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Vernal E. BARNETT *v.* HUGHEY AUTO PARTS, INC.

CA 81-344 631 S.W.2d 623

Court of Appeals of Arkansas
Opinion delivered April 21, 1982

[redacted]

Bradley & Coleman, by: *Douglas Bradley,* for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Vernal E. Barnett, appeals from a judgment of the circuit court holding him personally liable as guarantor for the debts of two corporate co-defendants. The appellant contends that the trial court erred in holding him personally liable on the guaranty pleading the statute of frauds, Ark. Stat. Ann. § 38-101 (Repl. 1962).

The cause was submitted to the court on a complete stipulation of facts. It was stipulated that for many years the appellee, Hughey Auto Parts, Inc., had supplied parts and machinery to Construction Service Company and Barnett Construction Company on open account payable monthly. Appellant was the principal for both corporations and essentially the sole stockholder in both corporations. Over the years it had been appellant's practice to make payments to appellee for corporation accounts drawn on the corporation accounts even though a particular indebtedness so paid might not be that of the corporation on which the check was drawn. From October 26, 1976 to September 15, 1977, the two corporations purchased large quantities of parts and equipment from the appellee for which no substantial payments had been made, causing the officials of appellee to express to appellant their concern about the condition of these accounts. Appellant assured them that he would be responsible for seeing that the amounts were paid. It was stipulated that based on that assurance appellee continued to make credit sales to the two corporations for which payments were not received.

On September 15, 1977, the appellee refused to make any more sales on credit to the two corporations, and again approached appellant about the condition of the accounts. The appellant again assured them that he would see that they were paid. It was further stipulated that "during one of these conversations Vernal E. Barnett delivered to the office of Hughey Auto Parts, Inc. a financial statement showing his net worth to be $1,740,000 as proof of Barnett's financial ability to perform his assurance of paying the corporate indebtedness from his own assets if the corporations did not pay." Based on these assurances and in reliance thereon "Hughey Auto Parts, Inc. forbore in filing of legal action against the corporations and Vernal E. Barnett personally."

The debts of the corporations were not paid and on January 10, 1980, appellee brought this action against the corporations on the unpaid debt and against Vernal E. Barnett upon his oral guaranty. The appellant answered denying he had executed any guaranty to personally answer for the debts or defaults of the corporations and specifically plead the statute of frauds. The trial court entered judgment against all three defendants. Only the appellant, Vernal E. Barnett, appeals. He relies upon Ark. Stat. Ann. § 38-101 (Repl. 1966) which provides that no action shall be brought to charge any person upon a specific promise to answer for the debt, default or miscarriage of another unless the promise on which the action is brought be made in writing and signed by the party to be charged. It is the settled construction of this section that every collateral undertaking or promise to answer for the default of another is within the statute and void if not in writing and signed by the person sought to be charged, but original undertakings are not within it and need not be in writing. It is also settled that where the debt has already been incurred, a promise by a third party to discharge the preexisting debt of another without any new consideration or benefit passing to him, is a collateral promise and within the statute. *Kurtz* v. *Adams,* 12 Ark. 174, 7 Eng. 174 (1851).

However, even if the debt preexists, a subsequent promise of a third party to pay it is deemed original and enforcible if founded on a new consideration of benefit

moving to the promisor. *Long* v. *McDaniel,* 76 Ark. 292, 88 S.W. 964 (1905). In *Jonesboro Hardware Co.* v. *Western Tie & Timber Co.,* 134 Ark. 543, 204 S.W. 418 (1918) the Supreme Court said, "We have several times held that a parol promise to pay the debt of another is not within the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties." It is also well settled that in determining whether an oral contract is original or collateral the intention of the parties at the time it is made must be regarded and in determining that intention the exact words of the promise, the situation of the parties and all of the circumstances surrounding the transaction should be taken into consideration. This determination ordinarily is one of fact and not of law. *Missouri Pacific Railroad Co.* v. *Havens,* 164 Ark. 108, 261 S.W. 31 (1924).

In this case the appellant was the principal officer and essentially the sole stockholder of both corporations. As such he had an unusual interest in the success of the corporate enterprise and an interest in the continued delivery of parts to the two corporations. Appellant was the principal representative of both corporations. These are permissible considerations in a determination of the issue before us. *Barrett* v. *Berryman,* 127 Ark. 609, 193 S.W. 95 (1917). It also appears that as principal officer he had used the accounts of the two corporations interchangeably in the payment of their debts. It was stipulated that the appellee placed reliance on this undertaking and advanced additional credits for which payment was not received. The appellant submitted a financial statement showing his ability to discharge the undertaking. In reliance on the financial statement and the additional undertaking and assurances of appellant, it was stipulated by the parties that there was forbearance by the appellee to sue either corporation or the appellant personally.

While no single factor set forth in the stipulation would in and of itself be determinative of the issue, we conclude that, when all the facts and circumstances of this particular case are considered, the court did not err in its determination that the undertaking of appellant was an original one and

not within the statute of frauds and was supported by original consideration and benefit moving to the promisor.

Affirmed.

Mary Joyce FISK *v.* STATE of Arkansas

CA CR 81-140 631 S.W.2d 626

Court of Appeals of Arkansas
Opinion delivered April 21, 1982
[Rehearing denied May 26, 1982.]

R. David Lewis, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Appellant Mary Joyce Fisk appeals from her conviction on three counts of delivery of a controlled substance for which she was sentenced to a fine of $500, three years and a day, and a consecutive three years, respectively. She advances eleven separate points for reversal. We find no merit in any of these and affirm. Only those facts necessary to an understanding of our decision will be recited.

Count 1: On December 14, 1980 undercover narcotics agents went to appellant's home, at which address they had previously purchased marijuana from another person. The appellant met them at the door and informed them that the person they were seeking had left town, but she proceeded to sell the agents the marijuana in exchange for money. At trial appellant admitted she delivered the contraband and received money in exchange.

Count 2: On January 12, 1981 the agents again contacted appellant stating that they wanted "something for a party." Appellant brought them a tray of controlled substances from which they selected some, paying appellant for it. At trial she admitted making this sale.

Count 3: The agents testified that also on January 12 they asked appellant about getting some "pounds of marijuana and other contraband." She said that she would try to arrange it and would contact them later. Over a two week period the agents and appellant were in constant contact, negotiating for sale and delivery of the "pounds." On February 3rd the agents talked again with appellant, discussing the sale of 22-1/2 pounds of marijuana and some other contraband for approximately $12,000 and arranging a place to meet to examine samples. The next day appellant met the agents and drove with them to a secluded place where she produced and they examined three bags of marijuana which were samples of the larger quantity. Appellant ascertained that the agents had the cash and phoned C. J. Perme locally to tell him she had "seen the money" and to arrange a place for examination of the 22-1/2 pounds. After this meeting, being satisfied that the agents had the cash and appellant and Perme had the marijuana, the parties agreed, on appellant's suggestion, to complete the sale at her home. Perme left to get the rest of the marijuana and appellant and the agents returned to their motel to pick up the "flash money."

The appellant insisted that the money be divided before the sale at her home. The agents gave her the $12,000. She put $6,000 in an envelope which she marked "J" and put this in her purse. She put the balance in an envelope marked "CJ" which the agent placed in his pocket for delivery to Perme. Appellant invited the agents into her house, where Perme was already waiting. The 22-1/2 pounds of marijuana were brought to the agents in appellant's bedroom where they had been invited to wait. At this point appellant and Perme were placed under arrest. Coincident to the arrest the officers searched appellant's purse for weapons and found additional marijuana. Pursuant to a proper warrant officers searched her vehicle the next morning and found the samples of marijuana along with a can containing marijuana located in the glove compartment. Appellant admitted at trial that the agents' testimony was "basically" correct.

POINT I

Appellant first contends that the trial court erred in excusing a juror for cause. During voir dire the prosecuting attorney asked a prospective juror if she could consider the full range of penalties, including imprisonment, if she were a juror. The woman responded that there was a possibility that she could not consider sending anyone to the penitentiary for a crime of this sort. She was then asked if she was stating that she would not be able to do so in this case. Upon her response that she did not know and had a question in her mind about it, she was excused for cause.

Appellant argues that this permitted the prosecution to seat a jury already committed to imprisonment, relying on *Haynes* v. *State,* 270 Ark. 685, 606 S.W. 2d 563 (1980). In *Haynes* the court found error in a pattern of questions and selection of jurors which would have seated a jury obligated in advance to consider imposing the maximum sentence. They were not chosen on their commitment to consider the whole range of penalties as the law requires. In the case at bar the prospective juror was asked whether she could consider the full range of penalties, which included prison. We find no merit to this contention.

POINT II

Appellant next asserts that the court erred in permitting the prosecuting attorney to tell the jury during voir dire that he represented the people of the state. Appellant objected to the following:

> MR. WEBB: Can you sit and be impartial to the defendant and to the people of this state, who I represent, in deciding the issues?

The appellant cites no authority in support of her position and we find none. Assignment of error by counsel in briefs unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that the assignments of error are well taken. *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606 (1977). The prose-

cuting attorney is elected to represent the state in criminal prosecutions. We find no error.

POINT III

Appellant also contends that the trial court erred in admitting into evidence the affidavit and warrant issued for the search of appellant's car, the testimony concerning the results of the laboratory test made on the contraband, and oral statements made by appellant, since these were not supplied in response to a proper motion for discovery.

We do not construe the motion for discovery as asking for copies of the affidavit and search warrant. It merely asks for information about "specific searches and seizures." The prosecuting attorney answered that "an affidavit for search warrant and search warrant were issued on 2/4/81." These documents are required to be filed and are available as public records. Even if the request for discovery could be construed as asking more than whether such warrants had been issued, we find no prejudice to the appellant. At the time these two documents were offered as evidence, defense counsel asked to examine them stating that this was the first time he had seen them. The prosecuting attorney asked if there were any objections to their being introduced:

> THE COURT: The Court hears none.
>
> MR. LEWIS: I don't want to waive any objection. If I find an objection later on I will make it known to the court.

While the assertion that the prosecuting attorney failed to apprise the appellant on discovery of the oral statements made by appellant and co-defendants might be of a serious nature, it is required that prejudice be shown from a failure to make proper discovery answers. *Earl* v. *State,* 272 Ark. 5, 612 S.W. 2d 98 (1981). Appellant only asserts that there were oral statements used at trial of which she had not been made aware. Although many statements attributable to her are scattered throughout the record, appellant does not point out to us which statements she finds objectionable, that a

proper objection to them was made, or that she was prejudiced by them. Absent convincing argument or citation of authority we find no merit to this contention. *Dixon* v. *State,* supra.

In response to defense counsel's motion for discovery of "any reports or statements of experts," the prosecuting attorney furnished the name and address of the expert who would be called to testify about the laboratory tests. Prior to trial the prosecuting attorney made his entire file available to defense counsel who did examine it. He was also told that if he needed more information he need only ask. The lab report showed only that the samples tested were in fact marijuana. The lab technician who was named in response to the discovery motion was called as a witness at trial and was made subject to cross-examination. We find no prejudice and agree with the trial judge that there could be no surprise to counsel in a marijuana case to find a lab report verifying contraband as marijuana. The trial court is not required under Rule 19.7, Arkansas Rules of Criminal Procedure (Repl. 1977), to comply with discovery procedures unless there is a likelihood that prejudice will result. We find no error.

