 Ark. App. 235, 239, 624 S.W.2d 449 (1981), we held that one spouse can lease his or her interest in an estate by the entirety; the lease, however, is subject to the other spouse's rights of survivorship and possession during his or her lifetime.

In the case before us, the circuit judge was persuaded by appellee's argument that *Lowe* v. *Morrison*, 289 Ark. 459, 711 S.W.2d 833 (1986), changed the law regarding execution against a spouse's interest in a tenancy by the entirety. Our review of that decision, however, has convinced us that it did not change the law and is entirely consistent with prior decisions. In *Lowe* v. *Morrison*, the supreme court affirmed the chancery court's dismissal of a partition action filed by the Lowes against the Morrisons. The court held that a third party with a money judgment against a husband cannot force the partition and sale of land held by the husband and wife as tenants by the entirety. In so holding, the court looked at the statutory right to partition property and the nature of tenancies by the entirety:

> Partition is a statutory right. Ark. Stat. Ann. § 34-1802 (Supp. 1985) provides:
>
> > Any persons having any interest in and desiring a division of land held in joint tenancy, in common, as assigned or unassigned dower, as assigned or unassigned courtesy [curtesy], or in coparceny, absolutely or subject to the life estate of another, or otherwise, or under an estate by the entirety where said owners shall have been divorced either prior or subsequent to the passage of this Act, except where the property involved shall be a homestead and occu-

> pied by either of said divorced persons, shall file in the circuit or chancery court a written petition in which a description of the property, the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division, and for a sale thereof if it shall appear that partition cannot be made without great prejudice to the owners, and thereupon all persons interested in the property who have not united in the petition shall be summoned to appear.

> Noticeably absent is the right to partition an estate by the entirety where the tenants are still married. An estate by the entirety is peculiar to marriage and entails the right of survivorship. The right of survivorship to the whole can only be dissolved in a divorce proceeding, by death, or by the voluntary action of both parties.

> In various cases we have touched on the question raised by this suit. First the right of survivorship cannot be defeated by an outsider such as a judgment creditor. *Ellis* v. *Ashby*, 227 Ark. 479, 299 S.W.2d 206 (1957). A third person can obtain a judgment against a husband or wife and that judgment will be a lien against the debtor's interest in the land. *Franks* v. *Wood*, 217 Ark. 10, 228 S.W.2d 480 (1950). That claim cannot, however, defeat the interest of the other spouse. *Moore* v. *Denson*, 167 Ark. 134, 268 S.W. 609 (1924). Only on the death of the other spouse can that claim be perfected. *Ellis* v. *Ashby, supra.*

289 Ark. at 460-61.

The trial court apparently agreed with appellee that *Lowe* v. *Morrison* overruled the cases discussed above which permitted execution against a spouse's interest in a tenancy by the entirety. *Lowe* v. *Morrison*, however, did not expressly overrule the earlier decisions, and we hold that it did not implicitly do so. The rule of law that a third party may not force partition against an estate by the entirety was in effect when the cases discussed above permitted execution against interests in such estates. Since execution may occur without partition, we believe the circuit judge erred in quashing the writs of execution and garnishment against appellee's interest in property he held with his wife

as tenants by the entirety. We therefore hold that a third party may execute against a spouse's interest in a tenancy by the entirety, subject to the other spouse's continued rights of possession and survivorship, and interest in one-half of the rents and profits and reverse and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

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

Dorothy A. PERRY *v.* William D. GADDY, Employment Security Department and Arkansas Blue Cross and Blue Shield

E93-251 891 S.W.2d 73

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1995

Walker, Roaf, Campbell, Ivory & Dunklin, for appellant.

Ronald A. Calkins, for appellee ESD.

Chet Roberts, for appellee Blue Cross and Blue Shield.

JOHN MAUZY PITTMAN, Judge. Appellant appeals the Board of Review's denial of unemployment compensation benefits in accordance with Ark. Code Ann. § 11-10-514 (1987) upon finding appellant was discharged for misconduct in connection with the work. Appellant argues that the decision is not supported by substantial evidence. We affirm.

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (1987); *Perdrix-Wang* v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Mere inefficiency, unsatisfactory conduct, failure of good performance as a result of inability or incapacity, inadvertence, and ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless they are of such degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations. *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

Appellant testified that she had worked for appellee for twelve years, initially as a claims examiner and then as a claims processor from 1983 to 1993. She maintained an adequate level of performance until 1991. The testimony was that appellant's average error rate in processing claims was 3.7% in 1991 and 4.7% in 1992, which exceeded appellee's requisite 3.0% error rate. Appellant's November 1991 performance review states that she had an average 4% error rate for the previous six months, and her supervisor commented that she felt that appellant had become relaxed or bored with her position. In appellant's October 1992 performance evaluation, her supervisor rated appellant's performance as inadequate. From August 1992 to January 1993 appellant received four warnings prior to her termination in February 1993 for excessive errors.

A mere failure to perform one's job because of an inability to do so is insufficient to establish misconduct for purposes of unemployment insurance. *Id.* Here, appellant had the ability to perform her job as the record states that she worked as a claims processor for ten years, was described by her supervisor in a 1991 evaluation as a "great asset" until her error rate exceeded the 3% standard, and was able to bring her error rate below 3% in August 1992 after an August 17, 1992, reprimand.

In reaching its decision, the Board noted the testimony of appellant's supervisor that appellant made the same mistakes repeatedly and that each time appellant was given instructions for correction of her mistakes. The record indicates that appellant's error rate exceeded the 3% standard seven out of the eight months immediately preceding her termination. Appellant argues that there is no evidence that she intended harm to appellee's interest. The Board held that appellant's recurring negligence established misconduct.

From our review of the record, there is substantial evidence to support the Board's findings and decision. Therefore, we affirm the Board's decision that appellant was discharged from her last work for misconduct in connection with the work.

Affirmed.

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

R.H. BUSSELL *v.* GEORGIA-PACIFIC CORPORATION
and Second Injury Fund

CA 94-91 891 S.W.2d 75

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1995
[Rehearing denied March 8, 1995.]

John Richard Byrd, Sr., for appellant.

The Rose Law Firm, A Professional Association, by: *James M. Gary* and *Todd P. Guthrie*, for appellee Georgia-Pacific Corp.

Terry Pence, for appellee Second Injury Fund.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case was employed by the appellee, Georgia-Pacific Corporation, on September 7, 1986. On that date, the appellant's back was injured when a step gave way while he was climbing a flight of stairs in the appellee's power plant. Following his fall, the appellant required several surgical procedures to his spine. After a hearing, the Commission found that the appellant failed to prove by clear and convincing evidence that his injury was caused in substantial part by a safety violation, and that the Second Injury Fund had no liability. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that his injury was not substantially caused by a safety violation. The appellee and cross-appellant, Georgia-Pacific Corporation, contends that the Commission erred in finding that the Second Injury Fund had no liability in this claim. We reverse on direct appeal and affirm on cross-appeal.

We first address the appellant's contention that the Commission erred in finding that he failed to prove that his injury was caused in substantial part by a safety violation. In cases, such as the case at bar, in which the Commission has denied a claim because of a failure to show entitlement thereto, the substantial evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for a denial of relief. *See Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979). However, the Commission's opinion in the case at bar fails to do so.

In its opinion, the Commission found that the claimant fell when a metal stair tread broke underneath his feet while he was traveling through an older area of the plant which had been non-operational for several years. The Commission also found that it was necessary for the appellant to reach his work area as quickly as possible in order to prevent a loss of power to the plant, and that he chose his route through the older area because he felt this

was the most direct and quickest route. The Commission also found that the step which broke and caused the appellant's fall was found to be in a rusted and deteriorated condition, and that the overall condition of the area where the accident occurred was rusty and deteriorated. The Commission noted that the metal stairs were installed in the late 1930's but, due to the nature of the power plant operation, the stairs were subject to buildups of sulfur, salt cake, lime, heat, and moisture. Despite the age of the stairs and the harsh conditions of the operation, the stairs were not galvanized or otherwise painted or coated to protect against corrosion. The Commission noted that all of the stairwells in this area were rusty and, although the employer had monthly safety meetings in which the lighting and condition of the area was discussed, employees were not restricted from using the area; as a result, employees routinely went into the area, and supervisory personnel were aware that the area was commonly used.

Despite these findings, the Commission concluded that the appellant failed to establish by clear and convincing evidence that his injury was substantially occasioned by the employer's violation of any statute or regulation pertaining to employee safety. In so concluding, they reasoned that proof of the deteriorating and rusty condition of the area was insufficient to establish that the appellant's fall was substantially occasioned by that condition. They further noted that the evidence established that all of the stairs in the area were in the same condition, and there was no evidence of any other stairs breaking in the same manner. We find the Commission's reasoning to be fallacious, and we hold that its opinion failed to provide a substantial basis for the denial of relief in this case.

Arkansas Code Annotated § 11-9-503 (1987) provides for a twenty-five percent increase in compensation where it is established by clear and convincing evidence that an injury 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. Section 11-2-117 sets out the general duties of an employer to provide a safe place of employment:

> (a) Every employer shall furnish employment which is safe for the employees therein and shall furnish and use safety devices and safeguards. He shall adopt and use meth-

> ods and processes reasonably adequate to render such an employment and place of employment safe and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of the employees.
>
> (b) Every employer and every owner of a place of employment, place of public assembly, or public building, now or hereafter constructed, shall construct, repair, and maintain it so as to render it safe.

Furthermore, Arkansas Department of Labor Rules require that:

> Rule 18. Broken or split treads that are uneven from wear shall be promptly replaced or repaired to put them in safe condition.
>
> Rule 20. Treads shall be firmly secured and sufficiently strong and stiff to be firm under foot for all reasonable conditions of use.

In the case at bar, the Commission found that both the stair which broke under the appellant's foot and the entire area in which the staircase was located were exposed to harsh conditions, unprotected against corrosion, and in a rusty and deteriorated state. The Commission nevertheless found that the appellant had failed to show that his injury was caused in substantial part by a safety violation. In so finding, the Commission stated that "claimant's relying on the general safety statute must show by clear and convincing evidence an unreasonably dangerous condition known by the employer or within the employer's comprehension," and concluded that the appellant had failed to do so because he had not shown that the employer knew that the particular stair on which he was injured would break. The Commission erred in so concluding. Here, the facts as found by the Commission establish that the stair which broke was corroded, that the area was generally corroded and deteriorated, that the employer was aware of the danger, and that the employer neither made repairs nor set the area off limits to employees. The law requires no greater showing to establish a safety violation, and we reverse on this point and remand for an award of benefits consistent with our holding.

Next, we address the cross-appellant's contention that the

Commission erred in finding that the Second Injury Fund has no liability on this claim. The cross-appellant notes that the appellant suffered injuries to his back in 1968 and in 1986 underwent back surgery as a result of those injuries. It argues that, because the prior injuries were in the same location, the Commission erred in finding that the Second Injury Fund had no liability. We do not agree.

In order to establish liability of the Second Injury Fund, it is necessary to satisfy the three-part test set out in *Mid-State Construction* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). The only requirement at issue in the case at bar is the requirement that the disability or impairment must have combined with the recent compensable injury to produce the current disability status. However, the Commission found that the appellant's fall from the staircase was so severe that it alone would be sufficient to produce the appellant's permanent and total disability status. In light of the evidence that the appellant obtained excellent results from his prior surgeries and was able to return to work without limitations following them, we cannot say that the Commission erred in so finding.

Reversed and remanded on direct appeal.

Affirmed on cross-appeal.

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

STATE FARM MUTUAL INSURANCE COMPANY
v. Lindsey O. BROWN

CA 93-1300 892 S.W.2d 519

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1995

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Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles* and *Mel Sayes*, for appellant.

Marc I. Baretz, for appellee.

MELVIN MAYFIELD, Judge. Appellant State Farm Mutual Automobile Insurance Company (State Farm) appeals a decision of the Crittenden County Circuit Court holding it liable for penalty, interest, and attorney's fees for failure to pay the appellee under

the medical payments provision of appellee's automobile insurance policy.

On February 11, 1989, appellee Lindsey Brown was involved in an automobile accident with Lisa Ann White, an uninsured motorist. On February 27, 1989, appellee filed a complaint against Ms. White seeking damages in the amount of $45,000.00.

On May 3, 1989, appellee filed an amended complaint with interrogatories adding State Farm as an additional defendant. The complaint alleged that appellee's insurance policy was in full force and effect on the date of the accident and that it included uninsured motorist coverage in the amount of $25,000.00, medical payments coverage, and property damage coverage. Appellee asked for judgment against State Farm in the sum of $25,000.00 for uninsured motorist coverage, up to $5,000.00 under medical payments coverage, attorney's fees, 12 percent statutory penalty, prejudgment and postjudgment interest, costs, and expenses. "Interrogatory No. 2" asked whether there was a policy of insurance issued to appellee that was in force on the date of the accident and, if so, for the policy number and terms, plus a copy of the policy. "Interrogatory No. 5" asked State Farm to admit that the policy of insurance provided for $25,000.00 in uninsured motorist coverage.

On May 15, 1989, State Farm submitted interrogatories to the appellee. "Interrogatory (2)" asked appellee to "itemize and attach copies of all medical expenses incurred for treatment" of his alleged injuries. "Interrogatory (7)" asked for a copy of all medical reports concerning those injuries.

On May 19, 1989, State Farm filed an answer in which it admitted appellee had uninsured motorist coverage and denied every allegation "not otherwise admitted."

On June 1, 1989, State Farm responded to appellee's interrogatories stating that a copy of the policy "will be furnished at a later date," that the policy provided at least $25,000.00 uninsured motorist coverage, and that appellee was not entitled to payment under this coverage as a result of his contributory negligence.

On June 9, 1989, appellee responded to State Farm's interrogatories and attached medical reports and copies of all medical bills incurred for treatment of his injuries.

The case was tried before a jury on April 28 and 29, 1993. During a bench conference held on the morning of trial State Farm announced to the court that it would confess judgment of $5,000.00 for medical payments with credit for "a little over" $2,500.00 previously paid. The trial court allowed State Farm to confess judgment over the appellee's objection and the case proceeded to trial. After hearing the evidence, the jury found that appellee had sustained property damage in the amount of $1,500.00, and damages for bodily injury in the amount of $18,500.00, and found appellee 10 percent negligent in causing the accident and Ms. White 90 percent negligent.

On June 4, 1993, a hearing was held on appellee's request for penalty, interest, and attorney's fees with respect to the medical payments claim. No contention was made for penalty or attorney's fee on the tort claim, apparently because the amount recovered for property damage and bodily injury, with credit for the $5,000.00 for which judgment was confessed for medical payments, was not within 80 percent of the amount the complaint sought for the tort damages. However, the appellant argued that appellee was not entitled to attorney's fees and penalty on the recovery for medical payments because it confessed judgment for $2,448.00, which was the remaining amount due on that claim; therefore, appellee did not recover 80 percent of the amount sought on that claim as required by statute. The appellee argued that he was not provided with a copy of the policy, or with notice that State Farm had paid any medical bills, until two days prior to trial and that he had submitted bills to State Farm in excess of the medical payments provision. Appellee argued further that he answered State Farm's interrogatories on June 9, 1989, and attached medical bills in excess of $5,000.00; that State Farm never offered to pay; that appellee was unaware State Farm had paid some medical bills until State Farm notified him of the fact a couple of days before trial; and that without any forewarning State Farm came into court on the morning of trial, after appellee announced ready for trial, and confessed judgment for the unpaid portion of the medical expenses up to the $5,000.00 policy limit. Appellee said this was "pretty late notice" for him to consider what to do insofar as amending his complaint. Appellee argued further that State Farm failed to plead payment, set-off, or lack of demand, and that he was entitled to attorney's fees.

The only witness at the hearing was Gordon Franklin, a claims specialist with State Farm, who testified that medical expenses in the amount of $2,552.00 were paid to the providers of medical services on March 24, 1989; that there may have been some medical bills presented in discovery or interrogatories after the lawsuit was filed, but he could not recall; that he really hadn't looked through the file; and that appellee had medical payments coverage in the amount of $5,000.00.

In a letter opinion dated July 14, 1993, the trial judge found:

> that plaintiff made demand on State Farm on May 3, 1993, [sic] for the $25,000 uninsured motorist's policy limit and $5000 for med-pay. The Court further finds that State Farm denied med-pay coverage on plaintiff, and any liability for payment of any of his claims. The Court also finds that State Farm on March 24, 1989, paid directly to plaintiff medical providers $2552 and intentionally withheld said knowledge from plaintiff until a few days before trial of this matter.
>
> Because Defendant State Farm intentionally withheld the fact that it had paid $2552 of Plaintiff medical bills, it prevented the plaintiff from amending his Amended Complaint to demand $2448 from said Defendant for payment of the remainder due under his med-pay coverage. The Defendant State Farm, by its conduct, is estopped from claiming that plaintiff is not entitled to Attorney fees, penalty and interest on the med-pay claim because he did not recover 80% of the amount he demanded. The Court again finds that the plaintiff is entitled to penalty, interest and Attorney fees for State Farm's failure to pay Plaintiff med-pay claim after he made demand.

In an amended letter opinion dated July 20, 1993, the judge stated that the reference in his prior letter to May 3, 1993, as the date of the appellee's demand for payment of $5,000.00 for med-pay should have been May 3, 1989. We note that this was the date that appellee filed the amended complaint that made appellant a party to the suit. The judge also found that appellee was entitled to attorney's fees in the amount of $5,193.00, interest on over-due benefits and attorney's fees in the amount of $1,833.84, a 12 percent penalty on attorney's fees, overdue ben-

efits, and interest in the amount of $1,136.98; and a $500.00 witness fee for Dr. Traylor for a total of $8,663.82.

On August 11, 1993, the trial court entered judgment against State Farm in the amount of $13,000.00 for the jury verdict ($20,000.00 less 10 percent deduction for appellee's negligence, less $5,000.00 credit for medical payments recovery), $2,448.00 under the provision for medical payments (which had not been paid to the providers), and $8,663.80 for penalty, interest, attorney's fees and costs, for a total judgment against State Farm in the amount of $24,111.82.

On appeal, State Farm argues that the appellee is not entitled to penalty and attorney's fees because he failed to recover 80 percent of the medical payments claim and that appellee is not entitled to prejudgment interest or an expert witness fee. On cross appeal, the appellee argues that the trial court abused its discretion in not awarding an attorney's fees for all the time spent by appellee's attorney before the confession of judgment for medical payments.

Liability For Penalty And Attorney's Fees

Appellant first argues the trial court erred in awarding a 12 percent penalty and attorney's fees. It contends that penalty and attorney's fees may be awarded only pursuant to statute; that appellee cannot recover under Ark. Code Ann. § 23-79-208 (Repl. 1992) because he did not recover 80 percent of the amount sought and that appellee cannot recover under Ark. Code Ann. § 23-89-208 (Repl. 1992) because he failed to provide "reasonable proof" that benefits were owed. Moreover, appellant argues there is no statutory authority for an award of penalty and attorney fees under a theory of estoppel.

Arkansas Code Annotated Section 23-79-208(d) actually provides that "recovery of less than the amount demanded" will not defeat the right to recover penalty and attorney's fee if the amount recovered is within 20 percent of the amount "demanded or which is sought in the suit." Section 23-89-202 provides that every automobile liability insurance policy covering any private passenger motor vehicle issued or delivered in this state shall provide minimum medical and hospital benefits to the named insured for reasonable and necessary expenses incurred within 24

months after the accident up to an aggregate of $5,000.00 per person. Under section 23-89-208 benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of the amount of benefits. Section (e) of that statute provides that if the insurer fails to pay the benefits when due, the person entitled to the benefits may bring an action in contract to recover them. And section (f) provides that if the insurer is required by the action to pay the overdue benefits, then the insurer shall be required to pay reasonable attorneys' fees plus 12 percent penalty plus interest from the date these sums become overdue.

As to the reasonable proof requirement, the appellee filed an amended complaint on May 3, 1989, alleging he had a policy of insurance with appellant that included $5,000.00 medical payments coverage. Then on May 15, 1989, appellant submitted interrogatories to the appellee asking for itemization and copies of all medical expenses incurred for treatment of injuries; and on June 9, 1989, appellee responded to the interrogatories attaching copies of all medical expenses. We think the trial court could find the appellant received reasonable proof of the benefits on June 9, 1989. At that point, appellant knew of the accident; knew of its liability under the policy; and knew the amount of benefits being claimed.

Appellant argues that copies of medical bills attached to answers to interrogatories in the context of litigation is not sufficient "reasonable proof." In support of this argument, appellant cites *Roy* v. *Farmers & Merchants Ins. Co.*, 307 Ark. 213, 819 S.W.2d 2 (1991). That case is distinguishable on the facts. There, a hospital sent a bill to the insurance company on February 1, 1991, which merely recited that the patient was hit by a car and that the owner or person who hit the patient was "Bobby & Sheri Rogers." On February 16, 1991, the company's claim adjuster received an application for benefits from the insured's attorney, and the insured received benefits on March 14, 1991. The trial court held the benefits were not overdue because they were paid within 30 days after appellee received proof from the insured. Our supreme court affirmed the trial court and held that reasonable proof of benefits means more than proof of a charge or loss; that a loss only becomes a benefit if the person is legally entitled to recover under the policy; and that it would be wrong to say the insurer must pay a claim based on presentation of a

bill without the claimant asserting in writing or perhaps through counsel that he or she is entitled to a policy "benefit." To the contrary, in the instant case the appellant knew the appellee was asserting that he was entitled to a policy "benefit," knew the amount claimed, paid part of the claim, and confessed judgment to the policy limits on the morning of trial without requiring further proof of the amount due. In *Farm Bureau Mutual Insurance Co.* v. *Shaw*, 269 Ark. 757, 600 S.W.2d 432 (1980), the court held that even an "informal demand" is sufficient. In the instant case, we cannot agree that the appellant failed to receive "reasonable proof" of the amount due.

With regard to recovery of 80 percent of the amount demanded, we do not think the trial judge erred in holding appellant estopped by its conduct from claiming that the appellee is not entitled to attorney's fees and penalty. We think the purpose of a penalty is to encourage insurers to pay what they owe without the necessity of a suit, and we do not think an insurer should be able to deny a claim until the day of trial and then say we'll pay, but we don't owe what you sued for because of payments to your doctor which you did not know about. Indeed, payment is an affirmative defense which must be specifically pled. Ark. R. Civ. P. 8(c). By its denial of liability and failure to plead payment, appellant in essence prevented appellee from amending his complaint to demand the correct amount.

The doctrine of estoppel prevents an injustice to one who has in good faith relied upon another's actions, representations, or conduct to his detriment; to establish estoppel, one must show that the party being estopped knew the facts and intended that his conduct be acted upon, and that the party seeking estoppel was ignorant of the true facts and relied upon the other's conduct to his injury. *First State Bank of Crossett* v. *Phillips*, 13 Ark. App. 157, 681 S.W.2d 408 (1984). We know of no authority, nor has appellant cited us to any, which prevents a trial judge from applying the doctrine of estoppel, in a proper situation, to keep an insurer from claiming the benefit of the statutory provision of 80 percent recovery. We find no error in the trial court's application of the doctrine of estoppel in this case.

Amount of Attorney's Fee

The second point in appellant's brief is the trial court erred

in awarding $5,193.00 attorney's fees. Appellant argues that amount is unreasonable and more than the amount of medical benefits paid. Appellant contends the trial court failed to consider recognized factors in determining the amount of the award.

Here, the trial judge heard evidence that appellee's attorney spent 175-200 hours in prosecuting both the medical payments and uninsured motorist claims. In determining a reasonable attorney's fee he stated that the confessed judgment of $5,000.00 represents 27.7 percent of the total amount recovered ($5,000.00 is 27.7% of $18,000.00); that $100.00 per hour is a reasonable fee considering the experience and ability of appellee's attorney, the time and work required in this case, and the fee charged in the area for similar legal services. Taking 187.5 hours as the time spent by appellee's attorney, the judge multiplied that by the 27.7 percent to get the hours spent on the medical payments claim. Based upon these factors, the trial judge awarded an attorney's fee of $100.00 × 51.93 hours or $5,193.00.

While courts should be guided by recognized factors in determining the reasonableness of an attorney's fee, there is no fixed formula to be used and the award of an attorney's fee is a matter for the sound discretion of the trial court; in the absence of abuse, its judgment will be affirmed on appeal. *Southall* v. *Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, 283 Ark. 335, 676 S.W.2d 228 (1984); *Caldwell* v. *Jenkins*, 42 Ark. App. 157, 856 S.W.2d 37 (1993). We cannot say that the trial court abused its discretion in awarding attorney's fees of $5,193.00.

Allowance of Prejudgment Interest

Appellant also argues that the trial judge erred in awarding prejudgment interest on the medical payments claim, the 12 percent penalty, and attorney's fees.

As we have already discussed, Ark. Code Ann. § 23-89-208 provides that medical and hospital benefits under an automobile liability insurance policy are overdue if not paid within 30 days after the insurer receives reasonable proof of the amount due, and if the benefits are not paid when due, the person entitled to the benefits may bring an action in contract to recover them. If the insurer is required by the action to pay the benefits

then the insurer shall be required to pay interest from the date the sums become due. Here, the benefits became due on June 9, 1989. Therefore, the trial judge did not err in awarding prejudgment interest on the medical payments claim.

However, the 12 percent penalty and attorney's fees did not become due until they were awarded by the court. Moreover, the test for an award of prejudgment interest is whether a method exists for fixing an exact value on the cause of action at the time of the occurrence of the event which gives rise to the cause of action; if such a method exists, prejudgment interest should be allowed, because one who has the use of another's money should be justly required to pay interest from the time it lawfully should have been paid. *Hopper* v. *Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983). Here, the amount of penalty and attorney's fee was not determined until the judgment of the court was rendered.

Therefore, the trial judge erred in awarding prejudgment interest on the 12 percent penalty and attorney's fees and we remand on this point to the trial court for a redetermination of the amount of prejudgment interest.

Allowance Of Expert Witness Fee

Finally, appellant argues the trial court erred in awarding a $500.00 expert witness fee for Dr. Traylor.

In *Wood* v. *Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994), our supreme court stated that since 1978 it had specifically held that expert witness fees are not recoverable costs against the losing party because the allowance of costs is purely statutory and Arkansas has no statute which provides for the recovery of expert fees.

We are not unmindful of appellee's argument that the award of the witness fee was in the nature of a sanction under Ark. R. Civ. P. 11 and that Dr. Traylor might not have been present at trial on June 4, 1993, if the bills were undisputed. The problem with this argument is twofold. In the first place the hearing held on June 4, 1993, was only on appellee's request for penalty, interest, and attorney's fees with respect to the medical payments claim and appellee has not told us why Dr. Traylor's presence was necessary at that time. Moreover, as shown by appellant's brief,

even though appellant confessed judgment on the medical payments claim, Dr. Traylor testified at trial on April 28, 1993, apparently in support of appellee's uninsured motorist claim.

Therefore, the trial court erred in awarding a $500.00 witness fee for Dr. Traylor and we reverse the trial court on this point.

Cross Appeal

On cross appeal, cross-appellant contends the trial court abused its discretion in not awarding an attorney's fee for the full time spent on the medical payment claim. In support of this argument cross-appellant cites Ark. Code Ann. §§ 16-22-308 (Repl. 1994), 23-89-208 (Repl. 1992), and 23-79-209 (Repl. 1992). However, section 16-22-308 is a general statute providing for the recovery of attorney's fees in actions on breach of contract, and a general statute does not apply where there is a specific statute covering a particular subject matter. *Cogburn* v. *State*, 292 Ark. 564, 732 S.W.2d 807 (1987). Section 23-89-208 is a statute which we have already discussed and which allows the recovery of attorney's fees where an insurer fails to pay benefits when they become due, but it adds nothing to the cross-appellant's argument as to the *amount* of the fees to be allowed. And section 23-79-209 (formerly Ark. Stat. Ann. § 66-3239) applies only in suits to terminate, modify, or reinstate a policy. Although appellee argues that this suit "established" the medical payment provisions of the policy which were denied up to the point where the appellant confessed judgment for those payments, we do not think the trial court erred in not following that line of reasoning. And, as we have already said, we cannot say that the trial court abused its discretion in the amount of attorney's fee allowed.

On direct appeal, the judgment is affirmed in part and reversed and remanded in part. On cross appeal, the judgment is affirmed.

COOPER and PITTMAN, JJ., agree.

Marie HIGGS et al. *v.* ESTATE OF Wilton HIGGS

CA 93-1186 892 S.W.2d 284

Court of Appeals of Arkansas
En Banc
Opinion delivered February 8, 1995

Bramblett & Pratt, by: *Eugene D. Bramblett*, for appellants.

Mike Kinard, for appellee.

JOHN E. JENNINGS, Chief Judge. This probate case is a will contest. Wilton Higgs was born in 1901 and lived most of his life in Locust Bayou. His wife, Gladys, died in 1984. The two

of them had no children. On October 10, 1985, Wilton Higgs filed a petition in Calhoun County Probate Court asking that his brother, Herman Higgs, be appointed conservator of his estate for reasons of Wilton's old age and physical disability. On the same date Wilton executed a will prepared by Mr. Searcy Harrell, a Camden attorney. In the will, he left $1,000.00 to Antioch Primitive Baptist Church. The rest of his estate he left to his brother, Herman Higgs, in trust for a third brother, Aubrey Higgs. Aubrey was a deaf mute who lived on the family home place. The 1985 will also provided:

> C. This trust shall terminate upon the death of my brother, Aubrey L. Higgs, and any balance of principal or any undistributed income shall be paid to my brother, P.D. Higgs, and my brother, Herman H. Higgs, equally, share and share alike. If each shall predecease me, the interest herein left to them shall go to their heirs at law.
>
> D. If my said brother, Aubrey L. Higgs, predeceases me, then there shall be no trust and my Executor shall distribute this portion of my estate directly to P.D. Higgs and Herman H. Higgs, equally, share and share alike, without any restrictions whatsoever. If each shall predecease me, the interest herein left to them shall go to their heirs at law.

In July 1986, P.D. Higgs died. He was survived by his wife, Marie, and daughter, Linda Wood, the appellants here.

In July 1988, Wilton executed a new will, prepared by Mr. Harrell, which was substantially the same as the 1985 will, except that it omitted P.D. Higgs and his heirs as contingent beneficiaries.

In March 1992, Wilton Higgs died and in June of that year his 1988 will was admitted to probate. Subsequently, Linda Wood filed a petition contesting the will, alleging that Wilton was mentally incompetent and subjected to undue influence at the time of its execution. After conducting a hearing, the probate judge entered an order upholding the 1988 will and the will contestants have appealed.

Appellants rely on two points: (1) the probate court erred

by not finding the will dated July 22, 1988, was prima facie void because of the confidential relationship between the testator and appellee, and by not requiring that appellee show by a clear preponderance of the evidence that he took no advantage of his influence with the testator, and (2) the probate court's finding of no undue influence is not consistent with the law and is clearly against the preponderance of the evidence. We find no error and affirm.

Appellants' first point is a procedural one and they rely on *Birch* v. *Coleman*, 15 Ark. App. 215, 691 S.W.2d 875 (1985). There we said:

> We agree with appellee that the evidence is insufficient to enable us to find that she procured the will. However, we do not think that a finding of procurement is a necessary prerequisite to our shifting the burden of proof to the proponent of the will. We hold that where a ward names his guardian as a principal beneficiary of his will, the existence of undue influence on the part of the guardian should be presumed and the will should be prima facie void, unless the guardian can show by clear preponderance of the evidence that he took no advantage of his influence with the ward and that the ward's testamentary gift was a result of his own volition.

At the hearing on the validity of the will, after Herman Higgs had testified, the following colloquy took place:

> Mr. Bramblett [appellants' counsel]: At this point, the contestants ask that the court declare as a matter of law and evidence that Herman Higgs be required to go forward with the proof regarding undue influence and the other issues that have been raised based upon the fiduciary relationship between Herman Higgs and Wilton Higgs when the second and last will was executed.
>
> Mr. Kinard [appellee's counsel]: Our position is that Herman Higgs was not the primary beneficiary of this will and Herman Higgs has not been shown to have done or caused anything to occur which meets the criteria of procurement and further there has been no evidence to tend to prove there was undue influence. Our position is that the

> evidence presented falls short of shifting the burden at this point.
>
> The Court: The proponent's objection is overruled for the reasons that the will was admitted without notice and there was a confidential relationship as conservator which served to shift the burden of going forward to the proponents of the will.

Following the hearing the court in a memorandum opinion found beyond a reasonable doubt that on July 22, 1988, Wilton Higgs knew the nature and extent of his property and to whom he was leaving his property; that Herman Higgs was in a confidential relationship with the decedent; and that there was nothing in the record that reflects that Herman Higgs procured the will or exercised undue influence over his brother.

We hold that the court's statement made during the course of the hearing which shifted the burden of going forward to the proponent of the will was correct. In *Hiler* v. *Cude*, 248 Ark. 1065, 1082, 455 S.W.2d 891, 900 (1970), the supreme court said:

> We adhere to the rule that the burden of proving mental incompetency, undue influence and fraud which will defeat a will is upon the party contesting it. We hold this burden, in the sense of the ultimate risk of nonpersuasion, never shifts from the contestant. This does not however, conflict with the rule concerning the burden of going forward with the evidence or burden of evidence. As stated in 29 Am. Jur. 2d, 156, Evidence Section 125: "In short, the burden of proof, in the sense of the ultimate risk of nonpersuasion, never shifts from the party who has the affirmative of an issue, although the burden of going forward with the evidence may shift at various times during the trial from one side to the other as evidence is introduced by the respective parties."

This statement of law has been followed by the supreme court ever since. *See Able* v. *Dickinson*, 250 Ark. 648, 467 S.W.2d 154 (1971); *Greenwood* v. *Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979); *Rose* v. *Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984). From this record we are persuaded that the probate judge properly

required the proponent of the will to go forward with the evidence, i.e., to produce evidence establishing that the will was not a product of undue influence.

Appellants also contend that the probate judge's finding that there was no undue influence is clearly against the preponderance of the evidence. At the hearing, Herman Higgs testified that he was seventy-five years old. He had worked for the United States Marshall's Office as a deputy for twenty-three years, and had previously worked for the El Dorado Police Department for twenty-seven years. He testified that Wilton had been found wandering about the street, unclothed, in September of 1985. He testified that after he was appointed conservator of Wilton's estate he did not report any of his handling of Wilton's business affairs to the probate court.

When the 1988 will was drawn Herman took Wilton from Locust Bayou to Camden to see Mr. Harrell. Herman testified that he did not go into Mr. Harrell's office with Wilton when the will was discussed. He testified that he placed Wilton in a nursing home in March of 1990.

Herman Higgs testified that Wilton Higgs' estate consisted of $150,000.00 in cash, and that he transferred ownership of those funds from Wilton to himself. He testified that his purpose in doing this was "to get the difference between his nursing home care expenses and his social security paid for by either the state or federal government."

Herman Higgs testified that the 1988 will was entirely Wilton's idea and that he had not talked to Wilton about changing his will. He said the only reason Wilton gave him for wanting to change his will was that he was having problems with Marie Higgs and Bill Spencer (Marie's son) regarding Bill's drinking. Jeffery Rogers, a Camden attorney with the firm of Roberts, Harrell, and Lindsey, testified that he remembered Wilton and Herman Higgs coming to the office on July 22, 1988. He testified that he and Herman had visited while Wilton went into Mr. Harrell's office. Mr. Rogers signed the will as one of the witnesses and testified that he did not observe anything to give him any reason to believe that Wilton Higgs was not of sound mind. He testified that he saw no indication of undue influence.

Searcy Harrell testified that he handled the conservatorship for Wilton Higgs, and that he thought it was a good idea because Wilton was physically weak and had been emotionally upset. Mr. Harrell did not think Wilton was mentally incompetent, but did feel he was subject to the influence of other people.

Regarding the July 1988 will, Mr. Harrell testified that Herman and Wilton came to the office together. He testified that he believed Wilton Higgs was of sound mind and not subjected to undue influence when the will was executed. On cross-examination Mr. Harrell testified that his recollection was that Herman Higgs told him, in Wilton's presence, what Wilton wanted to do with his property.

Appellant, Marie Higgs, testified that she did not find out that her child had been cut out of Wilton's will until the will was probated. She testified that Bill Spencer did have a drinking problem but she did not know whether he did on July 22, 1988. She testified that after her husband, P.D. Higgs, died in 1986 Wilton got progressively worse. She testified that Wilton would tell her that his mother and his wife, both dead for some time, had just left his home. She testified that she thought Wilton was competent in 1985, but that he was just confused and acting strangely.

Bill Spencer testified that there were times from 1986 through 1988 when Wilton became very disoriented. Mr. Spencer also testified that Wilton made statements indicating that he believed his mother and wife were still alive.

Steve Woodson was the grandson of Effie Higgs, a deceased sister of Wilton Higgs. He testified that when he stopped by to visit Wilton in the spring of 1988 he would not immediately recognize him. He testified that in his opinion Wilton was not competent in the spring of 1988.

Appellants argue, in effect, that on this evidence the probate judge had no choice but to make a finding of undue influence. In the case at bar, as in many undue influence cases, much depends on the credibility of the witnesses. Herman Higgs testified that the 1988 will was entirely Wilton's idea, and that he had done nothing to encourage Wilton to make the change. The lawyer who drafted the will, Mr. Harrell, testified that Wilton Higgs was mentally competent and that he saw no indication of undue influ-

ence. The probate judge evidently believed the testimony of these witnesses. The trial court's finding of no undue influence is not clearly against the preponderance of the evidence.

Affirmed.

ROBBINS, J., dissents.

JOHN B. ROBBINS, Judge, dissenting. My review of the evidence before the probate court causes me to believe that the preponderance of the evidence proved that the testator, Wilton H. Higgs, was subjected to the undue influence of Herman Higgs when he executed his will on July 22, 1988. However, our standard of review is somewhat higher than merely weighing the preponderance of the evidence. We review the evidence to determine whether the trial court's ruling is clearly against the preponderance of the evidence or is clearly erroneous. Ark. R. Civ. P. 52(a). If the appellants had retained the burden of proving undue influence throughout the trial, I could not disagree with the majority's conclusion that the trial court's finding of no undue influence is not clearly against the preponderance of the evidence. However, once appellants, as opponents of the will, presented proof that Wilton Higgs executed his will designating Herman Higgs as a principal beneficiary while Herman Higgs was standing in a fiduciary relationship with the testator, the existence of undue influence on the part of Herman Higgs became a presumed fact. *Birch* v. *Coleman*, 15 Ark. App. 215, 691 S.W.2d 875 (1985). Herman Higgs then shouldered the burden of proving by a clear preponderance of the evidence that he took no advantage of his influence with Wilton Higgs and that the testamentary gift made to him was a result of Wilton's own volition. *Id.*

The probate judge found that there was a confidential relationship between Wilton Higgs and Herman Higgs because Herman was the conservator of Wilton's estate. However, the court held that this only served to shift to the proponents of the will the burden of going forward with the evidence. At the conclusion of the trial the court held that "there is nothing in the record that reflects Herman H. Higgs procured the will or exercised undue influence over his brother;" and that "there is no evidence that, in fact, W. H. Higgs was subject to being led or influenced into doing anything." These findings ignore the burden of proof placed on Herman H. Higgs by *Birch* v. *Coleman, supra*, to prove by a

clear preponderance of the evidence that he took no advantage of his influence with Wilton H. Higgs and that Wilton's testamentary gift to him was the result of his own volition. To find an absence of proof of undue influence does not equate to finding that Herman H. Higgs proved by a clear preponderance of the evidence that his undue influence, presumed as a matter of law, was not in fact exercised by him over the testator. I am persuaded that the trial court failed to apply the proper burden of proof in reaching its decision.