POINTS IV, V, VII AND XI

The appellant's points for reversal numbered IV, V, VII and XI assert that the trial court erred in failing to suppress certain evidentiary matters as being the fruit of warrantless search or in violation of appellant's *Miranda* rights. As the basis for our ruling on these is the same, we combine them here.

The record reflects that shortly after her arrest the appellant entered a plea of guilty and thereafter moved, and was permitted, to withdraw that plea on June 5, 1981. On that same day the court set the case for trial on June 23, 1981, and advised counsel that all motions must be filed by June 16th and a hearing on those motions was set for June 19th. On June 19th no motion to suppress evidence had been filed. It was filed that afternoon but was not brought to the court's attention until the morning set for trial while the jury was

waiting in the courtroom. The court denied the motion as being untimely filed, brought to his attention too late for an evidentiary hearing or an intelligent ruling without unduly delaying the progress of the trial. We find no error.

A motion to suppress evidence must be filed not later than ten days before the trial date unless the court, for good cause, entertains the motion at a later time. Rule 16.2, Rules of Criminal Procedure (Repl. 1977). In this case the motion was not timely filed and no evidence of cause for delayed filing was offered. On overruling the motion the court granted a request that appellant be permitted to submit a brief in support of the motion at a later date. No such brief was filed. The trial court correctly denied the motion because it was filed too late. *Jackson* v. *State,* 266 Ark. 754, 585 S.W. 2d 367 (1979); *Burnett* v. *State,* 263 Ark. 225, 564 S.W. 2d 211 (1978); *Parham* v. *State,* 262 Ark. 241, 555 S.W. 2d 943 (1977). Notwithstanding the issue of timeliness of the motion, we have considered the points advanced by appellant in support of the motion and find them to be without merit.

POINT VI

Appellant contends the court erred in allowing testimony about drug sales for which she was not charged as admitted solely for the purpose of showing the likelihood that appellant committed the offenses charged due to her bad character.

One of the undercover agents testified that he had previously bought some marijuana at appellant's residence from a J. P. Forsythe. No objection was made to this testimony. When the officer was asked why he went to that address he answered that he had talked to Forsythe before going to the house. Defense counsel objected to this as hearsay, and the court properly ruled that the testimony was not offered to prove the truth of the matter but to show why the officer went to appellant's house in the first place.

While numerous statements were made regarding narcotics purchases made from appellant for which she was not

charged, the appellant does not point out in her argument where objections on the ground she now argues on appeal were made at the trial level. We find no merit to this contention. *Dixon* v. *State,* supra.

POINT VIII

Appellant argues that the trial court erred in refusing to instruct the jury on lesser included offenses, in particular that of possession of a controlled substance. In support of her position appellant makes no argument but simply refers us to *Glover* v. *State,* 273 Ark. 376, 619 S.W. 2d 629 (1981). In *Glover* the Supreme Court held that the crime of possession of a controlled substance is a lesser included offense of the larger crime of delivery. It does not hold that the trial court is required as a matter of law to instruct on that point except in appropriate cases. *Glover* cites with approval *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W. 2d 537 (1972) in which it was stated that the court so zealously protects the rights of an accused to have the jury instructed on lesser offenses that it has even held it to be reversible error to refuse to give an instructed verdict of a lesser included offense *in a proper case* even though the accused objects. Where there is testimony on which the defendant might be found guilty of a lesser rather than the greater offense the instruction must be given. *Caton & Headley* also holds that it is not error for the court to fail to instruct on the lower offense where the evidence clearly shows that the defendant is either guilty of the greater offense charged or is innocent. *Gilchrist* v. *State,* 241 Ark. 561, 409 S.W. 2d 329 (1966).

As to counts 1 and 2 the evidence shows that the agreed purchase price was delivered by the agents to appellant in exchange for her delivery of the contraband. Appellant admitted she sold the drugs in exchange for money in her testimony. She never contended that she merely possessed the drugs. On this evidence reasonable minds could not have found her guilty of mere possession.

On count 3 the record shows that at one meeting between appellant and the agents appellant accepted the agreed on $12,000 from the agents, dividing the money into

two equal packets and retaining her half. After the money passed hands she then accompanied the agents to her home where she had invited them to accept delivery of the marijuana and where delivery was made in her bedroom. The elements of delivery of a controlled substance, for which appellant was charged and convicted, consists of proof of delivery of the substance and proof of exchange of money or other things of value. On this evidence the jury could not have found her guilty merely of possession. It had to find her guilty of delivery of the controlled substance or find her innocent. In *Glover,* supra, there was evidence from which a jury might have found that there was no exchange of money. Here there is no question that the money was exchanged. We find no error.

Appellant argues the court also erred in refusing to instruct the jury on criminal attempt and criminal solicitation as lesser included offenses. Criminal solicitation and criminal attempt are not lesser included offenses under delivery of a controlled substance. They are separate crimes of which appellant was not charged.

POINT X

Appellant contends the court erred in imposing consecutive rather than concurrent sentences and in not suspending or probating part of the sentences. She argues that, due to a stated policy of the court not to alter a jury verdict, the appellant was penalized in exercising her right to a jury trial in contravention of her constitutional rights as interpreted in *United States* v. *Jackson,* 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). The trial court did not state that he followed such a policy. At the commencement of the trial counsel asked the court what his feeling would be towards suspending a sentence if the jury were to "give her time":

> MR. LEWIS: Does the court have any rule if there is jury imposed time, does the court suspend any of it?
>
> THE COURT: I rarely alter a jury decision. I think I have done it once or twice in two and a half years . . .

unless I feel it is out of proportion.

The court further indicated that if the matter were presented to him on plea or trial to the court he would consider suspending some time if appropriate.

A criminal defendant has no right to a suspended sentence or to have his sentences run concurrently. These are matters which are entrusted to the sound discretion of the trial court. *Lingo* v. *State,* 271 Ark. 776, 610 S.W. 2d 580 (1981); *Swaite & Swaite* v. *State,* 272 Ark. 128, 612 S.W. 2d 307 (1981). In sentencing the trial judge is required to exercise his judgment. It is the mechanical imposition of the same sentence in every case which *Jackson,* supra, condemns, and we find nothing to indicate that the court here mechanically imposed a sentence without exercising his discretion.

Affirmed.

GLAZE and CORBIN, JJ., dissent.

SOUTHERN WOODEN BOX COMPANY and AMERICAN MUTUAL INSURANCE COMPANY *v.* Archie SMITH

CA 81-308 631 S.W.2d 620

Court of Appeals of Arkansas
Opinion delivered April 21, 1982

Penix, Penix & Mixon, for appellants.

Henry & Walden, for appellee.

J. Gayle Windsor, Jr., for Associated Industries of Arkansas, Inc., and Arkansas State Chamber of Commerce; *Youngdahl & Larrison,* by: *Jim H. Larrison, Jr.,* for Workers' Compensation Commission; *Shackleford, Shackleford & Phillips, P.A.,* for Workers' Compensation Claims Conference and Arkansas Adjusters Association; *Mayes & Murray,* by: *Walter A. Murray,* for Arkansas Association of Self-Insurers; *Rose Law Firm, P.A.,* for Arkansas Poultry Association; *Allen, Cabe & Lester,* for Independent Insurance Agents of Arkansas; and *Bridges, Young, Matthews, Holmes & Drake,* for International Paper Company, *amici curiae.*

TOM GLAZE, Judge. The issue raised in this Workers' Compensation case is one of first impression. Simply stated, the question we must address is whether a claimant is

entitled under Arkansas law to obtain additional benefits after a final award without a showing that he has experienced a change in physical condition. In a split decision, the Commission answered this question in the affirmative, and thereby permitted the appellee to reopen his claim solely on the grounds of changed economic conditions.

The facts are not in dispute. Appellee sustained compensable injuries in August, 1976, and April, 1977, for which he was awarded a forty-five per cent disability to the body as a whole. This disability was based upon appellee's anatomical impairment rating of fifteen per cent and the wage loss factors of *Glass* v. *Edens,* 233 Ark. 786, 346 S.W. 2d 685 (1961). The Workers' Compensation Commission affirmed the award by written opinion dated January 23, 1980, and no appeal was taken from the decision.

By letter dated April 10, 1980, appellee requested another hearing, contending he was entitled to a greater permanent disability rating. Appellant responded that Ark. Stat. Ann. § 81-1326 (Repl. 1976) barred appellee from reopening his prior award of benefits because he could not show: (1) a change in physical condition, or (2) the benefits awarded were based upon an erroneous wage rate. Appellee conceded that he could not show either of these two requirements but he argued that he could maintain his rights for a claim for additional compensation pursuant to Ark. Stat. Ann. § 81-1318 (b). In sum, appellee contended that he could reopen his claim under § 81-1318 (b) and offer proof evidencing a change in economic conditions which would entitle him to an increase in benefits over that previously awarded on January 23, 1980.

The Administrative Law Judge found appellee was not entitled to reopen the previous award and refused to allow any proof concerning the change in economic conditions. As we noted earlier, the Commission reversed the decision of the Administrative Law Judge and remanded to allow appellee to present evidence on the question of changed economic circumstances. We disagree with the conclusion reached by the Commission.

The two statutory provisions relied upon by appellants and appellee are in relevant part as follows:

> § 81-1318 (b). Additional compensation. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of the injury, whichever is greater. . . .
>
> § 81-1326. Modification of awards. — Except where a joint petition settlement has been approved the Commission may at any time within six [6] months of termination of the compensation period fixed in the original compensation order or award, upon its own motion or upon the application of any party in interest, on the ground of a change in physical condition or upon proof of erroneous wage rate, review any compensation order, award or decision, and upon such review may make an order or award terminating, continuing, decreasing or increasing for the future the compensation previously awarded, subject to the maximum limits provided for in this act [§§ 81-1301 — 81-1349.]. . . .

These statutes were the subject of an earlier legal controversy in the case of *Reynolds Metal Company* v. *Brumley,* 226 Ark. 388, 290 S.W. 2d 211 (1956). However, in *Brumley,* the court dealt with the apparent ambiguity in the length of limitation contained in the two provisions, an issue which has no significance in the case at bar. The *Brumley* case is further distinguishable from the facts in the instant proceeding because in *Brumley* there was no question that the claimant suffered a change in physical condition so as to have the required grounds under § 81-1326 to reopen an award. Here, it is not contended that appellee failed to timely file a request to reopen his case. Rather, appellants argue appellee must have grounds under § 81-1326 to obtain an increase in benefits after a final award regardless of whether he filed his application to reopen within the time constraints of either statute, *i.e.,* § 81-1318

(b) or § 81-1326. Thus, appellants reason that appellee is prohibited from reopening his claim since he can only show a change in economic circumstances which is not a ground listed under § 81-1326.

In construing these two statutes, it is our duty so far as practicable to reconcile different provisions so as to make them consistent, harmonious and sensible. *Shinn* v. *Heath,* 259 Ark. 577, 535 S.W. 2d 57 (1976). Although the court in *Brumley* found a conflict between §§ 81-1318 (b) and 81-1326, it is clear that no case law has construed these provisions in the present context. It is also patently clear that if appellee is permitted to pursue his claim under § 81-1318 (b) without satisfying the grounds in § 81-1326 to reopen his award, § 81-1326 would be rendered meaningless. There is only one consistent, harmonious construction to be placed on the relationship between §§ 81-1318 (b) and 81-1326 in an effort to make them both effective, *viz.,* where a claimant seeks additional benefits after a final award, § 81-1326 governs as to the grounds required and § 81-1318 (b) governs the period of limitation for all claims for additional benefits whether or not there has been a final award.

Appellee cites cases from Arizona, Georgia, Kentucky, Maine and Mississippi in support of his position that no physical change is necessary to reopen a final award. After a review of these cases, we find that with the exception of Arizona, none of these states' workers' compensation laws provides, as does § 81-1326, that an award may be reopened on the ground of a change in "physical condition." Arizona presently has two applicable statutes with differing terms or grounds relative to the subject of reopening claims, *viz.,* A.R.S. § 23-1044 (F) (2) (requires no change in physical condition) and A.R.S. § 23-1061 (H) (requires a change in physical condition). As may be suspected, the Arizona courts have gone both ways on whether a physical change in condition is necessary to reopen an award. See *Wiedmaier* v. *Industrial Commission,* 121 Ariz. 127, 589 P. 2d 1 (1979), *Arizona Sand & Rock* v. *Industrial Commission,* 123 Ariz. 448, 600 P. 2d 752 (1979), and *Aetna Insurance Company* v. *Industrial Commission,* 115 Ariz. 110, 563 P. 2d 909 (Ct. App. 1977). A review of the statutory provisions in Kentucky

and Mississippi reveals that an award may be reopened upon a showing of "change of conditions." See K.R.S § 342.125 and Miss. Code Annot. § 71-3-53. It is interesting to note that even though the Kentucky law does not employ the language "change in *physical* conditions," the Kentucky Court of Appeals in *Osborne* v. *Johnson,* 432 S.W. 2d 800 (Ky. App. 1968), held:

> Since the determination of post-injury earning capacity is to be based on normal economic conditions, it follows that *a mere fluctuation in economic conditions will not be considered a "change of conditions" within the meaning of the reopening statute, KRS 342.125. As we interpret that statute, the change of conditions it contemplates is a change of the workman's physical condition.* [Emphasis supplied.]

We conclude from our study that the cases from the jurisdictions cited by appellee are simply not helpful in construing our own statutory provisions relative to reopening compensation awards. We find this especially true in light of the fact that there are a number of other jurisdictions where it has been held that a compensation case cannot be reopened because of a change in general economic conditions. See *J. A. Jones Construction Company* v. *Martin,* 198 Va. 370, 94 S.E. 2d 202 (1956); *Hoffmeister* v. *State Industrial Commission,* 176 Or. 216, 156 P. 2d 834 (1945); *Royal Indemnity* v. *Warren,* 102 Ga. App. 501, 116 S.E. 2d 757 (1960).

When we review other similar states' laws which deal with reopening final compensation awards, it is difficult to escape the clear language embodied in § 81-1326 which specifically provides a compensation claim may be reopened on the ground of a change in *physical* condition. Certainly, such specific language must have meaning and cannot easily be swept aside.

If economic changes in condition were intended to be grounds for a claim to be reopened, our Arkansas General Assembly could have easily so provided. One can envision changes in economic conditions which would work to the

disadvantage of claimants seeking benefits under our Workers' Compensation Act. In this vein, it is conceivable, even predictable, that many employers and insurance carriers might choose to seek a reduction in benefits awarded claimants by the Commission when economic conditions improve. In this event, the labor market would improve which would provide jobs for more people, including those who possess normally job limiting disabilities. If fluctuating economic changes are to be made a part of our formula in determining benefits, this is a policy question best left for our Arkansas General Assembly to address.

Meanwhile, for the reasons stated hereinabove, we hold the Commission erred and reverse and dismiss this cause.

Reversed and dismissed.

MAYFIELD, C.J., concurs.

Clifton James WILLIAMS *v.* STATE of Arkansas

CA CR 81-153 632 S.W.2d 235

Court of Appeals of Arkansas
Opinion delivered April 28, 1982
[Rehearing denied May 26, 1982.*]

*GLAZE, J., would grant rehearing.

Richard E. Holiman, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant was convicted in a jury trial of aggravated robbery and a sentence of ten years imprisonment imposed. We affirm.

The robbery occurred on January 9, 1981. Three days later the three victims were taken to the North Little Rock Police Department to look through 300-400 photographs on file. All three of them selected a photograph of the appellant which they identified as the robber. The picture was several years old and it was suggested that the police attempt to obtain a more recent one. Two or three days later the victims viewed two recent photographs of the appellant and he was positively identified by each of them as the man who committed the robbery.

These two photographs were again displayed to the victims during a discussion with the prosecuting attorney the day before trial. At an in-chambers hearing on the day of the trial, appellant's counsel moved to suppress the anticipated in-court identification. In overruling the motion the court ruled that the victims could testify to their first out-of-court photographic identification but not to the one made the day before trial.

During the trial the victims identified the appellant in court and testified to the first out-of-court photographic identification. On cross-examination they testified about the photographic identification made the day before trial.

Pretrial Identification

The appellant contends that the trial court was in error in its ruling on his motion to suppress the victims' in-court identification. It is his argument that there was an inadequate pretrial hearing by the court; a denial of the right to counsel at the viewing of the photographs the day before trial; and an impermissibly suggestive out-of-court identification.

In *Stovall* v. *Denno,* 388 U.S. 293 (1967), the court said that an out-of-court identification which is so unnecessarily suggestive that there is a substantial likelihood of mistaken

identification is a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution. And the court explained that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." In *Manson* v. *Brathwaite,* 432 U.S. 98 (1977), the court said "reliability is the linchpin in determining the admissibility of identification testimony" and that the factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty at the confrontation, and the time between the crime and the confrontation. These same factors were applied by the Arkansas Supreme Court in *Beed* v. *State,* 271 Ark. 526, 541, 609 S.W. 2d 898 (1980).

In *United States* v. *Wade,* 388 U.S. 218 (1967), the defendant was exhibited to witnesses before trial in a lineup conducted after indictment and without notice to his attorney. The court held this was a critical stage in the proceedings and that the Sixth Amendment right to counsel required the suppression of the lineup identification conducted in the absence of his counsel. The court said that any in-court identification made by a witness at the lineup would also have to be suppressed unless the prosecution could establish by clear and convincing evidence that the in-court identification was based upon observation other than at the lineup. This rule was followed by the Arkansas Supreme Court in *Sims* v. *State,* 258 Ark. 940, 530 S.W. 2d 182 (1975) and *Rowe* v. *State,* 271 Ark. 20, 607 SW. 2d 657 (1980).

In *United States* v. *Ash,* 413 U.S. 300 (1973), the court held that there is no Sixth Amendment right to counsel at the showing of a suspect's photograph either before or after commencement of prosecution. The court said that a substantial departure from the traditional Sixth Amendment right to counsel would be necessary to require counsel at a photographic identification made by a witness prior to trial. This is because the accused is not present at the time of the photographic display and there is no possibility that he

might be misled by lack of familiarity with the law or overpowered by a professional adversary.

Ash has been followed by the Arkansas Supreme Court in *Synoground* v. *State,* 260 Ark. 756, 543 S.W. 2d 935 (1976) and *Fountain* v. *State,* 273 Ark. 457, 620 S.W. 2d 936 (1981).

The cases cited above demonstrate, we think, that the absence of counsel at the viewing of the photographs the day before trial does not require a reversal of this case. As to any impermissibly suggestive out-of-court identification, we think the state's evidence was adequate to meet the test set out in *Manson* v. *Brathwaite.* The victims had ample opportunity to observe the appellant at the time of the crime; their attention was focused on him for a substantial period of time; they picked his picture out of a large number of photographs and, after they observed the more recent photographs, they were positive of their identification; only a few days elapsed between the crime and the identification of the photographs; and the defendant, who testified that he was 6′4″ tall and weighed around 273 lbs., was described by each of the victims as a "big man."

We think this evidence was sufficient to establish that the victims' identification derived from a source independent of the photographic identification made on the day before trial. In *Watkins* v. *Sowders,* 449 U.S. 341 (1981), the court held that the due process clause of the Fourteenth Amendment does not require a state court to hold a hearing outside the presence of the jury in every case where a defendant contends there was an improper identification. Thus, in the instant case, since the evidence introduced by the state was admissible, no prejudice could have resulted to the appellant and there was no error with regard to the adequacy of the in-chambers hearing.

Requested Instruction

Appellant's second allegation is that the trial court erred in refusing to give a requested instruction to the jury as to their consideration of the eyewitness identification testimony. The requested instruction was specifically ap-

proved by the federal court in *United States* v. *Telfaire,* 469 F. 2d 552 (D.C. Cir. 1972).

However, Arkansas dealt specifically with this question in *Conley* v. *State,* 270 Ark. 886, 607 S.W. 2d 328 (1980), wherein it was held the trial court was correct in refusing to give the *Telfaire* instruction for two reasons:

> First, the instruction contains comments on the evidence. This is a practice permitted in the federal courts but not in Arkansas. . . . Second, the instruction concerned the weight to be given to identification testimony, a subject not covered by the Arkansas Model Jury Instructions on criminal law.

Circumstantial Evidence

Appellant's final point for reversal is that the trial court erred in instructing the jury to consider circumstantial evidence. He contends the giving of AMCI 106 may have caused the jury to consider the evidence in a light unfavorable to him. This argument was rejected in *Slavens* v. *State,* 1 Ark. App. 245, 614 S.W. 2d 529 (1981).

In cases in which the state relies in part on circumstantial evidence the court must instruct the jury that such circumstantial evidence "must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion", *Ruiz & Van Denton* v. *State,* 265 Ark. 875, 582 S.W. 2d 915 (1979). The trial court gave this required instruction and thus we find no error.

GLAZE, J., dissents as to Point #1.

Herbert HATFIELD and Maxine HATFIELD *v.*
ARKANSAS WESTERN GAS COMPANY

CA 81-342 632 S.W.2d 238

Court of Appeals of Arkansas
Opinion delivered April 28, 1982
[Rehearing denied May 26, 1982.]

Marshall N. Carlisle of *Murphy & Carlisle,* for appellants.

Kathleen D. Burke, for appellee.

GEORGE K. CRACRAFT, Judge. The appellants, Herbert Hatfield and Maxine Hatfield, bring this appeal from an order of the chancery court finding that the appellee, Arkansas Western Gas Company, had a right-of-way across appellants' property fifteen feet in width for the purpose of laying and maintaining a gas line, directing appellants to cease further construction of a building within the right-of-way and to remove the walls of the partly constructed structure lying within the right-of-way.