The majority opinion quotes from *Hiler* v. *Cude*, 248 Ark. 1065, 455 S.W.2d 891 (1970), as authority for treating the *Birch* v. *Coleman* burden of proof as simply one of going forward with the evidence rather than a burden of proving the nonexistence of undue influence. I disagree that *Hiler* v. *Cude, supra*, has relevance to the case before us. First, *Hiler* v. *Cude* did not involve a confidential relationship situation as was involved in *Birch* v. *Coleman* and as is involved in the case at bar. *Hiler* and the other three cases cited by the majority, *Rose* v. *Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984), *Greenwood* v. *Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979), *Able* v. *Dickenson*, 250 Ark. 648, 467 S.W.2d 154 (1971), are distinguishable because each of them involved allegations that the principal beneficiary procured the testator's will.

Secondly, and more importantly, Ark. R. Evid. 301(a), which is identical to Unif. R. Evid. 301, provides the following:

> **Rule 301. Presumptions in general in civil actions and proceedings.** — (a) Effect. In all actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

This rule and the principal enunciated in *Birch* v. *Coleman, supra*, could not be any clearer in placing an affirmative burden on the proponent of a will which designated the testator's conservator as a principal beneficiary to prove that the nonexistence of undue influence is more probable than its existence.[1] *See Park* v. *George,*

[1]The burden of proof under *Birch* v. *Coleman, supra*, actually increases the burden to a "clear preponderance" rather than merely "more probable than" not.

Personal Rep., 282 Ark. 155, 667 S.W.2d 644 (1984). The court's decision was based upon its finding of an absence of evidence to show undue influence. There was no finding that Herman H. Higgs proved by a clear preponderance of the evidence the nonexistence of the exercise of undue influence which should have been presumed. *Hiler* v. *Cude, supra, Rose* v. *Dunn, supra, Greenwood* v. *Wilson, supra,* and *Able* v. *Dickenson, supra,* all predate the supreme court's adoption of the Arkansas Rules of Evidence on October 13, 1986.[2] To the extent the cited cases treat a presumed fact contrary to Ark. R. Evid. 301(a), they are no longer precedential.

The United States Supreme Court did not elect to adopt Unif. R. Evid. 301 for the federal courts, choosing rather the following:

> **Rule 301 — Presumptions in general in civil actions and proceedings.** In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Fed. R. Evid. 301. The majority's treatment of the presumption in this case is consistent with the federal rule. However, this is not the rule in Arkansas. Our supreme court could have adopted a modified form of Rule 301 such as the federal rule, but opted for Unif. R. Evid. 301 verbatim. In *Looney* v. *Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992), our supreme court affirmed a probate court in a procurement case which found that the procurer failed to rebut a presumption of undue influence. Although the burden of going forward versus the risk of nonpersuasion was not expressly discussed, it is implicit in the court's opinion that it recognized that the risk of nonpersuasion was on the proponent-procurer of the will.

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[2]The Arkansas legislature attempted to adopt the Uniform Rules of Evidence during an extended session in 1976. However, in *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986), the supreme court held that this act was invalid because the extended session of the legislature was unlawful. Furthermore, neither *Hiler* v. *Cude, supra,* nor the other cases cited in the majority opinion make any reference to Rule 301.

I would reverse and remand this case to the probate court for application of the proper burden of proof.

Shary EVANS *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 94-424 892 S.W.2d 525

Court of Appeals of Arkansas
En Banc
Opinion delivered February 8, 1995

David Ethredge, for appellant.

Charles MacKey, for appellee.

PER CURIAM. The appellee Arkansas Department of Human Services brought an action to terminate the parental rights of Shary Evans, the mother of A.S., a minor. The trial court entered an order declaring Ms. Evans to be an indigent person and appointing present counsel to represent her. Counsel continued to rep-

resent Ms. Evans throughout an appeal to this Court. We affirmed the chancellor's decision to terminate Ms. Evans' parental rights in an unpublished opinion handed down on January 25, 1995. The appellant's attorney has now petitioned this Court for attorney's fees and expenses.

Ms. Evans' right to counsel in this proceeding is established by Arkansas Code Annotated § 9-27-316(f) (Repl. 1993) which states that a parent or guardian has the right to be represented by appointed counsel, if indigent, during all stages of any proceeding to terminate parental rights or remove custody of a juvenile. That statute also provides that payment of attorney's fees and costs pursuant to such an appointment is to be awarded from the Juvenile Court Representation Fund. In considering a similar motion, the Arkansas Supreme Court remanded for the trial court to determine the petitioner's entitlement to attorney's fees from the Juvenile Court Representation Fund as prescribed by Ark. Code Ann. § 9-27-316. *See In re Termination of Parental Rights*, 301 Ark. 538, 785 S.W.2d 33 (1990). In the absence of any precedent for an allowance of fees under § 9-27-316 to be made directly by this Court, we likewise remand for the trial court to determine the petitioner's entitlement to attorney's fees from the Juvenile Court Representation Fund pursuant to § 9-27-316.

George MAXWELL *v.* CARL BIERBAUM, INC., and Cigna

CA 94-401 893 S.W.2d 346

Court of Appeals of Arkansas
En Banc
Opinion delivered February 22, 1995

Kenneth A. Harper, for appellant.

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

JOHN MAUZY PITTMAN, Judge. George Maxwell appeals from an order of the Arkansas Workers' Compensation Commission denying his claim for benefits sought in connection with his development of the tick-borne Lyme disease. Appellant contends that the Commission erred in finding that Lyme disease is not a compensable occupational disease and in finding that appellant had failed to prove by clear and convincing evidence a causal connection between his disease and his employment with appellee. We affirm.

In a workers' compensation case, the claimant has

the burden of proving that his claim is compensable. *Wolfe* v. *City of El Dorado*, 33 Ark. App. 25, 799 S.W.2d 812 (1990). As the appellant in this case concedes, where, as here, the condition involved is a disease as opposed to an accidental injury, the claim is compensable only if the disease is an "occupational" one as defined in our Workers' Compensation Act *and* the claimant proves by clear and convincing evidence a causal connection between the employment and the disease. *See* Ark. Code Ann. § 11-9-102(4), - 601(e) (1987); *Osmose Wood Preserving* v. *Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992); *Arkansas Department of Correction* v. *Chance*, 271 Ark. 472, 609 S.W.2d 666 (Ark. App. 1980). Here, the Commission found against appellant as to both distinct requirements, ruling (1) that Lyme disease is not an occupational disease because it "is an ordinary disease of life to which all members of the public are exposed, regardless of their occupation"; and (2) that appellant "failed to prove by clear and convincing evidence a causal connection between his disease and his occupation." Therefore, if the evidence is sufficient to support a finding that either of the above requirements were not met, the denial of compensation must be affirmed. *See American Transportation Corporation* v. *Director*, 39 Ark. App. 104, 840 S.W.2d 198 (1992). Because we conclude that the Commission's second finding is supported by substantial evidence, we will first address appellant's argument as to it.

As stated, the claimant in an occupational disease case has the burden of proving by clear and convincing evidence a causal connection between his employment and his disease. Clear and convincing evidence is a higher burden of proof than a mere preponderance. Clear and convincing evidence has been defined as proof so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the matter asserted, *Ross* v. *Moore*, 25 Ark. App. 325, 758 S.W.2d 423 (1988); it is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *ALCOA* v. *Vann*, 14 Ark. App. 223, 686 S.W.2d 812 (1985). It is well settled that the credibility of witnesses and the weight to be given to their testimony are matters solely within the province of the Commission. *Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989).

Where the sufficiency of the evidence is challenged

on appeal, the issue is not whether the evidence would support findings contrary to those made by the Commission or whether we would have reached a different result had we been the triers of fact. *Ringier America* v. *Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Rather, this court views the evidence and all inferences deducible therefrom in the light most favorable to the findings of the Commission and will affirm if those findings are supported by substantial evidence. *Harrington Construction Co.* v. *Williams*, 45 Ark. App. 126, 872 S.W.2d 426 (1994). Where the Commission has denied a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Johnson* v. *Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994); *Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

Here, the record indicates that appellant was employed as a logger and mechanic for appellee for about three years. His last day of employment with appellee was August 28, 1989. In September of that year, appellant was diagnosed as having Lyme disease. Appellant maintained that his Lyme disease resulted from a tick bite he suffered in late August 1989. He and his wife testified that, after appellant returned home from working in the woods one day, his wife removed a tick from his buttock. They testified that the area soon became hard and that a circular rash developed. Over the next several weeks, appellant began to suffer weakness, headaches, joint pain, and a low grade fever. Appellant first sought medical treatment for the rash on September 5, 1989. Eventually, he was diagnosed with and treated for Lyme disease.

Around the time period in which appellant contends he contracted the disease, he was working six days a week, twelve to fourteen hours a day. Ten to twelve of those daily hours would be spent in the woods cutting timber. However, there was also evidence that appellant lived in a rural area, with woods nearby his residence. Appellant's yard had to be sprayed with insecticide every week. Appellant's family also maintained a garden on their property. Additionally, appellant owned two "yard dogs," which had to be dipped for fleas and ticks twice a week.

In finding that appellant had failed in his burden of proving the required causal connection to his employment by clear and convincing evidence, the Commission noted the likelihood that appellant was exposed to the infecting tick other than at work. In this regard, the Commission specifically pointed to the rural location of appellant's home and the fact that his yard and dogs were so susceptible to the presence of ticks. From our review of the record in this case, we cannot conclude that this aspect of the Commission's opinion does not display a substantial basis for the denial of relief.

In light of our conclusion on this point, we need not consider appellant's argument that the Commission employed the wrong test in determining whether Lyme disease is an "occupational" one under the Act.

Affirmed.

COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I believe that the Commission erred in concluding that Lyme disease is not a compensable occupational disease. In so concluding, the Commission stated that "[c]ommon sense tells you that ticks are found virtually everywhere," and on this basis reasoned that Lyme disease was merely an ordinary disease of life to which everyone is exposed. This was wrong for several reasons.

First, the Commission resorted to sheer speculation in concluding that the ticks which carry Lyme disease are found everywhere. In fact, it appears that the ticks require certain habitation features and are therefore restricted to specific geographic ranges within the United States. *Lyme Disease*, 22 ALR 5th 246, 251 (1994). Cases from other jurisdictions involving the compensability of Lyme disease under workers' compensation statutes have discussed evidence relating to the existence of ticks within the relevant region. *See, e.g., Montgomery* v. *Industrial Commission*, 173 Ariz. 106, 840 P.2d 282 (1992). In the case at bar, however, the Commission's conclusion was based not on any evidence of the ticks' range but instead upon "common sense." Although it is undoubtedly true that we will defer to the Commission's experience and knowledge when employed to make a finding based on the evidence before it, the Commission's exper-

tise is not evidence and cannot be substituted for evidence. *Lunsford* v. *Rich Mountain Electric Coop.*, 38 Ark. App. 188, 832 S.W.2d 291 (1992). Whether the Commission's supposition regarding the range of ticks was truly common sense or was instead mere speculation, it was clearly not evidence and should not be permitted to pass as such.

Second, the Commission's opinion implied that Lyme disease could not be an occupational disease because it was not limited to workers in a single occupation. This, however, is contrary to our prior holdings. In *Sanyo Mfg. Corp.* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984), we held that the fact that the general public may contract the disease is not controlling, and stated that the test of compensability is whether the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or by workers in other employments. Thus, although histoplasmosis is a disease to which the public at large is susceptible, it has been held to be an occupational disease for persons working in the vicinity of poultry houses. *Osmose Wood Preserving* v. *Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992). I submit that no reasoned distinction can be drawn between Lyme disease and histoplasmosis so as to require that these diseases, one borne by ticks and the other by poultry, should be treated differently under the occupational disease statute.

Finally, I disagree with the majority's affirmance on the ground that the Commission found that the appellant was exposed to the infecting tick other than at work. In fact, the Commission made no such finding, but instead merely stated that:

> However, testimony was offered that claimant had a yard that had to be sprayed for ticks on a weekly basis, was exposed to two dogs that had to be dipped for fleas and ticks twice a week and lived in a rural community.

The problem with the Commission's observation is that it is not a finding of fact, but merely a statement regarding what testimony was offered. Instead, a finding of fact is "a simple, straightforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so." *The Green House* v. *Arkansas*

Alcoholic Beverage Control, 29 Ark. App. 229, 780 S.W.2d 347 (1989).

I respectfully dissent.

MAYFIELD, J., joins in this dissent.

Antonia NOVAK *v.* J.B. HUNT TRANSPORT

CA 94-1019 892 S.W.2d 526

Court of Appeals of Arkansas
En Banc
Opinion delivered February 22, 1995

Appellant, pro se.

No response.

JOHN MAUZY PITTMAN, Judge. On June 13, 1994, appellant filed a timely notice of appeal from a decision of the Arkansas Workers' Compensation Commission. However, the record was tendered to the clerk of this court more than ninety days after the filing of the notice of appeal. The Clerk refused to file the record, and the appellant has filed a motion for an order requiring that it be filed.

In support of her motion, appellant states that on September 7, 1994, she phoned the Commission office regarding her appeal and advised that the $100.00 filing fee would be mailed to the Commission; that on September 8, 1994, she was notified by mail that the transcript had been certified; that on September 9, 1994, she phoned the Commission and confirmed that the filing fee was being mailed that day; that on September 12, 1994, the filing fee was received in the Commission office; and that the Commission routed the filing fee and the transcript to the clerk of this court on September 13, 1994, one day past the September 12, 1994, ninety-day filing deadline. We do not find these circumstances to be sufficient grounds to grant appellant's motion for a rule on the clerk.

As is required in other civil actions, the record on appeal from the Workers' Compensation Commission must be filed within ninety days from the filing of the notice of appeal. *Tribble* v. *Heartland Express & Credit General Insurance Co.*, 45 Ark. App. 124, 872 S.W.2d 86 (1994). The responsibility for seeing that the record on appeal is timely filed lies with the appellant or his attorney and cannot be shifted to the court appealed from or its staff. *Id.; Davis* v. *C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981); *see Evans* v. *Northwest Tire Service*, 21 Ark. App. 75, 728 S.W.2d 523 (1987). We have said that in civil cases the failure to discharge that responsibility is excused only by the "most extraordinary circumstances." *Davis* v. *C & M Tractor Co.*, 2 Ark. App. at 157-58, 617 S.W.2d at 386 (quoting *Thomas* v. *Arkansas State Plant Board*, 254 Ark. 997-A, 997-B, 497 S.W.2d 9, 10 (1973)). Subsequently, however, the supreme court has held that the timely filing of the record on appeal is jurisdictional and that it must dismiss an appeal where the record is not timely filed. *Morris* v. *Stroud*, 317 Ark. 628, 630, 883 S.W.2d 1, 2 (1994); *see Jordan* v. *White River Medical Center*, 301 Ark. 292, 783 S.W.2d 836 (1990).

Assuming, *arguendo*, that the most extraordinary of circumstances can still excuse a failure to file the record in a timely manner, we cannot find that any such circumstances have been presented in the case at bar. Unlike, for example, the "devastating Jonesboro tornado," which damaged the attorney's home and law office and which was found sufficiently extraordinary in *Thomas* v. *Arkansas State Plant Board, supra*, the appellant here simply waited to mail the check for her filing fee until a point in time so late that it was not even received by the Commission until the last day on which the record could be filed with our clerk.

Motion for rule on the clerk denied.

COOPER, MAYFIELD, and ROBBINS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. By a 3 to 3 vote this court has today denied the appellant's pro se motion for rule on the clerk. I think the motion should be granted, and I believe the prevailing opinion has missed the point involved and fails to recognize established precedent.

No response has been filed by the appellee, and the facts involved are not in dispute. The Arkansas Workers' Compensation Commission rendered an opinion on May 13, 1994, holding against appellant's claim for compensation. A notice of appeal had been filed on June 13, 1994, but on August 29, 1994, the Commission granted the request of appellant's attorney to withdraw as counsel. On September 8, 1994, the Commission notified by mail the appellant in Rogers, Arkansas, that the transcript in her case had been certified and was ready. The appellant, however, had telephoned the Commission office on the previous day to inquire about the matter and had said that the $100 filing fee would be mailed to the Commission office so that the record could be filed in the office of the clerk of the court of appeals. Appellant followed up on September 9, 1994, to confirm that the filing fee had been placed in the mail.

The clerk of the Commission filed an affidavit in this court stating that: "The $100 filing fee was received in the WCC office on September 12, 1994, and routed to the Fiscal Department. The Fiscal Department routed the filing fee to the Clerk [of this court] on September 13, 1994." Our clerk refused to file the record because he did not think it was timely filed.

Arkansas Code Annotated § 11-9-711(b)(1)(A) (1987) provides:

> The appeal to the Court of Appeals may be taken by filing in the office of the commission, within thirty (30) days from the date of the receipt of the order or award of the commission, a notice of appeal, whereupon the commission under its certificate shall send to the court all pertinent documents and papers, together with a transcript of evidence and the findings and orders, which shall become the record of the cause.

Although the prevailing opinion concedes that the notice of appeal was timely filed, the reason it was timely is not apparent, and I think it might be helpful to first consider that matter. Under the above statute the time to file the notice of appeal begins to run from the date of receipt of the Commission's order or award. In this case we do not know when the appellant received the Commission's decision. We do know, however, from the record tendered to our clerk for filing, that the notice of appeal was filed by an attorney from Fayetteville who was subsequently allowed by the Commission to withdraw from the case before the record was tendered to our clerk. Assuming that the Commission's decision was mailed on the date it was filed, May 13, 1994, it surely could not have been received before May 14, 1994, by either the attorney in Fayetteville or the appellant in Rogers. If received on May 14, the 30-day period in which to file the notice of appeal would expire at the end of the day on June 13; thus, the notice of appeal filed on that date was within time. This is the same reasoning applied in the similar case of *Ashcraft* v. *Quimby*, 2 Ark. App. 174, 617 S.W.2d 390 (1981).

However, even if we assume that the decision of the Commission was received by the appellant or her attorney on the same day it was filed in Little Rock — May 13, 1994 — the 30-day period would end on June 12, 1994. But that date fell on Sunday, and under Ark. R. Civ. P. 6(a) when computing any period of time prescribed by "these rules, by order of the court, or by any applicable statute," when the last day of the period falls on Sunday the period runs until the next day. Thus, the notice of appeal filed on Monday, June 13, 1994, was timely filed under Rule 6(a) as well as under our case of *Ashcraft* v. *Quimby*.

The real issue here is whether the record from the Commission was timely filed. In *Davis* v. *C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981), we were called upon to determine whether the 90-day time period provided in the Rules of Appellate Procedure applied to the filing of a record in an appeal from the Workers' Compensation Commission. We noted that this was a question that usually would be decided by the Arkansas Supreme Court but in appeals from agencies or commissions the case first comes to us, citing *Ward School Bus Manufacturing, Inc.* v. *Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977), and *Houston Contracting Co.* v. *Young*, 267 Ark. 44, 589 S.W.2d 9 (1979). We then discussed Acts 252 and 253 of 1979, which provided that appeals from the Arkansas Workers' Compensation Commission would go directly to the Arkansas Court of Appeals, and noted that Arkansas Supreme Court Rule 29 had the same effect. We concluded that the record on appeal from the Commission should be filed within 90 days from the filing of the notice of appeal as provided by Rule 5 of the Rules of Appellate Procedure. That decision was based on the fact that Act 252 of 1979 said that appeals to the Commission would be allowed as in other civil actions. While the Arkansas Supreme Court did not review our holding in *Davis* v. *C & M Tractor*, the holding has never been reversed by any opinion of that court. Therefore, although neither the 1979 Acts nor Ark. Code Ann. § 11-9-711(b)(1)(A) (1987) provided for a specific period in which the record from the Commission should be filed in the appellate court, this court continues to think it should be filed within 90 days from the filing of the notice of appeal.

In the present case the last day of that period would have been September 11, 1994. However, that day fell on Sunday and under Ark. R. Civ. P. 6(a) (which I have previously discussed) the time would run to Monday, September 12. But the record was not actually tendered until the 13th. This was because the filing fee, which was received by the Commission on the last day to file the record, was not "routed" to the office of the clerk of the court of appeals until September 13. (Our clerk actually noted on the record that it was tendered on September 14.)

Although we made it clear in *Davis* v. *C & M Tractor, supra*, that it is the duty of the appellant's attorney to see that the record is filed within time, we held that because the legislative acts pro-

viding for workers' compensation appeals to be decided by the court of appeals were new and had not been interpreted before, the motion for rule on the clerk to file the record after the 90-day period should be granted. We relied upon cases of the Arkansas Supreme Court for that holding and said our decision was "within the spirit" of those holdings, but we made it clear that records must be timely filed in the future. *See* 2 Ark. App. at 158, 617 S.W.2d at 386.

Later on, however, in *Evans* v. *Northwest Tire Service*, 21 Ark. App. 75, 728 S.W.2d 523 (1987), we allowed a record to be filed after the 90-day limit because the Commission had failed to complete the transcript of its proceedings in time for it to be filed in the appellate court within 90 days from the filing of the notice of appeal. We noted that there was no authority which specifically provided for a writ of certiorari to be issued to the Commission for it to complete the record and said, "under these circumstances, we have decided to grant appellant's motion [for a rule on the clerk] and are directing the clerk to file the transcript as the record in this case."

But in *Tribble* v. *Heartland Express*, 45 Ark. App. 124, 872 S.W.2d 86 (1994), we refused to allow a record to be filed where the Commission did not complete it until four days before the 90-day period expired. This was some eight years after the *Evans* case, and we pointed out that ever since that time a rule (now Arkansas Supreme Court and Court of Appeals Rule 3-5) had been in existence which would allow an appellant to file a copy of the order appealed from before the time to file the record expired and get a writ of certiorari issued to file the record. Because that solution to the problem had been in place for many years, but had not been used in the *Tribble* case, we refused to let the record be filed.

So, in the present case, because the question now before us has never been presented before, I would allow the record in this case to be filed. After all, Ark. Code Ann. § 11-9-711(b)(1)(A) (1987) specifically provides that the Commission "shall send" its record to the appellate court to be filed. The appellant actually put the filing fee in the hands of the Commission on September 12, 1994, and this was within the period to file the record. Although the principle is well established that it is the attorney's

responsibility to see that the appeal is properly perfected, there was no case at the time here involved that had specifically interpreted the attorney's responsibility under the circumstances in this case. Therefore, I do not think it would have been unreasonable for an attorney to have assumed that the filing fee should be furnished to the *Commission* for it to use in filing the record. Thus I think it is "within the spirit" of the Arkansas Supreme Court cases discussed in *Davis* v. *C & M Tractor Company, supra*, the *Davis* case itself, and our case of *Evans* v. *Northwest Tire Service, supra*, to allow the record to be filed in the present case.

There was some discussion in our conference on the question of whether the filing of the record is jurisdictional and, if so, how that would affect our decision here. To bring that point into focus, we need to go back to the passage of Act 555 of 1953. That act was compiled as Ark. Stat. Ann. § 27-2106.1 (Repl. 1979), and it required filing a notice of appeal and cross appeal but provided the "failure . . . to take any of the further steps to secure the review of the judgment or decree appealed from shall not affect the validity of the appeal or cross appeal but shall be grounds only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or cross appeal." Early on, the Arkansas Supreme Court gave clear effect to this provision.

In *West* v. *Smith*, 224 Ark. 651, 660, 278 S.W.2d 126 (1955), on rehearing, the court allowed a record to be filed after the 90-day period had expired and no extension had been obtained. The court said Act 555 was new and it would use its discretion, in the interest of justice, and allow other records to be filed late during a short period of time. Also in *Davis* v. *Ralston Purina Co.*, 248 Ark. 14, 449 S.W.2d 709 (1970), the court denied a motion to dismiss an appeal saying, "the filing of a notice of appeal is jurisdictional, but irregularities in the other procedural steps . . . are merely grounds for such action as this court deems appropriate." 248 Ark. at 17, 449 S.W.2d at 711. Again in *Gallman* v. *Carnes*, 254 Ark. 155, 492 S.W.2d 255 (1973), the court allowed a record to be filed out of time after Act 555 had been amended. The court said, "to avoid unnecessary hardship to litigants . . . we think it best to allow a short period of grace" before the new provisions would be "routinely applied." 254 Ark. at 157, 492 S.W.2d at 257.

Even after the "grace period" ran out, the court in *Bernard* v. *Howell*, 254 Ark. 828, 496 S.W.2d 362 (1973), recognized its "inherent discretion" to allow a record to be filed out of time, but there was no "unavoidable casualty" or even sufficient "exceptional circumstances" to grant a motion for rule on the clerk to file the record. However, in *Thomas* v. *Arkansas State Plant Board*, 254 Ark. 997-A, 497 S.W.2d 9 (1973), the court found the "devastating Jonesboro tornado" an unavoidable casualty which justified allowing the record to be filed late. Other cases which recognized that the filing of the record on time is not jurisdictional are cited in *Yent* v. *State*, 279 Ark. 268, 650 S.W.2d 577 (1983), which said: "Under Appellate Procedure Rule 5(b) and its predecessor, Act 555 of 1953, § 20, the trial court cannot extend the time for filing the record to a date more than 7 months after the entry of the judgment, *although this court may do so for compelling reasons, such as unavoidable casualty*." 279 Ark. at 268-69, 650 S.W.2d at 578. (Emphasis added.)

And in *Johnson* v. *Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986), the court again explained that its appellate court rule provides that "[t]he filing of a notice of appeal is jurisdictional, but irregularities in the other procedural steps . . . are merely grounds for such action as *this court* deems appropriate." 290 Ark. at 259, 718 S.W.2d at 437 (emphasis in the original). In addition, the case of *Burris* v. *Burris*, 278 Ark. 106, 643 S.W.2d 570 (1982), cited in *Johnson* v. *Carpenter*, involved the failure to file a notice of appeal within time and the court said:

> Appellant urges that we treat the failure as an unavoidable casualty, which we have done on occasion when the record was unavoidably tendered out of time. However, the rule of unavoidable casualty applies to the lodging of the record on appeal and *not* to the failure to file Notice of Appeal, the latter being jurisdictional.

Although the prevailing opinion appears to be troubled by language in *Morris* v. *Stroud*, 317 Ark. 628, 883 S.W.2d 1 (1994), *Jordan* v. *White River Medical Center*, 301 Ark. 292, 783 S.W.2d 836 (1990), and *DeViney* v. *State*, 299 Ark. 471, 772 S.W.2d 607 (1989), these cases were not concerned with the *appellate court's* jurisdiction to extend the time for filing the record. They involved only the *trial court's* authority to extend the time. Therefore,

these cases are not authority for holding that failing to file a record affects the appellate court's jurisdiction. Rule 3 of the current Rules of Appellate Procedure has superseded Ark. Stat. Ann. § 27-2106.1, *see* Reporter's Notes (4), but Rule 3(b) still contains the language of Act 555 of 1953, which was compiled as Ark. Stat. Ann. § 27-2106.1, that "an appeal shall be taken by filing a notice of appeal" and the failure to take further steps "shall not affect the validity of the appeal or cross appeal, but shall be ground only for such action as the appellate court deems appropriate."

Even if it is arguable that the filing of the record is jurisdictional, there is no question but what the Arkansas Supreme Court has authority to allow a record to be filed out of time. In *West* v. *Smith, supra*, even Justice McFadden who wrote the majority opinion, which was reversed on rehearing, said, "It is not to be doubted that under our inherent constitutional power, this court could, in a most exceptional case, allow a record to be filed after the time fixed." 224 Ark. at 656, 278 S.W.2d at 130. Thus, it is not necessary for the court of appeals to pick between the "inherent constitutional power" recognized by Justice McFadden in *West* v. *Smith* or the view taken in that case by Justice George Rose Smith that timely filing of a notice of appeal is the *only* jurisdictional requirement in the procedural process of perfecting an appeal. Under either theory I think it proper to allow the record in the present case to be filed. While I do not claim that we have all of the "inherent constitutional power" possessed by the Arkansas Supreme Court, under the appellate procedure now in effect, there is no way for our supreme court to exercise its power in this case until we have passed on the motion presented.

The prevailing opinion appears to miss the point when it states there are no extraordinary circumstances in this case which calls for us to excuse the failure to file the record within 90 days after the notice of appeal was filed. The point here is that the statutory provision which states that the Commission shall send the record to the appellate court has not been previously interpreted with regard to whether the filing fee should be furnished to the Commission or paid directly to the appellate court. The appellant, acting pro se, sent the fee to the Commission. It was received by the Commission within the 90 days for filing of the record. The Commission, however, failed to take the record and

the fee to the court the day the fee was received. As was done by the Arkansas Supreme Court in *West* v. *Smith, supra*, and the court of appeals in the *Davis* and *Evans* cases, *supra*, I think we should allow the record to be filed late in the present case. Not because of an extraordinary circumstance, but because of an understandable failure to do what the law did not specifically say to do, and because we have the power and authority to exercise some compassion in a situation not unlike those in which compassion has been exercised before by both of the appellate courts of this state.

I feel, as Justice Smith said in *West* v. *Smith*, that it is "repugnant" to one's sense of justice to dismiss a case without a decision on its merits. It is also regrettable that we have not allowed the record to be filed in this case where the appellant is not represented by an attorney because an attorney would know that a 3 to 3 vote here is grounds for the Arkansas Supreme Court to review our decision and would know how to ask for that review.

I dissent from this court's refusal to grant appellant's motion for a rule on the clerk, and I am authorized to state that Judges Cooper and Robbins join in this dissent.

Julio BERNAL *v.* STATE of Arkansas

CA CR 93-1378 892 S.W.2d 537

Court of Appeals of Arkansas
Division II
Opinion delivered February 22, 1995

Robert A. Newcomb, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Acting Deputy Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of possession of marijuana with intent to deliver and sentenced to six years in the Arkansas Department of Correction. On appeal, he argues that his motions to suppress should have been granted because he was detained in violation of his rights under the Fourth Amendment to the United States Constitution and because he was not advised of his *Miranda* rights prior to making a statement to the police. We affirm.

At the suppression hearing, Robert Wortham, a narcotics detective for the City of Little Rock, testified that on September

14, 1992, he was monitoring passenger activity at the bus station in North Little Rock for narcotics trafficking. He testified that he used his narcotics detecting dog to search a bus that arrived at 9:00 a.m. from Dallas. He stated that the dog indicated that two suitcases on the bus, one blue and one black, contained narcotics. He testified that there was no identification on the exterior of either bag and that he and Agent Boyce, a DEA officer, identified themselves to the passengers and attempted to ascertain the owners of the suitcases. When the officers were not able to identify the owners, the driver of the bus asked the passengers to exit the bus with their luggage. Detective Wortham and Agent Boyce re-entered the bus and found the two bags remaining on the bus. Detective Wortham opened the blue bag and found seven bundles of green vegetable material later determined to be marijuana. He discovered two more large bundles of marijuana in the black bag. He testified that he then exited the bus with the bags, entered the bus station, and observed Border Patrol Agent Graham speaking with the appellant.

Randy Graham, a United States Border Patrol Agent, testified that he witnessed the appellant and Mr. Benito Salinas, the appellant's codefendant, exit the bus that arrived from Dallas. He stated that he noticed the appellant and Mr. Salinas intently watching Detective Wortham work the bus with the narcotics dog. He testified that Detective Wortham exited the bus and informed him that he had found a "hot bag," meaning one identified as containing narcotics. Agent Graham stated that he then observed the appellant and Mr. Salinas leave the bus terminal, walk down the street, have a discussion, and return to the bus station. Agent Graham subsequently approached the appellant and identified himself. He spoke to the appellant in Spanish and asked to see the appellant's bus ticket. The appellant informed him that he did not have one. He then asked the appellant for his identification and was given an alien identification card. Agent Graham testified that he noticed two small keys in the appellant's wallet when the appellant removed his identification card. He stated that he asked the appellant what the keys were to and the appellant responded they were to his suitcase on the bus. He stated that Officer Wortham then walked through the terminal carrying the blue and black suitcases containing marijuana and that the appellant identified the black suitcase as belonging to him.

He stated that the appellant identified the other suitcase as belonging to Mr. Salinas. Agent Graham then read the appellant his *Miranda* rights and placed him under arrest. He testified that the set of keys in the appellant's possession opened the black suitcase. He further testified that the appellant was free to leave and that he made no attempt to restrain him until the appellant indicated that he owned one of the bags containing marijuana.

The appellant testified that he was attempting to purchase coffee after exiting the bus when an officer approached him and told him to place his hands on the wall. He stated that the officer asked him for his wallet and he told the officer that he wanted an attorney. He testified that the officer then took his wallet from him and took his identification card out of his wallet. The appellant stated that when he was allowed to turn around, the officer shoved some keys at him which did not belong to him. The appellant also testified that he did not have a suitcase.

Benito Salinas testified that when he exited the bus, Officer Wortham spoke to him and took his bus ticket. He stated that the officer asked if he had a suitcase and he responded that he did not have any luggage. Mr. Salinas testified that the officers never grabbed or touched him, although the officers did grab the appellant. He further testified that the officers threatened to take away their green cards if they did not talk to or cooperate with them.

The appellant first argues that his motions to suppress should have been granted because he was detained in violation of the Fourth Amendment. The evidence the appellant sought to suppress consisted essentially of the black suitcase containing marijuana and his statement to Agent Graham in which he admitted ownership of the black suitcase.

In reviewing a trial judge's decision on a motion to suppress, this Court makes an independent determination based on the totality of the circumstances, and we reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Ward* v. *State*, 308 Ark. 415, 827 S.W.2d 110, *cert. denied* 113 S.Ct. 124 (1992). A motion to suppress evidence should be granted only if the Fourth Amendment violation was substantial. Ark. R. Crim. P. 16.2(e).

We first note that the appellant testified at the suppression hearing that he did not have a suitcase. The protection of the Fourth Amendment guarantees the right of people to be secure against unreasonable searches and seizures. The rights secured by the Fourth Amendment are personal in nature. *Rakas* v. *Illinois*, 439 U.S. 128 (1978). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Id.; Littlepage* v. *State*, 314 Ark. 361, 863 S.W.2d 276 (1993). A defendant's right to challenge a search and seizure as being violative of the Fourth Amendment is based upon the existence of a legitimate expectation of privacy. *Rabun* v. *State*, 36 Ark. App. 237, 821 S.W.2d 62 (1991). In *Rakas, supra*, the Supreme Court made it clear that a defendant can have a reasonable expectation of privacy in the area searched, or object seized, if he can show a possessory interest therein. *See State* v. *Villines*, 304 Ark. 128, 801 S.W.2d 29 (1990).

Here, the appellant denied ownership or possession of the suitcase. Thus, he failed to establish that he had an expectation of privacy in the suitcase and had no standing to challenge the search and seizure of it on Fourth Amendment grounds. Moreover, when one abandons an article, he abandons any right under the Fourth Amendment. *See Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989); *Wilson* v. *State*, 297 Ark. 568, 765 S.W.2d 1 (1989).

We also find that the appellant's statement to Agent Graham was not a product of an illegal detention. Not all personal intercourse between policemen and citizens involve "seizures" of persons under the Fourth Amendment. *Thompson* v. *State*, 303 Ark. 407, 797 S.W.2d 450 (1990); *Rabun* v. *State, supra.* A person has been seized within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *United States* v. *Mendenhall*, 446 U.S. 544 (1980). If there is no detention — no seizure within the meaning of the Fourth Amendment — then no constitutional rights have been infringed. *Florida* v. *Royer*, 460 U.S. 491 (1983); *Rabun* v. *State, supra.*

Arkansas Rule of Criminal Procedure 2.2(a) authorizes a police officer to request a person to furnish information by answer-

ing questions regarding the investigation of a crime. The appellant relies on *Meadows* v. *State*, 269 Ark. 380, 602 S.W.2d 636 (1980), in which the court found Rule 2.2 inapplicable to the facts where police officers detained persons who acted suspiciously. However, *Meadows* can be distinguished from the case at bar in that the officers in *Meadows* were not requesting information in the course of a criminal investigation.

Here, Agent Graham testified that he had been alerted by Officer Wortham that narcotics had been found on the bus. Agent Graham stated that he spoke to the appellant in the bus terminal, a public place. He testified that the appellant agreed to speak to him and that he made no attempt to restrain the appellant in any way. The appellant and Mr. Salinas testified that the officers detained and threatened them; however, conflicts in testimony are for the trial judge to resolve, and the judge is not required to believe any witness's testimony, especially the testimony of the accused since he is the person most interested in the outcome of the proceedings. *Ross* v. *State*, 300 Ark. 369, 779 S.W.2d 161 (1989). Under the facts in the case at bar, we cannot conclude that this was a "seizure" within the meaning of the Fourth Amendment.

The appellant next argues that his statement to Agent Graham should have been suppressed because the officer did not advise him of his *Miranda* rights prior to questioning him. However, the *Miranda* warning is not required unless the statement is a result of a custodial interrogation. *Ward* v. *State, supra. Miranda* warnings are not required if the questioning by police is simply investigatory. *Cook* v. *State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992). To determine whether or not one has been subjected to custodial interrogation so as to require the giving of *Miranda* warnings, our Supreme Court in *Shelton* v. *State*, 287 Ark. 322, 699 S.W.2d 728 (1985), set forth the following test:

> It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

287 Ark. at 328-29, 699 S.W.2d at 731 (quoting *Berkemer* v. *McCarty,* 468 U.S. 420 (1984)).

We do not think the circumstances here are such that the appellant would have been justified in the belief that he was in custody and thus, we cannot find that the statement was a product of a custodial interrogation so as to warrant its exclusion.

Affirmed.

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

Benjamin Brigham BALDWIN *v.* STATE of Arkansas

CA CR 93-1283 892 S.W.2d 534

Court of Appeals of Arkansas
Division I
Opinion delivered February 22, 1995

Brenda Horn Austin, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant Benjamin Brigham Baldwin was found guilty by a jury of the felonies of robbery and criminal mischief and misdemeanor criminal assault in the first degree. He was sentenced to five years for robbery and three years for criminal mischief in the Arkansas Department of Cor-

rection, to be served consecutively. The misdemeanor punishment was merged with the felony sentences. On appeal the appellant challenges the sufficiency of the evidence only as to the conviction of robbery.

At trial, Iretha Jordan testified that she works with her husband in his accounting business. Between 6:30 and 7:00 p.m. on February 19, 1993, they drove to a mall in Fayetteville, Arkansas, to eat at Luby's. Mrs. Jordan's husband has had one leg amputated and since there were no handicapped parking spaces open, Mrs. Jordan dropped her husband at the mall entrance and went to park the car. The driveways of the parking lot had been cleaned, and snow was piled up in the parking places. Mrs. Jordan said she pulled into a spot and kept trying to push into the snow bank a little further so the rear of her Cadillac would not stick out so far.