The material facts are not seriously disputed. In 1946 the appellants granted a right-of-way to the appellee across "the north side of Lot 8 and part of Lot 1 in Block 14 of the original plat of the Town of Fayetteville, Arkansas," for the purpose of "constructing, maintaining, laying, removing, relaying and operating pipelines and appurtenances thereto across those lots." Lot 1 abuts Lot 8 on the north. The right-of-way deed did not specifically define the width of the easement but did state its purpose. This deed was duly recorded. Shortly after the execution of the grant the appellee placed a pipeline near the north line of Lot 8. At the time of the grant the appellants owned Lot 8 but did not own Lot 1, which they subsequently acquired in 1970. Appellants admitted that they had full knowledge of the location of the pipeline and that they had executed a right-of-way as to both lots.

The appellants first contend that the chancellor's finding that appellee had established a valid existing right-of-way across their property of a width of fifteen feet was not supported by a preponderance of the evidence. We do not agree. The appellee did have a valid existing right-of-way across Lot 1 pursuant to Ark. Stat. Ann. § 50-404 (Repl. 1971) which provides that if any person shall convey any real estate in fee or any less estate and shall not at the time of such conveyance have the legal estate in the lands but after acquires it, the legal or equitable estate after acquired shall immediately pass to his grantee, the same as if the legal or equitable estate had been in the grantor at the time of the conveyance.

An easement or right-of-way is an interest in land and is conveyed by deed the same as land is conveyed. However, it is not essential to the validity of the grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement. The grant of an easement is valid when it designates the easement or right-of-way as such and describes the lands which are made servient to the easement. While the owner of the servient estate has the right to limit the location of an easement, where he fails to do so it may be selected by the grantee so long as his selection is a reasonable one taking into

consideration the interest and convenience of both estates. Where the grant of a right-of-way is not bounded in the deed it is to be bounded by lines of reasonable enjoyment. *Fulcher* v. *Dierks Lumber & Coal Co.,* 164 Ark. 261, 261 S.W. 2d 645 (1924). The court in reaching such determination will consider the interest and convenience of both estates, and the grantor will have the right of the use of the easement, except insofar as the limitation of that use is essential to the reasonable enjoyment of the easement. *Drainage District No. 16, Mississippi County* v. *Holly,* 213 Ark. 889, 214 S.W. 2d 224 (1948); 25 Am. Jur. 2d *Easements and Licenses* § 78.

The appellee's witnesses testified unequivocally that the minimum width of right-of-way necessary to maintain the pipeline would be fifteen feet. The court so found. The chancellor also found that appellants had actual knowledge of the installation of the line in 1946 and of their own grant and that the language in that grant provided for its maintenance. The findings of a chancellor will not be disturbed on appeal unless they are found to be clearly erroneous or against a clear preponderance of the evidence. As preponderance of the evidence lies heavily on the credibility of the witnesses we defer to the superior position of the chancellor in this regard. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 409 (1981); Rule 52 (a) Arkansas Rules of Civil Procedure.

The appellants next contend that the chancellor erred in sustaining a cause of action based on anticipatory breach of the use of the right-of-way. They contend that a cause of action does not exist until the appellee's right to repair or maintain the gas line actually has been denied.

The evidence in this case reflects that a building was under construction on that part of the real estate which was subject to the easement. At the time a temporary restraining order was entered there were two walls, door and window frames, and steel beams in place. Had the appellee failed to seek that order the building would have been completed. There was no anticipatory breach of the use of the right-of-way. Once the building was commenced, it was an unnecessary and unreasonable interference with the appellee's

rights and appellee's cause of action arose at that time. The chancellor in this connection stated "any reasonable human being would know that you cannot build over a gas line. . . ." The owner of the servient estate can do nothing tending to diminish its use or make it more inconvenient or create hazardous conditions. We find no merit to this contention.

The appellants next contend that the chancellor erred in determining that the rights of the owner of the easement were superior to those of the surface owner. The rule in this state is that the owner of an easement may make use of the easement compatible with the authorized use so long as the use is reasonable in light of all facts and circumstances of the case. *Massee* v. *Schiller,* 243 Ark. 572, 420 S.W. 2d 839 (1967). In the case of underground pipelines it would appear that one of the primary incidents of the easement is that the line be accessible for maintenance and repair. Without such rights the easements could become useless. The chancellor found that building over a gas line is a hindrance to access for maintenance and repair and a clear restriction on the right of full enjoyment. We find no error in the ruling of the chancellor in this regard.

The appellants finally contend that the chancellor's delimiting of the easement violates the due process clause in that the court's order that the real estate in issue remain unimproved constitutes a substantial taking of appellants' property without due process of law. They argue that the ditch for the pipeline was originally dug by hand and required only a narrow strip of land for construction. They contend that there is a difference between knowledge of existence of the pipeline and knowledge of the extent of the encumbrance.

We do not view this as an unconstitutional taking of additional lands without due process. The law in this state is, and has been at least since *Fulcher,* supra, that an unbounded easement is a grant of a valid right-of-way and that the limits of such a right-of-way are to be determined by the lines of reasonable enjoyment. As the appellants had the right at the time the easement was granted to limit its extent but did not do so, they cannot now claim that they are being

unconstitutionally deprived of their property by a court's present determination of the lines of reasonable enjoyment under that grant.

We affirm.

John RAPLEY *v.* LINDSEY CONSTRUCTION COMPANY, TRI-STATE INSURANCE COMPANY, PLANT SERVICES and GENERAL INSURANCE COMPANY

CA 81-405 631 S.W.2d 844

Court of Appeals of Arkansas
Opinion delivered April 28, 1982

Appellant, *pro se.*

Laser, Sharp & Huckabay, P.A., for appellees, Lindsey Construction Co. and Tri-State Ins. Co.

Matthews & Sanders, by: *Gail O. Matthews,* for appellees, Plant Services and General Ins. Co.

GEORGE K. CRACRAFT, Judge. Appellant, John Rapley, appeals from a decision of the Workers' Compensation Commission which denied his claim of total and permanent disability resulting from injuries received while in the employ or either or both appellees, Lindsey Construction Company and Plant Services, and entered an award for permanent partial disability to his body as a whole against appellee Plant Services.

Although represented by counsel throughout the pro-

ceedings before the Commission, appellant presents this appeal pro se. His brief fails to contain a statement of the case sufficient to enable the court to understand the nature of the case or the action taken by the Commission as required by Rule 9 (b), Rules of the Supreme Court and the Court of Appeals. It contains no recital of points relied upon for reversal as required by Rule 9 (c). His abstract of the proceedings omits all orders of the Commission, all medical testimony and exhibits and contains only portions of his own testimony in violation of Rule 9 (d). Appellees, while calling our attention to these deficiencies, have submitted no supplemental abstract other than the decisions of the Administrative Law Judge and the Full Commission. These deficiencies are flagrant and require an unjust and unreasonable delay in the disposition of the case and we therefore affirm the decision of the Workers' Compensation Commission in accordance with Rule 9 (e). *Gatewood* v. *Little Rock Public Schools,* 2 Ark. App. 102, 616 S.W. 2d 784 (1981); *Weston* v. *State,* 265 Ark. 58, 576 S.W. 2d 705 (1979).

Although we affirm due to failure to comply with Rule 9, we have reviewed the record even though not required to do so, at the expense of valuable appellate time which Rule 9 was intended to prevent. We conclude that appellant's argument on appeal would be rejected even if considered on the merits. On review of such cases we do not reverse the decision of the Commission if its determinations are supported by substantial evidence. *Bankston* v. *Prime West Corp.,* 271 Ark. 727, 601 S.W. 2d 586 (Ark. App. 1981). Our review discloses that the findings of the Commission are amply supported by the evidence.

Appellant initiated these proceedings against both appellees, contending that he was first injured on June 2, 1977 while in the employ of Lindsey Construction Company, and received a subsequent injury on August 1, 1978 while employed by Plant Services. He urged that these injuries were connected and that permanent total disability should be awarded against one or both appellees. The Administrative Law Judge found that appellant had sustained permanent partial disability to the body as a whole only to the extent of 35% and that there was no connection

between the two injuries. He dismissed the claim against Lindsey and entered the award only against Plant Services. The Full Commission affirmed and adopted the decision of the Administrative Law Judge in its entirety.

There was no evidence connecting the first injury with the second and none on which a finding against Lindsey Construction Company could have been warranted. The Commission's finding of 35% permanent partial disability is more than amply supported by the record. The Commission properly considered, along with medical evidence, evidence of age, education, experience and other matters affecting wage loss, in its determination of whether claimant was capable of performing work for which he was qualified. *Glass* v. *Edens,* 233 Ark. 786, 346 S.W. 2d 685 (1961). The medical evidence indicated that appellant has sustained anatomical disability of 15% to the body as a whole and that he should no longer do work requiring heavy lifting as in his previous jobs. In support of his claim of total disability appellant and his wife testified that he was thirty-three years old, had attended college for three years and held an Associate Arts degree in welding. Appellant testified that while he could not follow his former occupation as a welder, he had made no real effort either to seek employment in fields for which his education and experience might qualify him or otherwise determine whether he was able to perform the duties of such other pursuits. The Commission found that these factors effectively blocked a full assessment of all factors in determining ultimate disability. The finding of the Commission that appellant was not totally and permanently disabled is fully supported by the record. *Smelser* v. *S. H. & J. Drilling Corp.,* 267 Ark. 996, 593 S.W.2d 61 (1980).

We affirm.

GLAZE, J., not participating.

Jess P. ODOM *v.* THE FIRST NATIONAL BANK IN LITTLE ROCK

CA 81-346 631 S.W.2d 846

Court of Appeals of Arkansas
Opinion delivered April 28, 1982

Hankins, Hicks & Madden, for appellant.

Friday, Eldredge & Clark, by: *William L. Terry* and *John Dewey Watson,* for appellee.

DONALD L. CORBIN, Judge. Jess P. Odom, appellant, and Odom Enterprises, Inc., an Arkansas Corporation, were comakers of a promissory note payable to the appellee, First National Bank of Little Rock, Arkansas, in the principal sum of $631,430.76. Comaker Odom Enterprises, Inc., mortgaged 16,000 acres of Newton County lands as security for the indebtedness. Suit was filed on March 12, 1980, against both comakers because of a default in payment. At a trial on September 4, 1980, the parties entered into a settlement agreement whereby Odom Enterprises, Inc., and the appellant agreed to consent to judgment provided the judgment would not be entered for a period of six months. This time span was to allow the defendants to find a buyer for the Newton County lands in order to pay off the note. The case was continued to March 16, 1981. On March 13, 1981, Odom Enterprises, Inc., filed Chapter Eleven bankruptcy proceedings. This stayed further proceedings of the case at bar as it related to Odom Enterprises, Inc. Since

appellant Jess P. Odom was not a party to the bankruptcy proceedings, appellee proceeded against him. The trial court entered personal judgment against the appellant on June 18, 1981, for the indebtedness. Execution, garnishment or other efforts of collection against appellant's assets were stayed until after the sale of the mortgaged property or until further order of the court. The judgment further recited that the court retain jurisdiction and control of the parties to include further proceedings against Odom Enterprises, Inc., pending the proceedings in the bankruptcy court. We dismiss.