Mrs. Jordan testified that when she started to open the door on the driver's side of the car, it just opened. She described the events that followed.

> And of course that startled me and I looked around and here was this young man leaning down. . . . He didn't look bad; he looked nice. . . . And he said, "Ma'am, this is a carjacking, move over." And I was just sick; just a sick went over me because I knew what a carjacking was. . . . Well, I thought to myself — I thought, you know, "Get somebody else." You know, my husband's standing up there waiting on me. He's disabled. My mother's almost eighty years old. I take her to the doctor and to the store. I take care of her. And you just can't — I can't have this happen to me, you know. And then I realized — So then I just said, "Oh, please," and I just threw up my hands like that, "Please." . . . [H]e says, "Ma'am, I'm not gonna hurt you, I just want your car." Well, while he's saying that, I'm looking right at him saying (nodding head) — I don't answer but (nodding head) — And then he says, "But you're gonna have to move over." . . .

Mrs. Jordan explained to the jury that appellant had a long, dark duffle bag which he was holding so that it blocked her exit from the car. She said she had resolved in her mind that she was not going to move over and she was not going with the man. She began to honk the horn. She said:

> And of course he just like this jumps back like this, you know, and he grabbed my hand and jerked it off the horn and then there was just a — I don't even know how to describe it as far as — as soon as he moved, I moved and we both started — he started trying to get in the car with his duffel bag and everything and I'm trying to get out. I mean, when I — when I honked the horn it stopped that and that was it, you know, and I figured he would run away. Well, I didn't really figure, but, I mean, I just thought, "Someone will hear this horn." But I just honk, honk, honk, honk. So he grabbed my arm, jerked it off the horn and then I started climbing out and he started climbing in. And, I mean, we just — somehow he got in and somehow I got out. Now, I don't know — I realize that on the — when I talked to the 9-1-1 people that I said he pulled me out of the car. And I'll just be honest, all I know is I got out and he got in and we did it at the same time.

Mrs. Johnson was then asked:

> Q. Did he put any physical force on you while trying to get in there?
>
> A. Just when he pulled my hand off the horn.
>
> Q. And when you all were — he was attempting to get inside the car and you were attempting to get out, was there any bodily impact there?
>
> A. Well, just us — him crawling in and me crawling out.
>
> Q. Was his body rubbing against yours? . . .
>
> A. Well, we just — yeah, we had to touch. . . . [I]f you've ever traded places in the car when you're driving or, you know, when you're riding along, you just kind of scoot over each other some way.

Appellant took the car and drove out of the parking lot. He subsequently lost control of the Cadillac and drove into a snow bank and ditch on the side of the road, where he was apprehended by police officers who had been following him.

Appellant testified that he had broken up with his girlfriend in Ohio and had caught a bus to Fayetteville. When he arrived

he called his father, who wouldn't talk to him. Brock Baldwin, appellant's brother, testified that because of the snow he could not get out to pick up appellant, so appellant stayed in the lobby of a hotel overnight. The next day around noon, according to appellant's brother, he and his father went to the hotel. He said he hugged appellant but his father rejected appellant. However, appellant's father did give appellant some money and they dropped him off at the Northwest Arkansas Mall, where he could stay warm.

Appellant testified that his dad gave him $30 which he drank up in a bar. He said he was extremely drunk; he did not remember using the word "carjacking" to Mrs. Jordan, but he did remember telling her he needed her car; and he also remembered her honking the horn and that she got out and he got in. Appellant denied that he bumped into Mrs. Jordan getting into the car or that he threatened her. On cross-examination appellant denied jerking Mrs. Jordan's arm off the horn or preventing her from leaving her vehicle.

Arkansas Code Annotated Section 5-12-102 (Repl. 1993) defines robbery as follows:

> (a) A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.
>
> (b) Robbery is a Class B felony.

Physical force is defined by Ark. Code Ann. § 5-12-101 (Repl. 1993) as "any bodily impact, restraint, or confinement or the threat thereof." Appellant asserts that at trial Mrs. Jordan testified clearly that appellant told her several times that he would not hurt her, and in a statement prior to trial she admitted that he did not touch her, hurt her or threaten her in any way. He agrees that Mrs. Jordan testified that appellant "pulled" her hand off the horn, but he contends this is inadequate bodily contact to support the robbery conviction.

Appellant cites *Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985); *Jarrett* v. *State*, 265 Ark. 662, 580 S.W.2d 460 (1979); *Parker* v. *State*, 258 Ark. 880, 529 S.W.2d 860 (1975); and *Scott* v. *State*, 27 Ark. App. 1, 764 S.W.2d 625 (1989), as examples of

what has been held to be sufficient "bodily impact" to constitute physical force. Appellant argues that these cases show that to support a robbery conviction the State must prove "intentional" physical contact with the intent to threaten the victim or resist apprehension. He argues that here there was no intentional physical contact with Mrs. Jordan, he did not threaten or use force on her and that no harm came to her. He contends this was a case of "theft not robbery."

In *Thompson* v. *State*, appellant had been observed in a store placing four new towels in her large purse. A security guard observed this from an observation booth and went to apprehend appellant. She identified herself as a security guard and asked appellant to go with her to the security office. At that time, appellant unzipped her purse, started throwing out the towels, and began yelling, cursing, and hitting the security guard. This evidence was held to be sufficient to support a conviction for robbery. The conviction was reversed, however, on other grounds.

In *Jarrett* v. *State*, an officer was attempting to handcuff appellant when appellant broke away, tried to run, and the officer and appellant started to fight. Appellant continually tried to get away from the officer by pushing and knocking the officer away from him. The fight ended when the officer's gun accidentally discharged. The court found appellant's conduct in resisting apprehension by employing or threatening to employ physical force upon the officer to be adequate to support the conviction. 265 Ark. at 664-65, 580 S.W.2d at 461-62.

Parker involved a purse snatching. The victim said that when someone attempted to grab her purse she "put up a fight," the robber hit her in the face with enough force to knock her down and the purse was simultaneously "yanked" from her with force sufficient to break the purse strap. It was held that this evidence was sufficient to support the conviction for robbery. 258 Ark. at 884-85, 529 S.W.2d at 863.

In *Scott* v. *State*, a store security officer attempted to speak to appellant about a new coat he appeared to be carrying out of the store and a tie he had placed in the pocket of the coat. The appellant broke away from the security officer and swung his right arm, striking the officer with enough force to knock him down. Appellant then ran out of the store with the coat and tie,

jumped into a car and sped away. We held that, although the altercation in *Scott* was not as violent as the one in *Jarrett*, striking the officer with enough force to knock him down constituted physical force as defined by statute as "bodily impact, restraint, or confinement or the threat thereof." 27 Ark. App. at 4, 764 S.W.2d at 627.

Other cases are also revealing. In *Fairchild* v. *State*, 269 Ark. 273, 600 S.W.2d 16 (1980), appellant had been convicted of aggravated robbery. The appellate court found insufficient evidence of aggravated robbery but sufficient evidence to support a conviction of robbery. The court stated, "Although appellant first contends that there was insufficient evidence to show that he employed physical force against Mrs. Calva, we find that jerking the door from her, cornering her in the back hallway and grabbing her dress is sufficient restraint and bodily impact to constitute physical force." 269 Ark. at 275, 600 S.W.2d at 17.

In *Turner* v. *State*, 270 Ark. 969, 606 S.W.2d 762 (1980), the appellant and two other boys had blocked the path of a legally blind woman and her husband, who also had impaired vision and was crippled and using crutches, and demanded their money. When the woman took her billfold from her pocket, appellant grabbed her wrist, causing her to release her hold on the billfold, snatched her rain bonnet out of her pocket, and a second boy grabbed her husband's tobacco can from his hip pocket. The Arkansas Supreme Court held that the appellant's actions in obstructing the couple's path and seizing the woman's wrist with sufficient force to cause her to release her billfold, in light of the couple's helplessness, constituted sufficient force to accomplish its purpose and amounted to robbery. 270 Ark. at 970-71, 606 S.W.2d at 763.

We think that the "jerking" of Mrs. Jordan's hand from the horn, blocking her exit from the car with the large, long duffle bag, and the contact of their bodies as she got out of the car and he got into the car was adequate "bodily impact" to support the robbery conviction.

Affirmed.

ROBBINS and ROGERS, JJ., agree.

Ward BOONE *v.* Jim ARMISTEAD

CA 94-271 892 S.W.2d 531

Court of Appeals of Arkansas
Division I
Opinion delivered February 22, 1995

Davis & Cox, by: *James O. Cox*, for appellant.

Skinner Law Firm, by: *Jack Skinner*, for appellee.

MELVIN MAYFIELD, Judge. Ward Boone has appealed from an order of the chancery court which held that two judgments he held against appellee Jim Armistead should be satisfied of record.

On December 30, 1992, appellee filed a complaint to compel entry of satisfaction of two judgments. The appellee alleged that on March 20, 1985, the parties entered into an agreement in which the appellant agreed to satisfy two judgments against the appellee (one for $49,547.83 and one for $12,808.07) in consideration of the transfer of certain real property; that the appellee fully performed his obligations under the agreement; and that the appellant failed to satisfy the judgments.

On January 15, 1993, the appellant filed an answer in which he denied that the appellee had fully performed his obligations under the agreement. The appellant admitted the conveyance of title of the property, but alleged appellee, in addition to conveying the title, was to install sewer and water service to the property but never did so.

At a hearing held November 2, 1993, Jerry Solesbee, a home builder and plumber, testified that in March 1985 the appellee traded a piece of property, owned by Solesbee, to the appellant for a debt the appellee owed to the appellant. Solesbee said the appellee asked him to work something out with Solesbee and

Solesbee agreed. Solesbee also testified that on March 21, 1985, the appellant, the appellee, Solesbee, and Solesbee's wife "sat down at the house and swapped money for the deed on that piece of property on El Paso Street."

Solesbee testified that at the time the deed changed hands the appellee said they needed a release before they let the appellant have the deed but appellant said all he had to do was make a call and he would do that "as soon as we get our deal done." Solesbee said that appellant called his attorney and instructed him to fix a release for the appellee and then Solesbee gave appellant the deed. Solesbee testified further there was nothing mentioned about a partial release. Solesbee testified that he received $19,000, $6,000 from the appellant and the balance from the appellee; that appellant received the deed; but that the appellee did not receive the release. The deed was executed March 20, 1985, and filed of record March 21, 1985.

The appellee Jim Armistead testified that his agreement with the appellant was that he would trade land and building on El Paso street for a complete and total release of the judgments against appellee; that the total deal was that they would swap the property for the total judgment; and that he never heard anything about a partial release before filing this suit. Appellee said that prior to March 20, 1985, there were no discussions about hooking up water and sewer on the property and that on March 21, 1985, the money and deed changed hands.

The appellee also testified that there was some discussion about giving the appellant the deed before appellee got the release, but appellant called his attorney and told the appellee he could go to the attorney's office that evening and pick up the release. The appellee said he went by and the release was not ready, but the appellant's attorney told him not to worry, he knew it was all satisfied. Appellee testified that he first heard about the water and sewer two weeks later when appellant called and said he needed another $500 to run water and sewer to the building. The appellee said he told the appellant he didn't have $500 and that they satisfied "that thing and there was nothing to do about the water and the sewer."

The appellant testified that in 1985 the appellee offered him Solesbee's building as "partial" settlement; that there were other

terms in the agreement; that there was never an agreement to satisfy the judgments in full; and that on the date of the transfer "they" assured him that water and sewer would be put in. However, the appellant said, in 1988 he installed the water and sewer.

Appellant also testified that he did not know whether he made the demand regarding water and sewer before he received the deed, but it was during discussion at the closing between the three of them. He said it had not been brought up before, but while they were sitting at the table appellee agreed to put in the sewer and water, so appellant went ahead with the deal with the understanding that the sewer and water would be hooked up.

In an order entered November 16, 1993, the chancellor found there was an agreement between the parties to satisfy both judgments against the appellee and, in keeping with the agreement, the appellant paid $6,000 and the appellee paid $19,000 to secure the transfer of certain property to the appellant in full and final satisfaction of the two judgments. The chancellor also found that on the day of the transfer the parties agreed that the appellee would be responsible for installing water and sewer to the property; that the appellant had paid $1,161 to install the water and sewer; that the appellee owed appellant that amount plus an attorney's fee of $200; and if the appellee paid the amount due by November 5, 1993, an entry of full and final satisfaction of the judgments should be entered. The chancellor also found that the entire sum was paid on November 4, 1993; therefore, the two judgments had been fully paid and satisfied; and the Clerk of the Court was directed to enter a satisfaction of record of the judgments.

On appeal, appellant argues that the trial court erred in ordering the satisfaction of the judgments because the appellee failed to fully satisfy the agreement by failing to put in the sewer and water.

■■ An accord and satisfaction generally involves a settlement in which one party agrees to pay and the other to receive a different consideration or a sum less than the amount to which the latter is entitled. *Hardison* v. *Jackson*, 45 Ark. App. 49, 871 S.W.2d 410 (1994). The defense of accord and satisfaction presents an issue of fact and the appellee had the burden of proving accord and satisfaction. *Holland* v. *Farmers & Merchants*

Bank, 18 Ark. App. 119, 711 S.W.2d 481 (1986). On appeal, chancery cases are tried de novo on the record, but the appellate court will not reverse the findings of the chancellor unless they are clearly erroneous or clearly against the preponderance of the evidence. *Hardison* v. *Jackson, supra.*

Here, Jerry Solesbee testified that appellant was to receive a deed to the piece of property and the appellee was to receive a release for the judgments owed the appellant and that there was nothing mentioned about a partial release.

The appellee testified that the total deal was that they would swap the property for the total judgment; that he never heard anything about a partial release before filing his complaint to compel entry of satisfaction of judgment; that there were no discussions about hooking up water and sewer on the property prior to March 20, 1985; and that on March 21, 1985, the money and deed changed hands at Solesbee's house.

The appellant testified that he did not know whether he made the demand for water and sewer before he received the deed but that appellee agreed while they were sitting at the table at the house.

Under the evidence in this case, we think that the chancellor could have found that there were two separate agreements. One in which appellant was to receive a deed to the property in satisfaction of the debt, and another under which appellee was to install water and sewer to the property. Therefore, we do not find the chancellor erred in ordering satisfaction of the judgments.

In regard to appellant's argument that if part of the consideration agreed upon in an accord and satisfaction is not paid the whole accord fails, it is true that generally an accord and part performance will not constitute satisfaction. *General Air Conditioning Corp.* v. *Fullerton*, 227 Ark. 278, 298 S.W.2d 61 (1957). However, one may take such action, or accept such benefits, as to place it out of his power to abandon the contract of compromise, in which event his remedy is to sue on the agreement of compromise for damages for the part that remained unperformed. *St. Louis Southwestern Railway Co.* v. *Mitchell*, 115 Ark. 339, 171 S.W. 895 (1914). Where the discrepancy between the

performance and the accord is trivial, the general rule is reasonably applied. 1 Am. Jur. 2d *Accord and Satisfaction* § 49 (1994). Therefore, even if the chancellor had not found there were two separate agreements, we could not say, under the evidence here, that the chancellor erred in ordering satisfaction of the judgments.

Affirmed.

ROGERS and ROBBINS, JJ., agree.

Troy LAROE *v.* Linda LAROE

CA 94-212 893 S.W.2d 344

Court of Appeals of Arkansas
Division I
Opinion delivered February 22, 1995

David H. McCormick, for appellant.

Bullock & Van Kleef, by: *John D. Van Kleef*, for appellee.

JUDITH ROGERS, Judge. This case results from a judgment of the Yell County Chancery Court that awarded appellee $8,115.00 in child support arrearages. Appellant argues that the chancellor erred in not applying Ark. Code Ann. § 9-14-237 to the facts of this case and in not finding appellee was barred by laches and the doctrine of unclean hands from seeking judgment. We find no error and affirm.

Appellant, Troy Laroe, and appellee, Linda Laroe, were divorced by a decree dated 1980. Appellee was awarded custody of the parties' four minor children, and appellant was ordered to pay child support at the rate of $55.00 per week. In May 1993,

appellee petitioned the chancery court to hold appellant in contempt for his failure to pay support in the amount of $28,860.00 for the years 1984 through 1993. Appellee filed a second petition, which requested that the delinquent child support be reduced to judgment. Appellant answered, denying that he was delinquent in the amount sought by appellee and raised the statute of limitations, estoppel, and unclean hands as defenses to appellee's petition. Appellant also requested that his duty to pay support be terminated, alleging that the parties' children had reached the age of majority.

After a hearing on the parties' petition, the chancellor awarded appellee judgment in the amount of $8,115.00 for past due child support and attorney's fees of $800.00. In awarding appellee judgment, the chancellor held that appellee was barred from collecting any delinquent child support that accrued prior to May 12, 1988, because of the applicable five-year statute of limitation, and that appellant's duty to pay support terminated on May 29, 1991, when the parties' youngest child graduated from high school. The chancellor concluded that appellant owed support from May 12, 1988, to May 29, 1991, which computed to a three-year, two-week period, and multiplied this period times the rate of $55.00 per week to arrive at a total delinquency of $8,690.00. The chancellor reduced this amount by $575.00 based on payments he found that appellant had made outside the registry of the court during this period.

Appellant first contends the chancellor erred in not applying Ark. Code Ann. § 9-14-237 (Repl. 1993) to the facts of the case. This statute basically provides that an obligor's duty to pay child support for a child automatically terminates by operation of law when the child reaches eighteen years of age. Appellant contends that, if the court had followed this procedure as required by this statute, his arrearages would have been only $4,251.00.

We find no merit to this argument. Appellee filed her petition on May 11, 1993; § 9-14-237 did not become effective until August 13, 1993, and therefore was not applicable to this case. Moreover, even if it had been applicable, appellant would not have been allowed to adjust his child support as each child reached majority. Section 9-14-237(b)(1) and (2) provide:

> (b)(1) If the obligor has additional child support obligations after the duty to pay support for a child terminates, the court shall reassess the remaining obligations using the family support chart pursuant to § 9-12-312(a)(2).
>
> (2) In the event a review is requested, the court shall apply the family support chart for the remaining number of children from the date of the termination of the duty, subject to any changed circumstances, which shall be noted in writing by the court.

Appellant at no time petitioned the court to reduce his child support obligation until appellee sought judgment for the accrued arrearage. Arkansas Code Annotated § 9-14-234 (Repl. 1993) prohibits the modification of child support orders which retroactively affect the time period before the petition for modification was filed and proper notice given to the opposing party. *Grable* v. *Grable*, 307 Ark. at 414; *see also Burnett* v. *Burnett*, 313 Ark. 599, 604, 855 S.W.2d 952 (1993).

We also disagree with appellant's argument that the chancellor erred in giving appellee judgment for accrued child support through May 1991. He contends that the parties stipulated that their youngest child, Larry, graduated at the age of eighteen in 1990. At trial, however, appellee testified that one correction needed to be made to the parties' stipulation, which was that Larry graduated in 1991 and not 1990 as shown on the stipulation. Appellant has not abstracted anything showing that he objected to this correction being made at the hearing, nor did he dispute the statement that Larry graduated in May 1991. The chancellor found that the parties' youngest child graduated high school in May 1991, and we cannot say his finding in this regard is clearly erroneous. The appellate court affirms factual findings of the chancellor unless they are clearly erroneous. *Helms* v. *Helms*, 317 Ark. 143, 144, 875 S.W.2d 849 (1994).

For his second point, appellant contends the chancellor should have held that appellee's claim to child support arrearages were barred by laches and the doctrine of unclean hands. In support of his laches defense, appellant claims that he was prejudiced by appellee's delay in seeking judgment for child support arrearage because he no longer has the records to show the child support payments he made outside the registry of the court.

We first note that, although appellee sought judgment for child support arrearage since 1984, the chancellor barred her claim to support before May 1988. Appellee has not cross-appealed this holding; therefore, we need not address it except to dispute appellant's argument that the time-frame included ten years. Furthermore, the supreme court has held that the mere fact that the appellant delayed eleven years in pursuing her right to obtain judgment for child support arrearage will not defeat her right to accrued support. *See Cunningham* v. *Cunningham*, 297 Ark. 377, 379, 761 S.W.2d 941 (1988).

Appellant also claims the court should have denied appellee judgment under the "clean hands doctrine" because her former husband claimed the parties' children as dependents for obtaining social security benefits. The purpose of invoking the clean hands doctrine is to protect the interest of the public on grounds of public policy and for the protection of the integrity of the court; consequently, application of the doctrine depends on the chancellor's discretion as to whether the interests of equity and justice require application of the doctrine. *Grable* v. *Grable*, 307 Ark. at 415-16. As in *Grable*, here, the chancellor was in a better position to determine the facts and weigh the parties' competing interests. Appellant has not produced any evidence to show that the chancellor abused his discretion in declining to estop appellee from seeking judgment for the child support arrearage.

Accordingly, the judgment is affirmed.

ROBBINS and MAYFIELD, JJ., agree.

CITY OF FORT SMITH *v.* Maril L. FINDLAY,
Debbie L. Findlay, and Simmons First Mortgage Corporation

CA 93-1391 893 S.W.2d 358

Court of Appeals of Arkansas
Division I
Opinion delivered March 1, 1995
[Rehearing denied April 5, 1995.]

Dailey, West, Core, Coffman & Canfield, by: *Robert W. Bishop*, for appellant.

Sam Sexton, Jr., for appellees.

JOHN B. ROBBINS, Judge. This appeal involves an eminent domain action in which the jury awarded Maril and Debbie Findlay, appellees, $14,000.00 for the partial taking of their residential property in Fort Smith, Arkansas. Appellant raises seven points on appeal, three of which concern structural damage to appellees' house that appellees contend was caused by appellant's excavation. Because we agree with appellant that the jury was improperly allowed to consider the structural damage in awarding damages to appellees, we reverse and remand for a new trial.

In 1991, the City of Fort Smith, appellant, condemned a 4 1/2-foot-wide strip of appellees' property for drainage purposes. This strip was adjacent to an existing drainage easement which was located along the side and to the rear of appellees' lot. Appellant also acquired a temporary easement across appellees' driveway for construction purposes. Appellant deposited $985.00 for the taking, which it contended was the estimated compensation due appellees. Appellees answered and counterclaimed, stating that the actual value of the taking was $30,000.00 to $35,000.00.

The construction of the drainage project included excavation on appellees' property so that the city could install three 8-by-4-foot concrete box culverts. Appellees contended at trial that this excavation was eight feet deep and occurred within thirty inches of their house, causing the temporary loss of lateral support to their house, which, in turn caused the foundation of their house to separate from the wall. Appellees argued that this struc-

tural damage should be considered in determining the difference between the value of their property before the taking and the value after the taking, and an instruction was given and evidence admitted to that effect over appellant's objection. Appellant contended that these damages were not compensable, moved for a directed verdict, and objected to a jury instruction and the admission of any evidence concerning any alleged damage to appellees' house. The court, however, denied appellant's motions and overruled its objections. The jury then awarded appellees $14,000.00 in damages.

We first address appellant's points related to its argument that the trial court erred in allowing the jury to consider the alleged structural damage to appellees' house in assessing appellees' damages. When the taking is by the sovereign, the correct measure of damages is the difference in the fair market value of the entire tract immediately before and immediately after the taking. *Property Owners Improvement District 247* v. *Williford*, 40 Ark. App. 172, 176-77, 843 S.W.2d 862, 865 (1992). A landowner is entitled to recovery for damages done to his adjoining lands which ordinarily and naturally result from the taking and use of the right-of-way and is left to an action in tort against non-immune parties only if negligence is involved. *See Arkansas State Hwy. Comm'n* v. *Steed*, 241 Ark. 950, 957, 411 S.W.2d 17, 21 (1967). At trial, appellees argued that the damages to their house "inevitably or necessarily" flowed from the construction upon the easement and, therefore, they are entitled to receive compensation for these damages.

Appellant argues that there is no evidence that the structural damage appellees discovered after the excavation was caused by the City's excavation and that, even if such damage did occur, it was the result of negligence, for which the city cannot be held liable. The distinction between a negligent act and one that inevitably or necessarily flows from the construction of an easement was discussed by this Court in *Board of Commissioners of Little Rock Municipal Water Works* v. *Sterling*, 268 Ark. 998, 1001, 597 S.W.2d 850, 852 (Ark. App. 1980):

> Any damages arising from such actions by the contractor did not necessarily or reasonably flow from the taking of the easement. Damages from tortious actions are not a

proper element of damage in a proceeding for the condemnation of the easement. *Springfield & Memphis Railway Company* v. *Henry*, 44 Ark. 360 (1884).

In *Tri-B Advertising* v. *Ark. State Highway Commission*, 260 Ark. 227, 539 S.W.2d 430 (1976), the court quoted the general rule from 40 C.J.S. Highways § 212 as follows:

> However, the contractor, and not the highway authority, is liable for damages resulting from his own tortious acts in the performance of the contract, as where he is negligent, or commits an unauthorized trespass on the property off the right of way. Even though the highway authority may be immune from liability for damage, such immunity is not shared by the contractor.

Tort damages by an independent contractor are to be distinguished from damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor. Such distinction is clearly made in *White* v. *Maddux, Special Administrator*, 227 Ark. 163, 296 S.W.2d 679 (1956), in which the court reiterated the well established law that the State, its political subdivisions and *quasi* public corporations are not liable in tort. Damages to land outside the easement which inevitably or necessarily flow the construction upon the easement, such as permanent flooding of land outside the easement by reason of structures placed on the easement in keeping with the design of the condemnor, results in an appropriation of land for public use outside the easement. Such damages are embraced within just compensation to which the landowner is entitled. *Board of Directors, St. Francis Levee District* v. *Morledge*, 231 Ark. 815, 332 S.W.2d 822 (1960). The damages outside the easement in the present case were not an appropriation of additional land to public use, but resulted from tortious acts of the contractor unauthorized by the appellant.

Id. at 1001-02, 597 S.W.2d at 852.

When the possibility of a cause of action for damages due

> to an intentional act or to an inevitable result of an intentional act is eliminated, and that it the situation we have here, there remains only the possibility of an action in tort.
>
> There are many laymen, lawyers and judges who believe that, in all fairness, the State, its political subdivisions and *quasi* public corporations such as improvement districts created by the State, should be liable for torts committed. But the law, holding otherwise, has been firmly established for many years.

St. Francis Drainage Dist. v. *Austin*, 227 Ark. 167, 172, 296 S.W.2d 668, 671 (1956). *See also Arkansas State Highway Comm'n* v. *Lasley*, 239 Ark. 538, 540, 390 S.W.2d 443, 444 (1965); *Wenderoth* v. *Baker*, 238 Ark. 464, 467-68, 382 S.W.2d 578, 580 (1964).

There was testimony at trial that, after the excavation, appellees discovered a loose brick in the side of their house next to the excavated area and that they also discovered a crack in the kitchen floor after the flooring had been removed. The only evidence produced, however, that these damages may have been caused by the excavation included the testimony of Maril Findlay, who testified that the excavation occurred approximately thirty inches from his house and the land next to his house literally sunk. John Libby, a certified real estate appraiser, also testified that the soil on appellees' property has a low bearing strength, which when coupled with extreme drouth or wet, causes a shrink-swell situation, which has an effect on construction and its durability.

Van Lee, director of engineering for appellant, who was called as a witness by appellees, testified that he did not anticipate settlement in excavating appellee's premises and that the crack he examined in appellees' house did not relate to settlement nor was it caused by excavation. He testified that the separation of the wall from the floor is not typical of what he would expect to see when a house settles because of loss of support and that he would expect them both to go down, together, the wall and the floor.

In reviewing the denial of a motion for a directed verdict, this court gives the proof its strongest probative force.

Lazelere v. *Reed*, 35 Ark. App. 174, 180, 816 S.W.2d 614, 618 (1991). Substantial evidence is that evidence which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or another; it must force or induce the mind to pass beyond a suspicion or conjecture. *Bank of Malvern* v. *Dunklin*, 307 Ark. 127, 129, 817 S.W.2d 873, 874 (1991); *Newberry* v. *Johnson*, 294 Ark. 455, 458, 743 S.W.2d 811, 812 (1988). Consequently, a motion for directed verdict should be granted only if the evidence so viewed would be so insubstantial as to require a jury verdict for the party to be set aside. *Bice* v. *Hartford Accident & Indem. Co.*, 300 Ark. 122, 124, 777 S.W.2d 213, 214 (1989).

Giving appellee's evidence its strongest probative force, we hold that the trial court erred in denying appellant's motion for directed verdict on the issue of the structural damages to appellees' house. Appellees contended at trial that their house settled because the appellant did not require the contractor to shore up the excavation. However, appellees have not shown that this alleged failure to shore up the excavation caused the damage to their house, what specifications were called for by the appellant, or that the contractor followed the appellant's plans and specifications. In sum, there was no evidence that showed the damages to appellant's house flowed from the taking.

For this reason, we also agree with appellant that the trial court erred in giving Instruction No. 7A, which instructed the jury that "in considering the value of the remainder after the taking, you may consider damage, if any, done to the lands outside the taking area, which damage inevitably or necessarily flows from, or was caused by, construction in the area taken by the city of Fort Smith." Instructions should be based on evidence in the case, and instructions stating only abstract legal propositions or submitting matters on which there is no evidence should not be given. *Newman* v. *Crawford Constr. Co.*, 303 Ark. 641, 645, 799 S.W.2d 531, 534 (1990); *Riddell & McGraw* v. *Little*, 253 Ark. 686, 692, 488 S.W.2d 34, 38 (1972). Here, not only was there no evidence produced to support the giving of this instruction, but the instruction was also erroneous in that it did not limit damage to that which inevitably or necessarily flowed from the construction, but also included the words "or was caused by, construction in the area taken . . . ." This instruction would include

damages for an action in tort against appellant or its agents. This clearly is not the law. When the possibility of a cause of action for damages due to an intentional act or to an inevitable result of an intentional act is eliminated, there remains only the possibility of an actionable tort. *St. Francis Drainage Dist.* v. *Austin*, 227 Ark. 167, 172, 296 S.W.2d 668, 671 (1956). Arkansas Code Annotated § 21-9-301 (Supp. 1993) provides in part that no tort action shall lie against a municipal corporation on account of the acts of its agents or employees. *65th Center, Inc.* v. *Copeland*, 308 Ark. 456, 466, 825 S.W.2d 574, 580 (1992); *see also Harrington* v. *City of Greenbrier*, 262 Ark. 773, 775, 561 S.W.2d 302, 304 (1978).

Appellant's final point relating to structural damage concerns the trial court's admission of photographs depicting the structural damage and the excavation for the box culverts. Because appellees failed to produce any evidence that the structural defects in their house were the inevitable or necessary result of the construction, we agree that these photographs were irrelevant and prejudicial and should have been stricken.

Appellant also contends that the trial court erred in allowing appellees' appraiser, John Libby, to repeat hearsay statements on direct examination. The statement in question concerned a statement in another appraisal that John Libby repeated in court. Libby testified that, in attempting to determine the condition of the property prior to the taking, he looked at a previous appraisal of appellees' property performed by another appraiser and that appraisal contained the statement "[n]o adverse conditions noted." Appellant contends that the purpose of this statement was to establish that certain physical defects in the house did not exist prior to the construction of the drainage project and, therefore, its admissibility over appellant's objection was clearly prejudicial. We disagree.

Rule 703 of the Uniform Rules of Evidence allows an expert to base his opinion on facts learned from others, despite their being hearsay, if they are the type reasonably relied upon by experts in the particular field in forming opinions. *See Dixon* v. *Ledbetter*, 262 Ark. 758, 761, 561 S.W.2d 294, 295-96 (1978). In *Arkansas State Highway Commission* v. *Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985), this Court stated:

> The rule for admission of expert testimony does not depend on the relative certainty of the subject matter of testimony, but rather on the assistance given by the expert testimony to the trier of fact in understanding the evidence or determining a fact in issue. Ark. Unif. R. Evid. 702. Moreover, the relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility.

Id. at 297. *See also Arkansas State Highway Comm'n* v. *Russell*, 240 Ark. 21, 23, 398 S.W.2d 201, 202 (1966).

Here, John Libby testified that he looked at several appraisals of the property to determine its condition prior to the taking for determining its market value. The condition of the property prior to the taking was relevant to appellees' damages, and we cannot say the admission of this testimony was in error.

Appellant's fifth point claims the trial court erred in admitting evidence of the inconvenience caused appellees while the construction on the easement was in progress. The construction involved excavation of an area across appellees' driveway that prevented them from using their driveway or entering and exiting their house from the front. Although appellee Maril Findlay testified that he only lost the use of his driveway for a couple of days, the court allowed appellees to introduce photographs showing the construction in progress and the fact that they could not get in and out of their house, holding that the question of inconvenience would be one for the jury.

Appellees in their brief admit that this is not a case of a temporary inconvenience, but a case in which a temporary easement was taken for a specific purpose. A temporary easement is valued as the fair rental value of the property for the time that it is used. *Loyd* v. *Southwest Utils. Corp.*, 264 Ark. 818, 822, 580 S.W.2d 935, 936 (1979). *See also Property Owners Improvement Dist. No. 247* v. *Williford*, 40 Ark. App. at 176-80, 843 S.W.2d at 864-67. Here, evidence was presented to the jury concerning the rental value of the temporary easement, and the jury was instructed in this regard. The photographs were not relevant to the property's fair rental value and should have been excluded.

For its sixth point, appellant argues that the trial court erred in allowing the jury to view a videotape appellees made after the construction of the easement had been completed. Appellant argues that this video has no relevance to this lawsuit and, therefore, serves no valid purpose except to prejudice the jury by showing the existence of flooding and of a dangerous condition. We agree. The video shows only the conditions that existed after the taking and gives the jury no basis for comparing the drainage conditions before and after the taking. Furthermore, a portion of the video focuses on a drainage culvert located across the street from appellees' home that is not part of this project and therefore would only serve to confuse the jury.

For appellant's final point, it contends the trial court erred in admitting evidence that the original developers of the area were permitted to build in the area without improving the drainage. Although we find no prejudice from the inclusion of this evidence, we agree that it is not relevant to the difference in market value of the entire tract immediately before and immediately after the taking and should be excluded.

Reversed and remanded.

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

Laura Mae DEFFENBAUGH *v.* ESTATE OF William Hershel CLAPHAN and Estate of Lena May Claphan

CA 94-101 893 S.W.2d 350

Court of Appeals of Arkansas
Division I
Opinion delivered March 1, 1995

Sam Sexton III, for appellant.

Gary R. Cottrell, for appellee.

JOHN B. ROBBINS, Judge. Appellant, Laura Deffenbaugh, appeals from a decree of the Crawford County Probate Court, which refused to appoint guardians for the persons and the estates of her parents, appellees William Claphan and Lena Mae Claphan. We affirm the portion of the probate court's order denying the appointment of a guardian for Mr. Claphan but reverse and remand as to Mrs. Claphan.

Appellant is the daughter of appellees, William and Lena Mae Claphan. In 1993, she filed a petition requesting that she be appointed guardian of the persons and the estates of her parents, whom she alleged were incapacitated and unable to meet the

essential requirements for their health or safety or to manage their estate. Appellees' response denied that a guardian was necessary but further pled that, if the court should find either of the appellees to be incompetent, another family member should be appointed as guardian. After a hearing on the matter, the court made the following findings:

> 1. That the court has serious concerns for the financial well-being of William Herschel Claphan and suggests that a conservatorship would be in the best interest of William Herschel Claphan. However, William Herschel Claphan is not an incapacitated person.
>
> 2. That Lena Mae Claphan is clearly an incapacitated person, but William Herschel Claphan is able to provide for her care. Therefore, the request that petitioner be appointed her guardian is denied.

Because the probate court found that appellee Mrs. Claphan is clearly incapacitated, we agree with appellant that the probate court erred in refusing to appoint a guardian for her person and estate. Arkansas Code Annotated § 28-65-213(c)(3) (1987) provides that "[i]f it is found that the respondent is substantially without capacity to care for himself or his estate, a guardian for the person, estate, or both shall be appointed." At the beginning of the hearing on appellant's petition, the parties stipulated that appellee Lena Mae Claphan was incompetent. Furthermore, Dr. Charles Jennings, a physician specializing in internal medicine, testified that he has seen Mrs. Claphan on a regular basis since 1987 and that she suffers from severe organic brain syndrome, which poses a risk to her health and safety.

Appellant also contends that the probate court erred in not appointing a guardian for her father, Mr. Claphan. She argues that the probate judge found Mr. Claphan was easily influenced and the undisputed evidence shows that Mr. Claphan has been victimized by his grandson, Roger. She argues that Roger's influence, coupled with Mr. Claphan's failure to remember the power of attorney he executed in 1989 or the contents of his will clearly demonstrates that Mr. Claphan is unable to understand his actions and manage his estate and therefore justifies the appointment of a guardian on his behalf.

In support of her contentions, appellant testified that, in 1991, she discovered that thirty-eight blank checks had been stolen from her father and that, over a one-year period, her deceased brother's son, Roger, had written these checks to himself in an amount totaling $20,458.00. She stated that her father had to press criminal charges against Roger in order to collect this money from the bank and that he was able to collect only $9,000.00. She stated that, because of this loss, she had to cosign a note with her father in March 1991 so that he could obtain money to feed his cattle. She also testified that, after a discussion with Roger's family members, her father had revoked a power of attorney he had given her in 1989 and that, in 1993, her parents had deeded their home to Roger and his sister, reserving in themselves a life estate. She stated that she is concerned that Roger may steal from her father as he did before and that she is trying to protect her parents' assets. She also testified that her father's health has gotten progressively worse and that he frequently stumbles and falls. She stated: "He is much more uncooperative with me today than he was a year ago." She also testified that her father cannot look up a telephone number, her mother cannot dial a telephone, and they cannot really provide for themselves.

Dr. Jennings testified that he first saw Mr. Claphan in July 1991 and last saw him in June 1993. Dr. Jennings testified that he had some concern that Mr. Claphan is not adequately able to take care of his wife, that appellees were not able to manage their financial affairs, and that they were getting to the point that they could not manage their health affairs. He admitted, however, that his assessment of Mr. Claphan was based 90% upon the history that was provided to him by appellant and that he could not have formed his opinion regarding Mr. Claphan without appellant's statements.

Appellee William Claphan testified that he is eighty-one and will be eighty-two the first day of the following month. He was able to name the date and the day of the week, his address, when he was married, and the president of the United States. He testified that he has worked on a farm for the past ten years; that he worked at Riverside Furniture prior to that; that he receives $77.00 per month in retirement income; and that he and his wife together receive about $800.00 a month in social security. He

stated that, when he discovered that his grandson, Roger, had forged his checks, he discussed the matter with him and that Roger offered to get a loan to repay him. He stated that he did not want to prosecute Roger but that appellant and the bank had insisted on it. He also stated that Roger helps him around the farm, that he did not know how he would manage without Roger's help, and that he pays Roger minimum wages whenever he does help. He also testified that he goes through the canceled checks he receives from the bank.