We believe that Rule 54 (b) of the Arkansas Rules of Civil Procedure controls the disposition of this case. It provides in part:

> (b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. [W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In applying Rule 54 (b) we find that the judgment entered by the trial court is not an appealable order. See *Clark* v. *Fitzgerald,* 270 Ark. 240, 605 S.W. 2d 1 (1980). The Committee Comments to Rule 54 (b) state that its purpose is to prevent piecemeal appeals while portions of the litigation remain unresolved. The comment recognizes that there may be situations where a particular claim should be finally determined before the entire case is concluded. A final judgment on fewer than all claims involved may be directed

only upon the express determination that there is no good reason for delay. Thus, a party should always know whether a judgment in a Rule 54 (b) situation is ripe for appeal. Unless this express determination has been made by the trial court, there can be no appeal. *Clark* v. *Fitzgerald, supra.*

In the instant case, the trial court made no such express determination; but in fact, stayed the enforcement of its judgment until the conclusion of the bankruptcy proceeding involving Odom Enterprises, Inc.

Dismissed.

FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, INC. *v.* W. R. SMITH and Wray B. SMITH

CA 81-248 632 S.W.2d 244

Court of Appeals of Arkansas
Opinion delivered May 5, 1982

Samuel N. Bird of *Williamson, Ball & Bird,* for appellant.

L. David Stubbs, for appellee.

MELVIN MAYFIELD, Chief Judge. The appellant, Farm Bureau Mutual Insurance Company, was sued on a homeowners policy and the jury returned a verdict for the company. This appeal is from the granting of a motion for new trial. We find the motion should not have been granted.

Appellees' motion was based on an allegation of juror misconduct consisting of a statement said to have been made by one of the jurors during jury deliberations. The motion was accompanied by the affidavit of a juror who also testified at the hearing on the motion. While it is not entirely

clear from the appellant's abstract (there is no supplemental abstract by the appellees), we accept the assertion in appellees' brief that the affidavit and testimony by the one juror was that the other juror said "it's lawsuits like this that will make all our insurance premiums go up."

In its order granting a new trial, the court said while the testimony did not prove that appellees did not receive a fair trial, "with this shadow over the jury's deliberations it cannot be said plaintiffs did receive a fair trial."

The appellant objected to the trial court's consideration of the juror's affidavit and to the introduction of the juror's testimony at the hearing. The admissibility of such evidence is governed by our Uniform Rules of Evidence 606 (b), which states:

> (b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to asset [assent] to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Prior to the adoption of Rule 606 (b) we had a statute which provided: "A juror cannot be examined to establish a ground for a new trial, except it be to establish, as a ground for new trial, that the verdict was made by lot." In *Strahan* v. *Webb*, 231 Ark. 426, 330 S.W.2d 291 (1959), the court said the statute was based on the logic of the following statement from 53 Am. Jur. *Trial* § 1105 (now 76 Am. Jur. 2d *Trial* § 1219 [1975]):

> The rule is founded on public policy, and is for the purpose of preventing litigants or the public from invading the privacy of the jury room, either during the deliberations of the jury or afterward. It is to prevent overzealous litigants and a curious public from prying into deliberations which are intended to be, and should be, private, frank, and free discussions of the questions under consideration. Further, if after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, it would open the door for tampering with jurors and would place it in the power of a dissatisfied or corrupt juror to destroy a verdict to which he had deliberately given his assent under sanction of an oath.
>
> Testimony of the jurors to impeach their own verdict is excluded not because it is irrelevant to the matter in issue, but because experience has shown that it is more likely to prevent than to promote the discovery of the truth. Hence, the affidavit of a juror cannot be admitted to show anything relating to what passed in the jury room during the investigation of the cause, or the effect of a colloquy between the court and a juror, or the arguments made to a juror by a fellow juryman. The rule that a verdict cannot be impeached by the testimony of a juror is generally adhered to where it is sought to impeach a verdict on grounds of misconduct on the part of the juror or his fellow jurors, despite apprehension expressed in many cases that such rule sometimes serves the cause of injustice.

After Uniform Evidence Rule 606 (b) became effective, the Arkansas Supreme Court reaffirmed the long-standing attitude demonstrated in *Strahan* v. *Webb* by affirming the trial court's refusal to grant a new trial based on juror affidavits in *Sanson* v. *Pullum,* 273 Ark. 325, 619 S.W.2d 641 (1981). The court said:

> The jurors' affidavits were clearly inadmissible. Uniform Evidence Rule 606 (b) states plainly that a juror may not testify as to the effect of anything upon his mind as influencing him to assent to the verdict, nor

> may his affidavit be received concerning a matter about which he is precluded from testifying. We take this opportunity to state unequivocally, for the guidance of the bar, that in our opinion it is improper for a lawyer to interview jurors after a trial in an effort to obtain such inadmissible affidavits to impeach their own verdict.

See also *Garner* v. *Finch,* 272 Ark. 151, 612 S.W.2d 304 (1981).

In the instant case, the statement "it's lawsuits like this that will make all our insurance premiums go up" is simply an expression of opinion on the merits of the appellees' case. It therefore falls within the proscription of Rule 606 (b) and could not properly be considered as the basis for the granting of the motion for new trial. But even if the statement is not regarded as a comment on the merits of appellees' case, it would still not meet the rule's admissibility requirement of "extraneous" prejudicial information "improperly" brought to the jury's attention.

This is because the appellees' claim in this case is based upon the alleged failure of the insurance company to see that the appellees' house was properly repaired by the building contractor. The amount of the premium paid for the insurance was in evidence and in closing argument appellant's attorney told the jury that premiums would have to increase if companies were required to inspect the construction on the repair jobs for which they paid. Thus, in this case, the matter of an increase in premiums was before the jury without objection and was not "extraneous" information "improperly" brought to its attention.

Appellees contend the evidence by the juror was admissible to show prejudice and bias against them and in favor of the insurance company. In support of that contention the appellees cite *Shipley* v. *Permanente Hospitals,* 127 Cal. App. 2d 417, 274 P. 2d 53 (1954), where the court allowed juror affidavits which stated that during deliberations other jurors had admitted their general bias against verdicts for doctors in malpractice cases.

We think that case involved a different situation. Here, there was no evidence that any juror admitted bias or prejudice against the claims of insureds generally or the claims of these appellees specifically. To allow the evidence in this case to impeach the jury's verdict would violate evidence Rule 606 (b) and the public policy that protects the privacy of the jury room — a policy which experience has shown helps the jury's verdict to reflect the truth.

The order granting a new trial is reversed and the case is remanded with directions to enter judgment in accordance with the jury's verdict.

NATIONAL INVESTORS FIRE & CASUALTY INSURANCE COMPANY *v.* Louise EDWARDS, Administratrix of the Estate of Wilburne D. EDWARDS, Deceased

CA 81-347 633 S.W.2d 41

Court of Appeals of Arkansas
Opinion delivered May 5, 1982
[Rehearing denied June 9, 1982.]

Jim O'Hara, for appellant.

Clifton H. Hoofman, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant appeals from a judgment entered in circuit court against it in the amount of $7,280 with interest, 12% penalty and attorney's fees of $2500. The appellee, Louise Edwards, brought this action as administratrix of the Estate of Wilburne D. Edwards, deceased, seeking to recover benefits under a work loss coverage contained in an automobile insurance policy issued by the appellant to the deceased, who died in an automobile accident. The appellant denied that the policy afforded work loss benefits to one not surviving an accident. Also, since appellee had settled with and fully released the tortfeasor, the appellant plead and now asserts that it was entitled to a credit against its liability out of the tort recovery, less the reasonable costs of collection.

The case was submitted to the trial court sitting without a jury on an agreed statement of facts. The court found that the policy provisions were ambiguous and, construing them most strongly against appellant, found that appellant was

liable for the stipulated amount of work loss benefits. The court entered judgment for the full amount of stipulated benefits with interest and costs, a 12% penalty and allowed an attorney's fee against appellant in the amount of $2500. The court in both its findings and judgment was silent on the issue of appellant's right to a credit on its liability out of the settlement proceeds.

We agree that the trial court was correct in determining that the policy did afford work loss coverage under the circumstances, but conclude that the court erred in not recognizing appellant's right of reimbursement and credit out of the third party recovery, less its proportionate part of the cost of collection as provided in Ark. Stat. Ann. § 66-4019 (Repl. 1980) and in imposing interest, 12% penalty and attorney's fees on the appellant.

COVERAGE

According to the agreed statement of facts the appellant had issued its policy to Wilburne D. Edwards who died as a result of injury sustained in an automobile accident on July 10, 1977, at a time when the policy was in full force and effect with all premiums paid. The policy contained a "no fault" loss of income provision as required by Ark. Stat. Ann. § 66-4014 (b) (Repl. 1980). The parties agreed that if appellee was entitled to recover she would be entitled to recover $104 per week for 52 weeks as provided in the policy. It was agreed that the insured died as a result of bodily injuries and did not work or earn any income during the subsequent fifty-two week period. It was stipulated that appellee had made demand for payment under the work loss provisions on two occasions during July of 1977 but no payments were made by appellant. It was further agreed that on February 23, 1978 the appellee entered into a settlement with the tortfeasor for $50,000 and executed a full and complete release of all claims which the deceased might have against the third party.

The appellant argues that the provisions of our statute requiring this coverage do not compel an insurer to pay work loss benefits in case of death but contemplate that such benefits will be paid only to living, injured or disabled

persons. Ark. Stat. Ann. § 66-4014 (Repl. 1980) requires that every automobile liability insurance policy covering private passenger vehicles issued in this state provide minimum medical, income disability and accidental death benefits. Section 66-4014 (b) in pertinent part is as follows:

> (b) Income Disability Benefits. Seventy percent (70%) of the loss of income from work during a period commencing eight days after the date of the accident, and not to exceed fifty-two weeks, but subject to a maximum of $140 per week . . .

The appellant argues that the use of the word "disability" in the section head and the phrase "the loss of income from work during a period commencing eight days after the date of the accident," presumes a disabling injury to a living person and excludes death. It argues that the words "disability" and "death" are not synonymous relying on *Svec* v. *Allstate Insurance Co.*, 53 Ill. App. 3d 1033, 369 N.E. 2d 205 (1977); *Hamrick* v. *State Farm Mutual Automobile Ins. Co.*, 270 S.C. 176, 241 S.E.2d 548 (1978); *Cannon* v. *Georgia Farm Bureau Mutual Ins. Co.*, 240 Ga. 479, 241 S.E. 2d 238 (1978); *Western Fire Ins. Co.* v. *Wallis*, 289 Or. 303, 613 P. 2d 36 (1980); and *Griffin* v. *Travelers Indemnity Co.*, 328 So. 2d 207 (Fla. 1976). These cases in construing similar statutes and policy provisions incorporating them, do so hold. However, this argument and the cases cited would be more persuasive if we were here construing the wording of our statute or a policy provision which incorporated its words and phrases. Although our statute does require that minimum coverage be provided in all policies, it does not prohibit an insurer from providing broader coverage than that mandated. The provision contained in the policy sued on was much broader:

> "WORK LOSS" means (a) With respect to an income earner, loss of income from work the eligible injured person *would have earned had he not sustained bodily injury* . . . .

This provision does not speak of "disability," "during a period of disability" or "as a result of disability," as does our

statute or the statutes and policy provisions construed in those cases cited by appellant. It defines work loss as "loss of income from work which an eligible person *would have earned had he not sustained the bodily injury.*" The next question then is does the term bodily injury include death? The policy itself provides the answer. The policy defines the term "bodily injury" in the following manner:

> "BODILY INJURY" means bodily injury, sickness or disease, *including death resulting therefrom.*

When these two policy provisions are read together they provide that work loss benefits are afforded for loss of income from work which an injured person would have earned had he not sustained the bodily injury from which his death resulted. The appellant has thus elected to draft its coverage much broader than the statute might require. While we conclude that this language is clear, if any ambiguity exists, it must be resolved most strongly against the insurance company and most favorably to the insured. *Employers Mutual Ins. Co.* v. *Farm Bureau Mutual Ins. Co.*, 261 Ark. 362, 549 S.W.2d 267 (1977); *First Heritage Life Assur. Co.* v. *Butler*, 248 Ark. 1164, 455 S.W.2d 135 (1970).

APPELLANT'S SUBROGATION RIGHTS

The appellant next contends that even if it were held liable under the policy for the payment of work loss benefits, it was entitled to a credit against liability out of appellee's recovery from the tortfeasor, as provided by subrogation provisions contained in the policy and by Ark. Stat. Ann. § 66-4019 (Repl. 1980). It was stipulated that over a year prior to the commencement of this action the appellee compromised and settled any and all claims of the deceased growing out of the accident against a third party tortfeasor for the sum of $50,000. The appellant was not a party to that agreement and it was not stipulated that it had knowledge of or acquiesced in the settlement in any way.

The appellee contends that where an insurer denies liability it cannot thereafter invoke as a defense that its right to subrogation has been destroyed by its insured's settlement

with release of an ultimately liable third person. In support of this position she relies on *Powers* v. *Calvert Fire Ins. Co.*, 216 S.C. 309, 57 S.E.2d 638 (1950); *Dinn Oil Company* v. *Hanover Ins. Co.*, 87 Ill. App. 206, 230 N.E.2d 702 (1967); *Liberty Mutual Ins. Co.* v. *Flitman*, 234 So. 2d 390 (Fla. 1970): and *Kahane* v. *American Motorists Ins. Co.*, 65 Misc. 2d 1065, 319 N.Y.S. 2d 882 (1971). In some of these cases the courts held the insurer was estopped to raise these defenses where it had by its conduct induced the insured to pursue a tortfeasor or had acquiesced and participated in settlement negotiations without asserting its subrogation rights. Others found the insurer to have waived its subrogation rights by denying liability under the policy and thus forcing the insured to pursue the third party.

In the matter before us for review we are not required to address the soundness of these decisions for they would clearly have no application. Where a case is submitted to the court on a complete statement of facts, the burden is on the party seeking to recover to show his right from the facts agreed upon and he may not claim that there are other facts which the court should or may presume. *Lasley* v. *Bank of Northeast Arkansas*, 4 Ark. App. 42, 627 S.W.2d 261 (1982). The agreed statement of facts contains no indication that appellant induced or otherwise encouraged appellee to pursue the third party or that it had knowledge of, or had acquiesced in any way in her settlement. Nor does the agreed statement of facts indicate that appellant ever denied liability under the policy. The agreed statement of facts merely sets forth that demand was made but that "no payment was received." There are many instances in which payment under the policy might be delayed without a denial of liability. The denial of liability first appears in the answer of the appellant, which was filed many months after the settlement agreement extinguishing its subrogation rights had been effected.

No Arkansas cases have been cited where such a rule has been applied. While our courts have in some cases held a denial of liability by the insurer to constitute a waiver of certain defenses such as the insured's failure to file a timely proof of loss, the cases show a strong reluctance to find such

a waiver where it would permit a double recovery for a single wrong. *Shipley* v. *Northwestern Mutual Ins. Co.*, 244 Ark. 1159, 428 S.W.2d 268 (1968); *Black* v. *Farm Bureau Ins. Co.*, 272 Ark. 406, 614 S.W.2d 937 (1981). Nor do we view this as a defense, but an assertion by appellant of a statutory right.

Ark. Stat. Ann. § 66-4019 (Repl. 1980) contains the following provision effecting the mandatory no fault work loss coverage:

> INSURERS' RIGHTS OF REIMBURSEMENT — Whenever a recipient of, § 1 (a) and (b) [§ 66-4014 (a) and (b)], benefits recovery in tort for injury, either by settlement or judgment, the insurer paying such benefits has a right of reimbursement and credit out of the tort recovery or settlement, less the cost of collection as hereinafter defined. All costs of collection thereof shall be assessed against insurer and insured in the proportion each benefits from such recovery. Said insurer shall have a lien upon said recovery to the extent of its said benefit payments.

The appellee contends that this statute can have no application as the appellant had not paid the insured and hence was not entitled to the benefit of subrogation. The statute provides a right of "reimbursement and *credit*" for a tort recovery. In *Black* v. *Farm Bureau Mutual Ins. Co.*, supra, the appellant was injured by two joint tortfeasors. He entered into a settlement with, and released from liability only one of them in exchange for $10,000. He then brought suit against the insurer under a no fault policy provision affording coverage against uninsured motorists. The second tortfeasor was not insured. There, in applying a similarly worded subrogation statute which did not include the words "credit for tort recovery" the court said:

> The stipulation certainly makes this case less difficult than it might have been. There being no disputed facts, it is clear that had Farm Bureau paid appellant pursuant to the terms of his uninsured motorist coverage it would have been entitled to subrogation under the provisions of Ark. Stat. Ann. §

> 66-4006 (Repl. 1980). Therefore, when joint tortfeasor Bohannon paid $10,000 to appellant and his carrier, this amounted to collection of subrogation in advance and satisfied the liability under the uninsured motorist provision of the policy.
>
> An individual is entitled to only one recovery for the minimum limit of the Arkansas Financial Responsibility Act. *MFA Mutual Insurance Co.* v. *Wallace,* 245 Ark. 230, 431 S.W.2d 742 (1968). If he collects only a portion of the minimum from a joint tortfeasor or any other responsible persons or organization, he may collect the balance up to the minimum from his uninsured motorist carrier. *State Farm Mutual Automobile Insurance Co.*v. *Cates,* 261 Ark. 129, 546 S.W.2d 423 (1977).

Here the recovery from the tortfeasor was $50,000, a sum which greatly exceeds the minimum coverage provided in the policy.

We conclude that the trial court erred in not taking into consideration the settlement recovery and in not giving the appellant credit for that amount in accordance with Ark. Stat. Ann. § 66-4019 (Repl. 1980) which provides that in such cases the credit allowable to the appellant out of the tort recovery should be reduced by the cost of collection. It further provides that the cost of collection shall be assessed against the insurer and the insured in the proportion each benefits from said recovery. In *Northwestern National Ins. Co.* v. *American States Ins. Co.,* 266 Ark. 432, 585 S.W.2d 925 (1979) it was held that cost of collection includes reasonable attorney's fees. Under the provisions of the statute all costs of collection, including reasonable attorney's fees, should be prorated between the parties according to the benefit each receives and not assessed solely against the insurer.

We also conclude that the trial court erred in allowing attorney's fees and penalty against the appellant. Had the issue of appellant's rights of subrogation and credit not been in issue, and the suit been solely for recovery under the policy, these allowances might have been proper under Ark.

Stat. Ann. § 66-4021 (Repl. 1980). However, as the action against appellant was brought after the settlement was made and it relied upon its rights set forth in the subrogation statutes referred to, the court should not have allowed attorney's fees or 12% penalty against the appellant.

We conclude that appellant was entitled to reimbursement or credit out of the tort settlement, less the cost of collection. The case is reversed and remanded for a determination and apportionment of the costs of collection and entry of a judgment not inconsistent with this opinion.

Reversed and remanded.

Lonnie EUBANKS *v.* Alberta EUBANKS

CA 81-343 632 S.W.2d 242

Court of Appeals of Arkansas
Opinion delivered May 5, 1982

Robert S. Blatt, for appellant.

Lawrence W. Fitting of *Gean, Gean & Gean,* for appellee.

JAMES R. COOPER, Judge. The appellant seeks a reversal of the decision of the Sebastian County Chancery Court which increased his child support obligation from $40.00 per week to $84.00 per week for his three minor children. The appellee argues that the chancellor's decree increasing the amount of support did not constitute an abuse of discretion and is supported by a preponderance of the evidence.

The parties were divorced by decree of the District Court of LeFlore County, Oklahoma, on June 17, 1974. At that time, appellee was awarded custody of the six minor children then residing with her. Appellant was ordered to pay $150.00 per month as child support. On August 8, 1977, appellee filed a complaint in the Chancery Court of Sebastian County, Arkansas, seeking an increase in child support. On January 3, 1978, the Chancery Court of Sebastian County rendered an order giving full faith and credit to the

Oklahoma divorce decree, but denied the petition for an increase in child support. The court modified the Oklahoma order by requiring that child support payments were to be made in the amount of $40.00 per week. The court also provided:

> The defendant is ordered to provide additional help for said minor children, as is done in the past, and he shall be responsible for all extra ordinary medical and dental expenses of said minor children.

On December 29, 1980, a motion for modification of the 1978 order was filed in the Chancery Court of Sebastian County. That motion indicated that three minor children were still residing in the home, and sought an increase of support to $90.00 per week. After a hearing, the chancellor entered an order which increased the amount of weekly support to $84.00. The court found that sum to be reasonable based on appellant's gross earnings, his net earnings, and the child support chart. The appellee was given the right to claim the children as dependents for income tax purposes. Although the chancellor did not specifically relieve the appellant of the duty to make additional payments as had been done in the past, as required by the 1978 order, he only stated that he encouraged the appellant to continue to provide additional help other than that which was required by the court.

The record reflects that at the time of the hearing, the appellant was making $8.00 an hour under a union contract; that he had been paid $7.60 an hour for the previous two years under another contract; and that he had worked for the same construction company for twenty-seven years. The appellant testified that he gave his sixteen year old daughter approximately $7.00 a week to help her pay for her school lunches, and that he gave each of his other children $2.00 to $3.00 per week. He further testified that his monthly expenses were $1,075.81, but that figure did not provide anything for clothing or entertainment. The appellant further testified that his net earnings were $245.00 a week, and that he had remarried and was supporting a step-child.

The appellee testified that her net earnings were between $195.00 and $245.00 per week, and that her income was $11,518.00, $11,664.00, and $13,540.00 for 1978, 1979, and 1980, respectively. There was no testmony as to any other differences between the situation of appellant and appellee, between 1978 and the date of the hearing in this case.