In reference to the deed to their house, reserving a life estate, that Mr. and Mrs. Claphan had given Roger and Roger's sister, he explained that Roger and Barbara wanted to keep the house in the family; that he knew he and his wife would be able to stay in the house until they died; and that, if he wanted to sell the property, Roger and Barbara would help him convey it. He stated that he understood that Roger and Barbara would have to sign an instrument in order for him to sell the house; however, on examination by the court, he admitted he was not real sure of the purpose of the deed that he signed. He also did not remember that a will he executed in 1989 left everything to appellant; he thought it went to appellant and "the boys." He also testified that he did not remember giving appellant his power of attorney and, when he discovered it a year ago, he had it revoked because Roger and Roger's relatives told him that the power of attorney would allow her to do whatever she wanted with his property. He testified that he did not think he needed a guardian, that he could take care of his own business, and that appellant has tried to boss them around "like we were kids."

Gene Neidecker testified that he has known Mr. Claphan since 1990 when Mr. Claphan purchased a bull from him. He stated that Mr. Claphan knew the kind of bull he wanted, that he picked out a good bull and paid a fair price for it, and that he purchased a second bull from him 1992. He stated there was not anything about the transaction that caused him to have doubts about Mr. Claphan's ability to handle his own affairs.

At the conclusion of the hearing, the probate judge stated that Mr. Claphan had forgotten some things but that his memory was very sharp on other things and that Mr. Claphan was very apprehensive about his welfare and his old age. He stated that deter-

mining whether Mr. Claphan was incompetent was a very close question but that he found Mr. Claphan to be competent, although easily influenced and easily upset, and that he wished Mr. Claphan would get a bank to serve as his conservator or to advise him. He concluded that, while he thought Mr. Claphan needed a conservator, he did not find him lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his health or safety or manage his estate.

Arkansas Code Annotated § 28-65-201(a) (1987) provides that "[a] guardian of the estate may be appointed for any incapacitated person." Arkansas Code Annotated § 28-65-101 (1987) provides the following relevant definitions:

> (1) "Incapacitated person" means a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his health or safety or to manage his estate. . . .
>
> . . . .
>
> (10) "Essential requirements for health or safety" means the health care, food, shelter, clothing, and protection without which serious illness or serious physical injury will occur.

Arkansas Code Annotated § 28-65-213 (1987) further provides:

> (b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of a proper disposition.
>
> (c)(1) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of less restrictive alternatives to guardianship to meet the needs of the respondent.
>
> (2) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action.

A probate court's finding of incapacity involves a finding of fact, and the appellate court will not reverse such a finding unless it is clearly against the preponderance of the evidence or clearly erroneous. *In the Matter of Bailey*, 299 Ark. 352, 355, 771 S.W.2d 779, 781 (1989). Earlier Arkansas cases described the test for competency as follows:

> As a general rule, it may be stated that, in order to have that measure of capacity required by law to be of sound mind, a person must have capacity enough to comprehend and understand the nature and effect of the business he is doing; and where it is clearly made to appear that the mental incapacity and imbecility is of such a degree as to render the person unable to conduct the ordinary affairs of life and leaves him in a condition to be the victim of his infirmity, then such person is in contemplation of law not of sound mind. Weakness of understanding is not alone sufficient to show mental unsoundness if capacity remains to see things in their true relations and where the individual has a moderate comprehension of his immediate duties and of the value and use of his property." Reaffirmed in many subsequent decisions, among the latest being that of *Kelley* v. *Davis*, 216 Ark. 828, 227 S.W.2d 637.

Dew v. *Requa*, 218 Ark. 911, 915, 239 S.W.2d 603, 606 (1951) (quoting *Pulaski County* v. *Hill*, 97 Ark. 450, 134 S.W. 973, 975 (1911)); *Powers* v. *Chisman*, 217 Ark. 508, 511, 231 S.W.2d 598, 599 (1950).

> While it is difficult to state the test applied by the courts more precisely, it is clear that no very high standard of competence is to be exacted; mere lack of good business sense not amounting to some degree of mental incompetency is ordinarily not regarded as sufficient to require guardianship. Nor does susceptibility to influence justify the appointment of a guardian, if the alleged incompetent possesses capacity to manage his property as a result of sanative reasoning, although a contrary rule prevails if, in the disposition of his property, he is guided by the will of others, rather than his own. The unsoundness of mind which will justify an appointment must be more than mere debility or impairment of memory; though loss of memory may,

> of course, be a factor in determining whether a person has competence to manage his estate.
>
> Competency at the time of the proceeding for appointment of the guardian is the subject of inquiry. A possibility of future incompetency is not sufficient.

39 Am. Jur. 2d *Guardians and Wards* § 20 at 22-23 (1968).

Here, there was evidence that Mr. Claphan continues to farm, that he pays his grandson to help him with farming, and that he has watched his checks and checkbooks since his checks were stolen. The burden was on the appellant to prove by clear and convincing evidence that appellee Mr. Claphan was no longer able to handle his affairs, and the court below had the benefit of not only hearing and observing the witnesses, but more importantly, it had the opportunity to hear and observe Mr. Claphan. We therefore cannot say that the court's finding that Mr. Claphan was not mentally incapacitated is clearly erroneous.

> Mental capacity and competency are to be presumed and before any person shall be deprived of the right to handle his or her own property and manage his or her own affairs there must be *clear* and *convincing* proof of mental incompetency and such proof must be *preponderating.*
>
> . . . . Proof of mental incompetency must possess such strength and clarity as to lead incontestably to but one conclusion, to wit, that respondent is mentally incompetent. A finding of mental incompetency is not to be sustained simply if there is *any* evidence of such incompetency but only where the evidence is preponderating and points unerringly to mental incompetency.

In re Estate of Myers, 395 Pa. 459, 150 A.2d 525, 526-27 (1959) (citations omitted).

It is probable that, within the near future, Mr. Claphan may be incapacitated and require the appointment of a guardian for himself; however, the court must act on his capacity at the time of trial. Accordingly, the decree is affirmed as to Mr. Claphan. As to Mrs. Claphan, the decree is reversed and remanded with instructions that a guardian be appointed for her person and estate.

Affirmed in part; reversed and remanded in part.

MAYFIELD and ROGERS, JJ., agree.

Frankie WEBB *v.* STATE of Arkansas

CA 94-502 893 S.W.2d 357

Court of Appeals of Arkansas
Division I
Opinion delivered March 1, 1995

Bill Luppen, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Acting Deputy Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Frankie Webb, a juvenile, appeals from an order of the juvenile court which granted the State's motion to nol-pros three counts of committing a terroristic act.

On September 7, 1993, the State filed a felony information in circuit court charging appellant with four counts of terroristic acts in violation of Ark. Code Ann. § 5-13-310 (Repl. 1993). The acts were alleged to have been committed on June 14, 1993, at which time the appellant was 14 years of age. On November 16, 1993, appellant filed a motion to transfer his case to juvenile court.

On December 7, 1993, the State amended its information

in circuit court to include one count of first degree battery, and on January 11, 1994, the circuit court granted appellant's motion to transfer the case to juvenile court. That same day, the State filed a delinquency petition in juvenile court charging appellant with committing three of the same terroristic acts charged in circuit court. The fourth terroristic act and the count of first degree battery charged in the amended information in circuit court were not included in the delinquency petition.

At a hearing on the State's delinquency petition, held January 13, 1994, the juvenile judge granted the State's oral motion to nol-pros over appellant's objection that:

> The circuit court transferred this case to juvenile court. It's my position that that's where this conduct should be tried, and that Mr. Johnson by nol prossing this charge, I believe their strategy is, would then refile charges saying that it is now a battery first in order to get them into an adult court where he can be —faces five to twenty years in the penitentiary, Your Honor; and would say that, in effect, they are circumventing the transfer order of Judge Langston and the laws of Arkansas under transfer of juvenile to juvenile court. And that's my objection, Your Honor.

Although the record in this case does not contain anything about it, we know from the State's brief that the case of *Webb* v. *State*, 318 Ark. 581, 886 S.W.2d 624 (1994), has some involvement with the case now before us. From the opinion in that case we know that on the same day — January 13, 1994 — that the juvenile court granted the state's motion to nol-pros (the order was actually entered on January 24, 1994) the State again charged appellant, by a new information filed in circuit court, with the first degree battery count which had been transferred from circuit to juvenile court on January 11, 1994. We also know from our supreme court's opinion in *Webb* that the appellant made a motion to dismiss that case on the basis that circuit court lost jurisdiction when the battery charge was transferred to juvenile court. The court denied the motion to dismiss. Appellant then filed a petition for a writ of prohibition which was granted in *Webb*. The court held that, by transferring the first degree battery charge to juvenile court, the circuit court waived jurisdiction over appellant and the circuit court's jurisdiction over the juvenile, once sur-

rendered pursuant to a valid hearing on a motion to transfer, could not be regained simply by the state's unilateral action of refiling its charges in circuit court.

The appeal in the instant case was originally in our supreme court, but on July 12, 1994, the case was transferred to the court of appeals. In this appeal, the appellant argues that the juvenile court erred in granting the State's motion to nol-pros. Appellant contends that once a circuit court has transferred a case to juvenile court, the juvenile court is without authority to transfer that case back to circuit court. Appellant says the juvenile court has in effect transferred his case back to circuit court by allowing the State to nol-pros the juvenile petition and refile the charges in circuit court in violation of Ark. Code Ann. § 9-27-310 (Repl. 1993). The cases of *State* v. *Hatton*, 315 Ark. 583, 868 S.W.2d 492 (1994), and *Pennington* v. *State*, 305 Ark. 312, 807 S.W.2d 660 (1991), are cited as authority for this contention.

Because we do not know what will happen in the future, we think the only question before us is whether the juvenile court erred in granting the State's motion to nol-pros. In a recent case, *Cook* v. *City of Pine Bluff*, 318 Ark. 190, 885 S.W.2d 7 (1994), our supreme court dismissed a criminal appeal from an order of nolle prosequi. The court held that under Arkansas Rule of Criminal Procedure 36.1 only a person *convicted* of a crime has the right to appeal. Thus, the court reasoned, no appeal could be taken from an order of nolle prosequi because this has discontinued — or dismissed — the charges and no judgment of conviction has been entered.

Appeal dismissed.

ROBBINS and ROGERS, JJ., agree.

Tommy TOLSON and Tammy Tolson *v.* Mary Tolson DUNN

CA 94-155 893 S.W.2d 354

Court of Appeals of Arkansas
Division I
Opinion delivered March 1, 1995

J. Larry Allen, for appellants.

Acchione & King, by: *Harold King*, for appellee.

JUDITH ROGERS, Judge. This appeal arises from a judgment of the Grant County Chancery Court finding that appellants had failed to prove an oral contract existed between the parties and denying their claim for specific performance, adverse possession, and the value of the improvements they had placed on appellee's property. On appeal, appellants argue three points for reversal. We find no merit in appellants' arguments and affirm.

For their first point, appellants contend that the chancellor erred in denying them specific performance. Appellants claim

that the parties entered into an oral agreement in 1987 whereby appellee, appellant Tommy Tolson's mother, agreed to deed them certain land when appellants completed building a house on the land. Appellants contend that, after the construction was completed, appellee refused to transfer title to the property to them and, therefore, appellee should be ordered to specifically perform the parties' agreement.

Tommy Tolson testified that he moved on appellee's land in 1980-81; that he started constructing a home with appellee's permission; that appellee promised to give him a deed to the land; and that, based on that promise, he built another room onto the structure. He stated that he completed the structure in 1992 and that he would not have made the improvements if appellee had not told him he was going to get a deed. He stated that he borrowed some money from First National Bank to build two more rooms and that appellee knew he was borrowing the money and she signed the loan document.

Gerald Edwin Whitehead, a certified residential appraiser, testified that he placed a value of $8,300.00 on the structure built by appellants.

Appellee, Mary Tolson Dunn, testified that she allowed appellant, Tommy Tolson, to build a little shack on the property in 1980 because he had no job and no place to go and that she bought the lumber he used. She stated that she told him to move when he first got married, but she did not want to take her own son to court. She further testified that her son never asked her for the land and she never promised it to him.

John Tolson, appellee's son and appellant Tommy Tolson's brother, testified that he had heard his mother ask appellant to leave and that appellant did not respond.

Appellants allege that the facts in this case are nearly identical to those in *Humann* v. *Renko*, 2 Ark. App. 32, 616 S.W.2d 26 (1981). We disagree. In *Humann*, the chancellor found that the appellees had met their burden of proving an oral contract where there was testimony of the neighbors to support the appellees' testimony and where appellant, when confronted with the testimony, never directly contradicted it. No such evidence exists in the case at bar.

Chancery cases are reviewed *de novo* on appeal, and the appellate court will not disturb the chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence, and because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court will defer to the chancellor's superior opportunity to assess credibility. *Appollos* v. *Int'l Paper Co.*, 34 Ark. App. 205, 808 S.W.2d 786 (1991); Ark. R. Civ. P. 52(a). The testimony here was disputed regarding whether there was an agreement between the parties, and therefore, this presented a question for the factfinder. The chancellor found that appellants had failed to prove an oral contract existed, and this court cannot say this finding is clearly against the preponderance of the evidence. Because the chancellor found that no oral agreement existed between the parties, appellants were not entitled to specific performance. *See Fisher* v. *Jones*, 306 Ark. 577, 816 S.W.2d 865 (1991).

Appellants contend for their second point that the chancellor erred in finding that they had not established title to the property by adverse possession. Appellants argue that because the testimony was clear and undisputed that appellants took possession in 1980, commenced construction in 1981, and appellee did nothing to interrupt their possession until 1991, they proved their claim to adverse possession. We disagree.

Whether possession is adverse to the true owner is a question of fact. *Sharum* v. *Terbieten*, 241 Ark. 57, 406 S.W.2d 136 (1966). In order to establish title by adverse possession, appellants had the burden of proving that they had been in possession continuously for more than seven years and their possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold adversely against the true owner. *Clark* v. *Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982). If the original use and possession were permissive, it cannot become adverse until notice of the hostility of the possessor's holding has been brought home to the owner by actual notice or by a holding so open and notorious as to raise a presumption of notice equivalent to actual notice; the evidence of the adverse holding when the original entry is by permission must be very clear. *Mikel* v. *Development Co.*, 269 Ark. 365, 602 S.W.2d 630 (1980). Although we review chancery cases *de novo* on the record, we do not reverse the decision of the chancellor unless his findings are clearly against the

preponderance of the evidence. *Hicks* v. *Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990).

Here, appellant Tommy Tolson admitted at trial that he began building his house on appellee's land in 1981 with appellee's permission. Later, at the conclusion of the hearing, he testified that he moved onto the property with appellee's permission and remained there with appellee's permission. He also stated that appellee did not ask him to move from the property until 1992. It is clear from the record that appellants had permission from appellee to remain on the property and consequently their possession was not adverse to the titleholder. Therefore, the chancellor's finding that appellants had failed to sustain their claim of adverse possession is not clearly against the preponderance of the evidence.

For their final point, appellants contend that the chancellor erred in not awarding them the value of the improvements they placed on appellee's property. Appellants' expert witness valued these improvements at $8,300, and appellants contend they should have been awarded damages for this amount. In support of their claim, they rely on Ark. Code Ann. § 18-60-213 (1987), that provides in part:

> (a) If any person believing himself to be the owner, either in law or equity, under color of title has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvement made as stated and the amount of all taxes which may have been paid on the land by the person, and those under whom he claims, shall be paid by the successful party to the occupant, or the person under whom, or from who, he entered and holds, before the court rendering judgment in the proceeding shall cause possession to be delivered to the successful party.

This section requires one entitled to recover for such improvements to meet two tests: (1) he must believe himself to be the owner of the property; and (2) he must hold under color of title. *Smith* v. *MRCC Partnership*, 302 Ark. 547, 792 S.W.2d 301 (1990). In *Baker* v. *Ellis*, 245 Ark. 484, 432 S.W.2d 871 (1968), the supreme court stated:

> One who believes himself to be the legal or equitable owner and improves land of another, under color of title, can recoup the cost of the improvements. Ark. Stat. Ann. § 34-1423 (Repl. 1962) [now codified at § 18-60-213]. Color of title generally connotes an instrument which by apt words of transfer passes what purports to be a title but which is defective in form.

Id. at 486, 432 S.W.2d at 872.

Here, it was undisputed that appellants had no writing evidencing color of title nor had they paid any taxes on the property. Appellants argue, however, that this court should reverse the holding in *Baker* v. *Ellis* because they contend the plain and unambiguous wording of the first sentence of § 18-60-213 allows appellants to either peaceably improve land under color of title or peaceably improve land without color of title and be entitled to damages. Appellants cite *Leathers* v. *W.S. Compton Co.*, 316 Ark. 10, 870 S.W.2d 710 (1994), for this proposition. However, *Leathers* has no relation to § 18-60-213 and only stands for the proposition that, when the language of a statute is plain and unambiguous, we give the language its plain and ordinary meaning. 316 Ark. at 13. Even if we were so inclined, we have no authority to overrule a decision of the supreme court. *Roark* v. *State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994). Because appellants did not make the improvements under color of title, they are not entitled to damages under § 18-60-213.

Furthermore, the chancellor noted that appellants' expert witness had testified that the improvements appellants made to the property were removable and, in his order, he gave appellants six months to remove their improvements. Appellants have not challenged this finding by the chancellor.

Affirmed.

PITTMAN and COOPER, JJ., agree.

SERVICE FINANCE CORPORATION *v.* Sandy J. EVANS

CA 94-294 894 S.w.2d 149

Court of Appeals of Arkansas
Division II
Opinion delivered March 8, 1995

Acchione & King, by: *Gary Van Gilder*, for appellant.

Teresa Severns and *Law Office of Don Cooksey*, by: *Don Cooksey*, for appellee.

JOHN E. JENNINGS, Chief Judge. This is an ordinary debt case. The appellee, Sandra Evans, incurred a debt with Baptist Medical Center in the amount of $918.00. Baptist assigned its claim to Service Finance Corporation, a collection agency, for the sum of $200.00. Service Finance then sued Sandra Evans for the amount of the debt in Miller County Circuit Court and the case was tried to a jury. The jury found for the defendant.

On appeal, Service Finance contends that the court erred in admitting evidence of Ms. Evans' financial status and in admit-

ting evidence as to the amount it paid for the claim. We agree with both contentions and reverse and remand for new trial.

Over timely objection the appellee was permitted to testify that she was unable to pay $25.00 per month on this account. The defendant was also permitted to elicit testimony that Service Finance paid $200.00 for the claim.

Rule 402 of the Arkansas Rules of Evidence provides that all relevant evidence is admissible and that evidence which is not relevant is not admissible. Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In determining whether evidence is relevant, the trial court has discretion. *Simpson* v. *Hurt*, 294 Ark. 41, 740 S.W.2d 618 (1987). We do not reverse the trial court's decision as to whether evidence is relevant absent an abuse of discretion. *In re Estate of O'Donnell*, 304 Ark. 460, 803 S.W.2d 530 (1991).

In the case at bar the issue was whether the appellee incurred the debt and owed the money. Her ability to pay was not an issue in the case. *See generally* 31A C.J.S. *Evidence* § 177 (1964); *Northwestern University* v. *Crisp*, 211 Georgia 636, 88 S.E.2d 26 (1955). The appellee's inability to pay the full amount of the debt is not relevant to any issue in the case and it was error to admit that testimony.

Similarly the amount paid by the collection agency for the claim was irrelevant. It bears no logical relation to any issue properly before the court and on retrial it should not be admitted into evidence.

Reversed and Remanded.

PITTMAN and COOPER, JJ., agree.