The law is well settled that modification in child support is to be based on changes in circumstances. In *McFadden* v. *Bramlett,* 270 Ark. 850, 606 S.W.2d 375 (Ark. App. 1980), this Court stated:

> We regard as settled law the rule that an increase in child support must be based upon a showing of changed circumstances. *Barnes* v. *Barnes,* 246 Ark. 624, 439 S.W.2d 37 (1969); *Haney* v. *Haney,* 235 Ark. 60, 357 S.W.2d 19 (1961), where Justice Smith stated for the court: " . . . any increase in the allowance for the support of the children must be based upon a showing that conditions have changed since the entry of the decree." One seeking the modification has the burden of showing a change in circumstances requiring modification. *Collie* v. *Collie,* 242 Ark. 297, 413 S.W.2d 42 (1967); *Riegler* v. *Riegler,* 246 Ark. 434, 438 S.W.2d 468 (1969).
>
> Moreover, the consideration has a relative aspect: the needs of one party as compared to the ability of the other. *Lively* v. *Lively* [222 Ark. 501, 261 S.W.2d 409], *supra,* and *Watnick* v. *Bockman,* 209 Ark. 696, 192 S.W.2d 131 (1946). The assumption, upon considering a modification of the child support provision of a decree, is that the Chancellor correctly fixed the proper amount in the original divorce decree. *Collie* v. *Collie, supra.* In the instant case, we can find no evidence in the record to support an increase in child support on the basis of changed circumstances. Appellant merely testified as to his income and his financial circumstances for the year 1979, but there was no evidence to show that his economic situation had changed since the order of February 7, 1979, wherein appellant was ordered to pay

> $75.00 per month. Certainly there was no testimony that appellee's needs had increased, as she did not take the stand.

In *Hurst* v. *Hurst,* 269 Ark. 778, 602 S.W.2d 137 (Ark. App. 1980), this Court discussed the principles underlying modification of child support and concluded:

> That the state of the law in this area may be said to be in Arkansas that the Chancery Court has broad power to modify a provision for child support where it finds a modification to be in the best interest of the children and no hard and fast rule can be laid down concerning the specific nature of the changed circumstances or the degree thereof. We regard this general statement as entirely consistent with the rule expressed in *Collie* v. *Collie,* 242 Ark. 297, 413 S.W.2d 42 (1967), and *Shue* v. *Shue,* 162 Ark. 216, 258 S.W. 128 (1924), to the effect that whether a modification of child support is justified by changed circumstances is within the *sound discretion* of the Chancellor.

The Court also pointed out, after examining the cases dealing with modification of support, that:

> [W]hen the child support has been reduced by way of modification, the Supreme Court has been apt to scrutinize the record for clear change of circumstance but less inclined where an increase in child support has occurred.

The *Hurst* case, *supra,* dealt with the situation where the appellant had provided additional support, and this Court found that the appellee was entitled to rely on the expectation of that additional support over and above that which was agreed to in a separation agreement.

In the case at bar, we are unable to find any changed circumstances which justify an increase in child support such as that awarded by the chancellor. There was no testimony concerning increased need on the part of the appellee, nor was there testimony of a substantial increase in

appellant's earnings. In fact, the appellant was earning approximately forty cents per hour gross, or $16.00 per week, more than he had been earning in 1978. The appellee, on the other hand, had one less child to support at her home, and she was earning approximately $2,000.00 more than she had been in 1978.

Although it may be that the original child support could have been set at a higher amount without having constituted an abuse of discretion, we must assume that the chancellor correctly fixed the proper amount of support in the original decree. *McFadden* v. *McFadden, supra.* Under that rule, we must hold that the chancellor was clearly erroneous in finding a change of circumstances, and, therefore, that he abused his discretion by increasing the child support to $84.00 per week.

It seems obvious that the chancellor took into consideration the fact that the 1978 order provided that the appellant was to continue making some type of payments, which he had been making voluntarily. There is nothing in this record to show the amount of those payments. The chancellor would certainly have been justified in setting child support at a sum certain, which he found to be equal to the total of $40.00 per week plus the voluntary payments made prior to 1978. This record is not fully developed enough for this Court to be able to set such an amount on *de novo* review, and therefore we remand the case to the chancellor so that he may hear whatever additional evidence the parties wish to present regarding those amounts paid prior to 1978, and to reduce that sum to a definite amount.

Reversed and remanded.

PER CURIAM. Gardner Smith, Jr., by his attorney, has filed for a rule on the clerk.

His attorney, Charles P. Allen, has attached an affidavit admitting that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Willie Earl JOHNSON, Jr. and Murphy CARROLL
v. STATE of Arkansas

CR 82-29 632 S.W.2d 416

Supreme Court of Arkansas
Opinion delivered May 10, 1982

Haskins & Wilson, by: *John W. Achor,* for appellant Johnson.

John A. Crain, for appellant.

Frank H. Bailey of *Bailey & Paden, P.A.,* for appellee.

LAWSON CLONINGER, Judge. Appellee Richard L. Burnett is a former stockholder of Saltzman-Guenthner Clinic, Ltd., the appellant corporation. Appellee alleged in his complaint that under the terms of his employment with appellant corporation, the stock he owned should be redeemed at book value. Appellant counterclaimed, alleging that appellee had breached his employment contract by engaging in competition with appellant and that appellee had been overpaid.

The trial court found that the term "book value" as used in the employment contract was not ambiguous, as urged by appellant, and that parol evidence was not admissible to vary the terms of the written agreement; that in the absence of qualification or limitation of the written employment agreement, all assets of the corporation, including accounts receivable, are to be considered in determining book value; that the acts of appellee did not constitute competition with the business of appellant; and that the evidence was insufficient to show that appellee had been overpaid.

We affirm.

Appellant is a professional corporation formed to practice medicine and surgery, and appellee is a medical doctor. On April 1, 1977, the parties entered into an agreement, whereby appellee would devote his entire time to the business of appellant. Appellant has not furnished this court with a legible copy of the employment agreement, but from the legible portions of the agreement and the testimony

of the parties it is determined that the agreement provided as follows: Appellee was not to engage in any activity in competition with the business of appellant without the approval of appellant's Board of Directors; appellee was to be compensated with such salary and other compensation as fixed from time to time by the Board of Directors; either party could terminate the agreement by giving a 30-day written notice, which period could be shortened by agreement; and appellant agreed that in the event of termination of the agreement appellant corporation could make a 100% redemption of any stock owned by appellee "at the then book value of the stock."

Appellant's position is that the term "book value" is an ambiguous term, and appellant attempted to introduce evidence that "book value" as used in the agreement was understood by the parties to mean "assets less accounts receivable less liabilities."

When an ambiguity in a written instrument is alleged as foundation for the admission of parol evidence, the court is charged with the initial factual determination of the existence or nonexistence of ambiguity in the written agreement. *Gilstrap* v. *Jackson,* 269 Ark. 876, 601 S.W.2d 270 (Ark. App. 1980). If the court finds that the language used is ambiguous, it may then admit parol evidence to show that the language was intended to have any particular meaning that the words will reasonably bear. *Kerr* v. *Walker,* 229 Ark. 1054, 321 S.W.2d 220 (1959). If the court finds the language of the contract not ambiguous then parol evidence may not be admitted to prove that clear and unambiguous words were subjectively intended to have a meaning not fairly attributable to them. *Arkansas Rock and Gravel Co.* v. *Chris-T-Emulsion Co.,* 259 Ark. 807, 536 S.W.2d 724 (1976).

A trial court's finding of fact will not be reversed on appeal unless clearly erroneous, clearly against the preponderance of the evidence. Rule 52 (a), Arkansas Rules of Civil Procedure; *Winkle* v. *Grand National Bank,* 267 Ark. 123, 601 S.W.2d 559 (1980).

A number of courts in other jurisdictions have found

that the term "book value" has acquired an established meaning; it is the value of all the assets of the corporation as shown on its books less all of its liabilities. *Hollister* v. *Fiedler,* 86 A. 2d 809 (N.J. 1952); *Hagan* v. *Dundore,* 50 A. 2d 570 (Md. 1947); *Mills* v. *Rich,* 229 N.W. 462 (Mich. 1930). In *Bain and Company* v. *Deal,* 251 Ark. 905, 475 S.W.2d 908 (1972), the Arkansas Supreme Court quoted with apparent approval an excerpt from *Schumann* v. *Samuels,* 142 N.W. 2d 777 (Wis. 1966) which declared:

> The book value is not an arbitrary value that may be entered upon the books of the company but the value as predicated upon the market value of the assets of the company after deducting its liabilities.

In the instant case three certified public accountants presented evidence that the term "book value" unless qualified or used with modifiers, has a generally accepted meaning of assets minus liabilities, and that the "book value" of one share of stock is assets of the corporation, minus liabilities, divided by the number of outstanding shares. The employment agreement was on a form prepared by appellant, and appellant could have easily qualified or limited the meaning of the term if it so chose. The finding of the trial court that the term "book value" was not ambiguous is not clearly erroneous or clearly against the preponderance of the evidence.

Appellant was not entitled to present parol testimony to show the intent of the parties. The term "book value" used in the written agreement without limitation or qualification was not ambiguous. When the parties entered into the written agreement, all antecedent proposals and negotiations were merged into the written contract which cannot be added to or varied by parol evidence. *Hoffman* v. *Late,* 222 Ark. 395, 260 S.W.2d 446 (1953).

The trial court found insufficient evidence to prove that appellee had violated his agreement not to enter into competition with the business of appellant. We agree. There was evidence that appellee had purchased land on January 31, 1980 upon which to build his own clinic, and that

appellee's employment with appellant continued on until April 30, 1980. There is no evidence, however, that appellee treated any patients outside of appellant's clinic or performed any act in competition with appellant's business prior to his employment termination. There was evidence that in December of 1979 the doctor members of appellant's Board of Directors planned to form a partnership for the purpose of building a clinic which was to be leased to appellant corporation. Appellee had been invited to become a partner in the plan, but appellee had refused because of his disapproval of the land proposed to be purchased by the partnership. Neither the plan of the doctors to form a partnership nor appellee's purchase of land for a clinic had been approved by appellant's Board of Directors. The finding of the trial court that there was insufficient evidence to find that appellee had engaged in competition with appellant in violation of the agreement is not clearly erroneous.

The compensation of appellee was fixed by the Board of Directors of appellant corporation, as provided for in the parties' written agreement. If appellee has been overcompensated, which fact the evidence tends to support, it was occasioned by the action of appellant's Board of Directors. Appellant cannot now complain of the action of its Board.

Affirmed.

CORBIN, GLAZE and CRACRAFT, JJ., dissent.

TOM GLAZE, Judge, dissenting. I respectfully disagree with the majority decision. In affirming the trial court, we are permitting a result which was clearly not intended by either of the parties when they entered into their employment agreement. The majority has placed a construction on the parties' agreement which allows the appellee to purchase one hundred shares of stock at $300 and less than one year later, the appellant is required to repurchase these same shares for the sum of $9,316. This difference in amount is due solely to the fact that appellee originally purchased the one hundred shares based on a "book value" which did not include the accounts receivable owned by appellant. Thus,

we have the anomalous situation where appellee purchased shares of stock at a "book value" which did not include the asset of accounts receivable, but when he sold the shares, he did so at a "book value" which included accounts receivable. From the facts presented in this cause, I am convinced that this result was not intended by the parties. I am also persuaded that if the parties' agreement was properly construed in light of the rules set forth in *Les-Bil, Inc.* v. *General Waterworks Corp.*, 256 Ark. 905, 511 S.W.2d 166 (1974), a different, correct and more equitable result would have been reached.