Bobby MORELOCK *v.* KEARNEY COMPANY

CA 94-373 894 S.W.2d 603

Court of Appeals of Arkansas
En Banc
Opinion delivered March 8, 1995

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

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

JOHN MAUZY PITTMAN, Judge. Bobby Morelock appeals from an order of the Arkansas Workers' Compensation Commission finding that he failed to prove that he sustained compensable injuries to his feet on September 16, 1992, and to his back on December 11, 1992. Appellant challenges the sufficiency of the evidence to uphold the decision. We affirm.

On appeal in workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* Where the Commission's denial of relief is based on the claimant's failure to prove entitlement to benefits by a preponderance of the evidence, the substantial evidence standard of review requires affirmance if the Commission's opinion displays a substantial basis for the denial of relief. *Id.* It is the function of the Commission to determine the credibility of witnesses and the weight to be given to their testimony. *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.*

Appellant worked as a lathe operator for appellee for 15 years. Appellant testified that he left work on September 12, 1992, complaining of a headache. On September 16, 1992, Dr. Johnny Atkins saw appellant and diagnosed tendonitis in his feet and advised him not to go to work for one week. Appellee's personnel manager testified that when appellant subsequently brought a doctor's excuse, appellant said that he was unsure of the cause of his tendonitis. Appellant did not work from September 12 to September 22, 1992. Appellant returned to work on September 22 and was reprimanded for excessive absenteeism, occurring both before and after September 16. Appellant first claimed on September 22 that his foot injury was work-related. Appellant

does not recall a specific incident but contends that he suffered a compensable injury to his feet on September 16, 1992, caused by repetitively "rocking" on his feet to operate the lathe.

Although appellant testified in his deposition that he first noticed pain in his feet on September 16, 1992, he recanted this testimony at trial and stated that his foot problems began in July prior to September 16, 1992. Dr. Joe Rouse's report of September 29, 1992, states that appellant said that he had been having problems with his feet for about two months. Appellant testified that about two or three months prior to September 1992 he told co-workers his feet hurt; appellant's supervisor said he first learned that appellant was asserting a work-related injury to his feet on September 22, 1992. Appellant stated that his foot problems started when he worked twelve-hour days for seven days a week during the 1992 summer months. However, appellee's records indicate that appellant worked an average of 40 hours a week or less and with the exception of one day, he never worked more than eight hours a day that summer.

Appellant's supervisor testified that a lathe operator may shift his weight from one foot to the other, but the job did not require "rocking" one's foot as appellant described. The supervisor stated that 30 to 40 percent of a lathe operator's time is spent setting up the machine which requires standing stationary without shifting or rocking the feet. He also said that appellant worked as a lathe operator from December 3 to December 11, 1992, without complaining about his feet. Dr. Joe Rouse opined that he could not say that appellant's condition was caused by work activities, but that his work did aggravate the condition. Appellant worked from September 22 to September 28 and then did not work until October 6, 1992. On October 6, he was assigned to light duty. Appellant said the job required him to reach forward while seated, which placed stress on his lower back. He frequently worked light duty until December 3, 1992, when he returned to work as a lathe operator. He worked until December 11, 1992, when he said that his back hurt. Appellant contends that he suffered a back injury on December 11, 1992, and has not worked since that time.

Appellant testified that he was physically active in non-work related activities, such as sports and hunting, prior to September

16, 1992. Appellant said that he was not physically active from December 1992 until April 1993, but the Commission found that he had engaged in activities such as basketball, volleyball, deer hunting, and four-wheeling prior and subsequent to September 16 and December 11, 1992, the dates of his alleged injuries. Moreover, appellant's medical records indicate that he suffers from degenerative disc disease, and the records document complaints of low back pain from 1981 to 1988.

The Commission found against appellant for several reasons: appellant failed to prove that he sustained a compensable injury to his feet or back; appellant's testimony lacked credibility and consistency; appellant was slow in reporting his injuries as work-related; appellant had excessive absences from work prior to and after the alleged injury in September; appellant engaged in physically demanding activities before and after both alleged injuries; Dr. Rouse testified that the foot injury was not job-related; three physicians who saw appellant related the foot injury to his job, but none of them "documented persuasive evidence of job-related injuries"; and appellant's back problems were longstanding. From our review of the record, we cannot conclude that fair-minded persons could not find as the Commission did here.

Affirmed.

ROBBINS and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I must respectfully dissent from the majority opinion in this case because I do not think the Commission's decision is supported by substantial evidence.

The Commission affirmed and adopted the opinion of the administrative law judge. The law judge's opinion states that the appellant "contends that he sustained an injury to his feet on September 16, 1992." And the crux of the opinion is found in the first sentence of the discussion entitled "COMPENSABILITY," which states, "This case turns on the credibility of the witnesses."

The appellant complains, on appeal to this court, that by simply adopting the law judge's opinion "the Commission determined the outcome of [appellant's] case by ignoring the objec-

tive medical evidence." I agree. Moreover, the majority opinion of this court appears to have followed suit.

As an example, the majority opinion states that appellant testified by deposition that he first noted pain in his feet on September 16, 1992, but "he recanted this testimony at trial and stated that his foot problems began in July prior to September 16, 1992." The record actually shows that at the hearing before the law judge the appellant testified, on direct examination, that he first noticed his feet were bothering him "approximately two to three months before I reported it." Then, on cross-examination, when the employer's attorney showed appellant a copy of his deposition and pointed out that the question asked at the deposition was "when you first noticed the problem" and not "when you reported the injury," the appellant admitted that he had "made a mistake."

It is clear to me that the appellee, the law judge, the Commission, and the majority of this court majored on a minor point. The appellant does not contend that he sustained some specific injury to his feet. He testified that a couple of months after he first noticed pain in his feet, he went to see a doctor for a headache and also told the doctor about his feet. A report from that doctor, Dr. Adkins, is in the record and confirms appellant's testimony. Jane Anderson, personnel manager for appellant's employer, testified that on September 16, 1992, the appellant came into her office with a note from the doctor which said that the appellant could not work until September the 21st because he had tendinitis in his hip, legs, and feet. Ms. Anderson then sent him to see the company doctor. In *Marcoe* v. *Bell International*, 48 Ark. App. 33, 888 S.W.2d 663 (1994), this court said:

> We have long adhered to the rule that an accidental injury may stem not only from a specific incident or a single impact, but also may result by a continuation of irritation upon some part of the body. — Neither do we require the injured workman to make inescapable proof that said accidental injury occurred on a date certain. A reasonably definite time is all that is required.

This leads us to the next problem I have with the majority opinion. The appellant was sent to the company doctor, Dr. Joe

Rouse. The law judge's opinion quotes from the doctor's report of September 22, 1992, as follows:

> [This 33-year-old white male presents with bilateral] ankle and forefoot pain. The pain was insidious in onset approximately 2 months ago and has been progressively more severe and intense since that time. There was no antecedent trauma or injury that he can recall. . . . I cannot say that his findings or symptoms are consistent with an on-the-job injury and therefore I do not feel are workers' compensable but cannot argue that his symptoms are somewhat exacerbated by his work activities (as they would be with any weight bearing on or off the job).

However, neither the law judge, the Commission, nor the majority opinion mentioned that the aggravation of a pre-existing condition may be compensable. *See Service Pharmacy* v. *Cox*, 252 Ark. 313, 478 S.W.2d 749 (1972); *Lockeby* v. *Massey Pulpwood, Inc.*, 35 Ark. App. 108, 812 S.W.2d 700 (1991).

The appellant was then referred back to his personal physician, Dr. Adkins, who referred him to Dr. Tom Phillip Coker. On December 4, 1992, Dr. Coker wrote to the employer as follows:

> Because the patient rocks first to one side of one foot and then the other side of the other foot and this is a repetitive activity performed hundreds of times a day at work, my opinion is that this is the etiology of his problem.
>
> He states this as being questioned because he is an active individual but general activity has nothing to do with whether or not a repetitive activity produces a problem. We see these cases literally by the dozens each year where a worker working in industry doing the same thing time after time produces a problem in the hands or feet whereas normal activity that the patient is engaged in for years does not produce this problem.

And on December 22, 1992, Dr. Coker wrote to Dr. Adkins as follows:

> This patient was seen on 12-22-92. He tried to return to work at his former job which requires side-to-side motion of his foot and symptoms have returned.

> . . . He is to be off work for two weeks and will have steel insoles placed in his shoes. It is a bad sign when returning to previous activity produces a flare of the symptoms and it may be that he is not going to be able to do this.
>
> He also is on limited status from Dr. Raben but he feels that a sitting job increases his back problems whereas a standing job increases his foot problems. For that reason, we will try him at no activity for two weeks.

And on February 16, 1993, Dr. Adkins wrote to the appellant's attorney as follows:

> The tenderness was fairly severe, it was usually worse when he climbs stairs. It was my feeling that he had an anterior compartment sprain to the tendons and muscles. He returned on the 29th [of September] and had apparently improved while off work, however, despite being 80% better at the time he returned to work, his leg pain quickly returned to its' usual degree. On that second visit, it was observed that his type of work required him to alternately shift from his left foot to his right foot, running a lathe, he moves back and forth constantly during his shift and this action is [sic] certainly can cause this type of pain and leg strain. His pain had actually now referred into his dorsal feet, in the anterolateral aspect of his ankles, but his hips were better. All of his pain increased with use.
>
> It was my impression that he had a significant tendinitis and anterior compartment strain. I recommended that he be off work for one week and then sitting or standing at a job for one week. He was to return to the Clinic one week following that. I also recommended that he seek orthopedic consultation, due to the fact that I felt this would be a chronic problem, *unless he took quite a bit of time off work.*

As can be seen from Dr. Coker's report of December 4, 1992, the doctor says that at work the appellant "rocks first to one side of one foot and then the other side of the other foot" and that this "repetitive activity" is the "etiology" of the problem appellant has with his feet. Although the law judge's opinion does not discuss this matter, the majority opinion repeats the ref-

erence in the appellee's brief to the testimony of appellant's supervisor that in appellant's job there is no "rocking back and forth." However, the record discloses that the supervisor testified as follows:

> Q. Now, do you have to stand up while you perform that job?
>
> A. Yes.
>
> Q. Do you stand absolutely still while you perform that job?
>
> A. Sometimes.
>
> Q. Sometimes with nothing moving or just maybe a hand moving?
>
> A. I'm not familiar with rocking of the feet at all. You shift your weight from one foot to the other, is what I was used to seeing. I'm not used to seeing anybody — I don't guess I've ever seen any rock on their feet while running a lathe.
>
> Q. So the shifting, then, that we're talking about is what is necessary more than rocking?
>
> A. Yes, ma'am.
>
> Q. Okay. When they're shifting, what are they doing shifting?
>
> A. While you're — you pull your material up to a stop on a lathe — I'm talking on a lathe. You rotate your turret handle forward, then you shift your weight from one foot to the other to close your collets with your left hand.
>
> Q. So you're kind of reaching from one side to the other?
>
> A. Yes, ma'am.

Thus, it is clear that the appellant shifted his weight from foot to foot. As the appellant's brief puts it, "the bottom line is whether the claimant is 'rocking or shifting,' he is continually moving

his weight from one foot to the other, which no matter how you phrase it, is repetitive motion."

The appellant contends that he eventually had to report the problem with his feet. He says the evidence shows that after he was released by Dr. Coker to try his job again, he was unable to do it for more than nine or ten days, and Coker then referred him to Dr. Susan Raben who changed his anti-inflammatory medicine and prescribed physical therapy for him. This was for appellant's "lumbar strain" which appellant said was caused by the "light work" he was given after he first saw the doctor about his feet. His back got to the point that Dr. Coker sent him to Dr. Raben on December 17, 1992. Dr. Raben thought, as Dr. Coker reported on December 22, 1992, that appellant's light-work job increased his back problems.

Although the appellant admitted that he had gone deer hunting for short periods while off work, I agree with the appellant that the Commission, by adopting the law judge's focus on insignificant inconsistencies, has allowed the decision in this case to turn on a credibility question without an in-depth analysis of the evidence. Although we do not reverse the Commission if its decision is supported by substantial evidence, where we are convinced that fair-minded persons with the same facts before them could not have reached the same decision, it is our duty to reverse. *Price* v. *Little Rock Packaging Company*, 42 Ark. App. 238, 856 S.W.2d 317 (1993). Even, if the appellant is untruthful, compensation cannot be denied for that reason alone. *Boyd* v. *General Industries*, 22 Ark. App. 103, 113, 733 S.W.2d 750 (1987); *Guidry* v. *J & R Eads Construction Co.*, 11 Ark. App. 219, 222, 669 S.W.2d 483, 485 (1983).

I would reverse and remand with directions for the Commission to determine benefits.

ROBBINS, J., joins in this dissent.

Claudia ARANEDA *v.* Erick ARANEDA

CA 94-68 894 S.W.2d 146

Court of Appeals of Arkansas
En Banc
Opinion delivered March 8, 1995

Price Law Firm, by: *Robert J. Price*, for appellant.

Mitchell, Blackstock & Barnes, by: *Jack Wagoner, III*, for appellee.

JAMES R. COOPER, Judge. The appellant in this chancery

case, a resident of Guatemala, filed a divorce action against the appellee, who was at that time living in Little Rock, Arkansas. The appellee filed a counterclaim for divorce. After a hearing, the chancellor entered a decree of divorce in favor of the appellant, but denied her request for alimony. From that decision, comes this appeal.

For reversal, the appellant contends that the chancery court lacked jurisdiction to grant a divorce; that the chancellor erred in finding there were no marital assets; and that the chancellor erred in refusing to award her alimony. We find the appellant's first point to be dispositive, and we reverse and remand.

The record shows that the appellee was living in Little Rock on November 20, 1992, when the appellant's divorce action was filed. However, the only evidence adduced at trial regarding the appellee's residence was that he had been a resident of Little Rock "for at least sixty days prior to *December* of 1992." (Emphasis supplied). Although it was perhaps merely the result of an inadvertent error in framing the question, the effect of stating that the appellee had been a resident for sixty days prior to *December* (as opposed to November 20, which was the actual date on which the action was commenced) was that only 49 days of residence prior to the commencement of the action was established.

[redacted] Arkansas Code Annotated § 9-12-307 (Repl. 1993) provides that residence in the state by either the plaintiff or defendant for 60 days before the commencement of the action must be proved in order to obtain a divorce. Furthermore, proof of residence must be corroborated and the corroboration of residence may not be waived by the parties. Ark. Code Ann. § 9-12-306 (Repl. 1993); *Hodges* v. *Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989). Residence for the required period in this state is jurisdictional and, dealing as it does with the power and right of the trial court to act, evidence corroborating residence should not be speculative and vague in scope. *Hingle* v. *Hingle*, 264 Ark. 442, 572 S.W.2d 395 (1978). The question of residence, being jurisdictional, may be raised at any stage of the proceeding. *Id.*

[redacted] In the case at bar, there was no evidence corroborating the appellee's residence in the state for the statutory period. Although it is true that the corroborating evidence may be rela-

tively slight, there is no evidence in the case at bar to corroborate residence in the state for 60 days prior to commencement of the action.

We recognize that a party who has benefited from a transaction may be estopped from questioning the transaction's validity. *Crain* v. *Foster*, 230 Ark. 190, 322 S.W.2d 443 (1959). However, the doctrine of estoppel is ultimately founded upon a party's own act or acceptance,[1] and for this reason the application of the doctrine is inappropriate in the case at bar. Proof of residency in a divorce action is to be distinguished from other elements of proof in that the legislature has expressly provided that it may neither be waived nor established by agreement of the parties. Ark. Code Ann. § 9-12-306 (1987). Given that this element may not be dispensed with or supplied by the express and direct action of the parties, it follows that it may not be supplied by their indirect actions through application of the doctrine of estoppel. Consequently, we are constrained to reverse and remand for further proceedings consistent with this opinion. *See Hingle* v. *Hingle*[2], *supra.*

Reversed and remanded.

JENNINGS, C.J., and MAYFIELD, J., dissent.

John E. Jennings, Chief Judge, dissenting. On November 20, 1992, the appellant, Claudia Araneda, filed an action for divorce in Pulaski County Chancery Court alleging that her husband, Erick Araneda, had been a resident of Pulaski County for more than sixty days prior to the filing of the action. In addition to a divorce, Mrs. Araneda sought an equitable property division, alimony, and child support. On December 7, 1992, Mr. Araneda filed an answer and counterclaim admitting the allegation as to residence.

At the hearing the attorneys advised the judge that the divorce would not be contested. The court was advised that the issues to

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[1]In the words of Lord Coke, the doctrine "is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth." 2 Coke, Littleton 352a.

[2]We note that the remand in *Hingle, supra,* was broad enough to allow proof of residency as well as corroboration.

be decided were the division of the parties' property, alimony, and child support. After taking extensive testimony on these issues, the chancellor awarded a divorce to the appellant, Mrs. Araneda. The chancellor also awarded her custody of the parties' two children and directed Mr. Araneda to pay $485.00 per month as child support.

Mrs. Araneda now appeals arguing that the trial court erred in not awarding her alimony, and in finding that there were no significant marital assets. She also contends that the trial court "lacked jurisdiction" to grant her a divorce.

The majority agrees with the argument that the trial court lacked jurisdiction and remands the case for further proceedings. I would hold that appellant is estopped to raise this issue and would reach the merits of her other contentions.

I cannot deny that the majority opinion comports with a literal reading of the supreme court's decision in *Hingle* v. *Hingle*, 264 Ark. 442, 572 S.W.2d 395 (1978). The court in *Hingle* said, "The question of residency is jurisdictional and may be raised at any stage of the divorce proceeding." The primary distinction between *Hingle* and the case at bar is that here appellant attacks the validity of the decree of divorce that she herself obtained.

It may be helpful to determine what kind of jurisdiction it is we are talking about. It is not subject matter jurisdiction — chancery courts generally have jurisdiction to decide divorce cases. *See generally Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987). An action for divorce is in the nature of a proceeding in rem or, more accurately, a proceeding quasi in rem. 24 Am. Jur. 2d *Divorce and Separation* § 7 (1983). The res — or thing — on which the judgment operates is the marital status of the parties. *Id.* The satisfaction of statutory residence requirement is essential to the court's jurisdiction over the marital status of the parties. *See generally* 24 Am. Jur. 2d *Divorce and Separation* § 238 (1983). By statute, corroboration of proof of residence may not be waived. Ark. Code Ann. § 9-12-306 (Repl. 1993).

The question, however, is not one of waiver but rather estoppel. In the case at bar Mrs. Araneda brought this action, put on the proof that she now claims was defective, obtained the decree

of divorce, and has subsequently accepted its benefits. She is in no position to attack its validity now. In *Crain* v. *Foster*, 230 Ark. 190, 322 S.W.2d 443 (1959), the supreme court said that one who accepts the benefit of a decree is estopped to deny its validity. *See also Anderson* v. *Anderson*, 223 Ark. 571, 267 S.W.2d 316 (1954); *Smith* v. *Smith*, 272 Ark. 199, 612 S.W.2d 736 (1981); *Tennessee* v. *Barton*, 210 Ark. 816, 198 S.W.2d 512 (1946). One who shares in the fruits or benefits of a judgment or decree is estopped to challenge its validity, even where there is a want of jurisdiction of the subject matter. *Mason* v. *Urban Renewal*, 245 Ark. 837, 434 S.W.2d 614 (1968). *See also Rader* v. *Payne*, 188 Ark. 899, 68 S.W.2d 457 (1934). The fact that some of these cases involve collateral attacks rather than direct appeals should not be determinative. *Anderson, supra*, was a collateral attack but the court said, in dicta, that the principle would apply in a direct appeal from the judgment.

In the case at bar the decree rendered by the chancellor may well be "void" under traditional doctrine, but Mrs. Araneda is estopped, by her own actions and her acceptance of the benefits of the decree, from making the argument.

I respectfully dissent.

MAYFIELD, J., joins.