This controversy centers around the definition of "book value" as that term is employed in the termination provision of the parties' employment agreement. That provision reads as follows:

> In the event the employee is also a shareholder of the employer, termination of this agreement shall not affect any rights the employee may have with regard to the stock of the employer which he owns, provided, however, that, upon termination of this agreement by either party, the employee hereby covenants and agrees that *the employer may make a 100% redemption of such employee's stock at the then book value of the stock.* [Emphasis supplied.]

The majority court has taken the position that the term "book value" is not ambiguous and, therefore, appellant was not entitled to present parol testimony to show the intent of the parties. On this point, I disagree.

Admittedly, the term "book value" normally means the value of the corporation as shown on the books of account of that corporation, after subtracting liabilities. Moreover, I am quite aware that generally accepted accounting principles normally require that "book value" be based on an accrual basis, which means that accounts receivable would be included when determining the value of a corporation's stock. However, in the instant case, the facts clearly reflect that the appellant used a cash basis of accounting and, therefore, never included an accounts receivable amount

when computing the value of the company stock. Given these facts, the term of "book value" as employed by the parties in their agreement, was susceptible to two separate or possible meanings. This being so, I believe a latent ambiguity exists, and the trial court should have allowed the appellant the opportunity to present parol testimony to explain what the parties intended by the term "book value" as it was used in the parties' agreement. See *Ellege* v. *Henderson,* 142 Ark. 421, 218 S.W. 831 (1920). See also, 3A C.J.S. *Ambiguity,* at 409-410 (1973).[1]

If I am correct that a latent ambiguity exists, I am then met with the well-settled rule that the language used in a contract will be resolved against the drafter of the agreement, *i.e.,* in this case, the appellant. This rule must, however, give way in this cause to other rules of construction in our attempt to determine the parties' intent when they entered this employer/employee relationship. To this effect, see *Les-Bil, Inc.* v. *General Waterworks Corp., supra.* Here, the parties' agreement employed the technical term "book value." As noted in *Les-Bil,* our cases clearly recognize that when a technical term is used in a sense other than the ordinary meaning of the word, testimony is admissible to explain the meaning of the term and the question may be submitted to the trier of fact to determine in what sense the term was used. The court in *Les-Bil* further stated:

> In determining the intention of the parties at least equal regard must be given to the rule that, in spite of the fact that words in a contract are generally to be given their usual and ordinary meaning, words of art or words connected with or peculiar to a particular trade, profession or occupation are to be given the significa-

[1]The term "latent ambiguity" in Corpus Juris Secundum is defined to mean "an ambiguity which arises not upon the words of the instrument, as looked at in themselves, but upon those words when applied to the object or subject which they describe. It is one which does not appear on the face of the language used or the instrument being considered or when the words apply equally to two or more different subjects or things, as where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or evidence aliunde creates a necessity for interpretation or a choice among two or more possible meanings."

> tion attached to them by experts in such art or trade, profession or occupation unless it appears that they were used in a different sense. If, in reference to the subject matter of a contract, words have, through usage acquired a meaning different from their usual meaning, the parties must be taken to have used them in their peculiar meaning.

Although I am convinced that a clear ambiguity arose due to the parties' use of the term "book value," the trial court refused to allow appellant to introduce parol evidence to show what the parties meant by the use of that term. For instance, I believe the trial court erred in excluding the testimony of Julia Short, the business manager of the appellant at the time appellee was employed. Ms. Short testified that she had advised appellee that the purchase of shares of stock did not include accounts receivable, and it was not to be included in evaluating the shares when there was a termination of employment. Moreover, she informed him that the salary he was paid was from the accounts receivable, and it was for this reason appellee would receive no accounts receivable when he terminated employment. None of this testimony by Ms. Short was considered by the trial judge when he construed the parties' agreement and decided the shares were worth over $9,000. Ms. Short's testimony was actually bolstered by the testimony given by appellee. At trial, appellee admitted that Dr. Beard, one of appellant's physicians and shareholders, explained that it was easy to buy into the appellant corporation because "You don't pay much for your stock and as a consequence you didn't take much out for your stock when you left." Appellee testified that Dr. Beard informed him that the stock was not worth much. He also could not remember whether Julia Short explained to him that the appellant corporation used a cash basis of accounting.

Considering the rules of construction applicable to this case, I believe the trial court clearly erred in excluding the testimony of Ms. Short as well as other parol evidence indicating that the term "book value," as employed by the parties' agreement, was not meant to include the corporation's accounts receivable. At the very least, I believe this

matter should be remanded to the trial court for its consideration of that parol evidence which it did not consider when reaching its decision. However, my stronger belief is that this Court should, in reviewing this cause *de novo,* find that the parties did not intend the term "book value" to include accounts receivable. If this Court had done so, the uncontradicted evidence is that appellant's stock actually possessed a negative value rather than the inflated amount awarded by the trial court. Since appellee paid only $300 for the shares initially, the finding and holding I urge is certainly more reasonable and fair in view of the fact he owned the shares less than one year and all the evidence leads to the conclusion that the shares were sold him at a price which was computed without any reference to accounts receivable.

CRACRAFT and CORBIN, JJ., join in this dissent, except CORBIN, J., would remand to the trial court for its consideration of the parol evidence which was excluded at the trial of this cause.

Mary ASKINS *v.* Jimmy ASKINS

CA 81-335 632 S.W.2d 249

Court of Appeals of Arkansas
Opinion delivered May 5, 1982

Herschel W. Cleveland of *Hixson, Cleveland & Rush,* for appellant.

Ernie Witt of *Witt & Donovan,* for appellee.

LAWSON CLONINGER, Judge. Appellant, Mary J. Askins, and appellee, Jimmy Askins, were married in 1975 and divorced on February 11, 1981. The transcript of testimony was lost by the court reporter, and on September 23, 1981, an effort was made to settle the record in accordance with Rule 6 of the Arkansas Rules of Appellate Procedure. Pursuant to Rule 6, statements were given by the attorneys for the parties, and affidavits were given by the appellant and appellee.

The trial court did not enter a formal order settling the record, but based its decision upon the statements of the attorneys, the affidavits of the parties, and the court's stated recollection of the testimony.

The burden was on appellant to bring up a record sufficient to show that the trial court was wrong. *Armbrust* v. *Henry,* 263 Ark. 98, 562 S.W.2d 598 (1978). The record in this case is not settled or reconstructed in such manner as to enable this court, in most instances, to determine if there were errors in the trial court. On all the points urged by appellant for reversal, with one exception, the finding of the trial court based upon conflicting evidence is not clearly erroneous, or clearly against the preponderance of the evidence, as required by Rule 52 (a), Arkansas Rules of Civil Procedure. We hold that the trial court was in error only in awarding ninety acres of land to appellee as his separate property when such property was held by the parties as tenants by the entirety.

On March 26, 1976, appellee's brother conveyed ninety-five acres of land in Logan County to appellant and appellee, at a time when the grantees were husband and wife. The land had been owned by appellee's family for a number of years, and there was evidence that title to the land at one time had been in appellee only. The parties executed a mortgage to Logan County Bank on the ninety-five acres on the same date the conveyance was made to them, and there was evidence that title was placed in both appellant and appellee at the insistence of the bank.

In the decree of divorce, the trial court declared five of the ninety-five acres of land to be marital property and ordered it sold for the payment of marital debts. There is no appeal from this order. The court then ordered the remaining ninety acres to be the sole and separate property of appellee, on a finding that appellee owned the property prior to the marriage.

It is clear from the exhibits and from the uncontroverted testimony that the deeds of March 26, 1976 created a tenancy by the entirety in appellant and appellee as husband and wife. Ark. Stat. Ann. § 34-1215 (Supp. 1981), provides that when a decree of divorce is rendered, any estate by the entirety shall be automatically dissolved unless the court order specifically provides otherwise, and in the division of the property the parties shall be treated as tenants in common.

This statute is the only authority for dividing estates by the entirety, and it provides for the equal division of property without regard to gender or fault. *Warren* v. *Warren,* 273 Ark. 528, 623 S.W.2d 813 (1981).

The fact that Ark. Stat. Ann. § 34-1214 (Supp. 1981), the general property division statute, has been amended, does not affect the applicability of § 34-1215 when a tenancy by the entirety is involved.

The case is reversed and remanded with directions to the trial court to make a division or partition of the ninety acres of land in accordance with the provisions of Ark. Stat. Ann. § 34-1215 (Supp. 1981). In all other ways the case is affirmed.

PIERCE-ODOM, INC. a/k/a ODOM'S, INC., Conway, Arkansas *v.* Melvin EVENSON and Sybil M. EVENSON, His Wife

CA 81-338 632 S.W.2d 247

Court of Appeals of Arkansas
Opinion delivered May 5, 1982

Ronald K. Burton, for appellant.

No brief for appellees.

DONALD L. CORBIN, Judge. Appellant, Pierce-Odom, Inc., appeals from a judgment granting appellees' petition for specific performance of a contract for the sale of a mobile home to appellees, Melvin Evenson and his wife, Sybil. We reverse and remand.

The testimony at trial indicated that the litigation arose out of the following transactions. On October 16, 1980, appellees went to appellant's mobile home lot in Conway, Arkansas, to look for a new mobile home. Gene DeHart,

who was employed by appellant, told appellees that he was the sales manager for the business and he showed the appellees several different models of mobile homes on the lot. Appellees told DeHart that they could not buy a mobile home until they sold some property they owned in Hamilton Hills subdivision in Fairfield Bay. Appellees testified that there was some discussion about appellees' property and the selling price. Appellees left the lot without entering into an agreement with DeHart. DeHart called the appellees on October 20 to inquire if they had sold their property and the appellees told him that they had not. According to appellees, DeHart then stated that his boss, Jerry Odom, had told him that Pierce-Odom would take their lot in on a trade for a new mobile home. DeHart told them that Pierce-Odom was not interested in the mobile home they were presently living in and appellees told him that they had a buyer for their mobile home. Appellees returned to the mobile home lot on October 21 and met again with DeHart. They inquired as to the whereabouts of Mr. Odom and were told by DeHart that he was out-of-town that day.

Appellees signed a contract prepared by DeHart for the sale of a mobile home. The contract set forth the terms of the sale including the trade-in of the appellees' property at Fairfield Bay as partial payment for the new mobile home. However, no representative of Pierce-Odom signed the contract. Appellees paid $100.00 as a down-payment and told DeHart that they would call back and arrange for delivery of the new mobile home after talking with the purchaser of their old mobile home. The appellees later called Mr. DeHart and he reported that the mobile home could be delivered on Friday of that week.

Prior to the time that the mobile home was to be delivered, the appellees cashed a certificate of deposit and had a deed prepared to transfer the real property in preparation for carrying out the contract. They also sold their old mobile home and had it removed from their lot in preparation for the delivery of the new mobile home. On the day before the mobile home was to be delivered, Jerry Odom, owner of the mobile home lot, called the appellees and asked for directions to their lot in Hamilton Hills subdivision

which the appellees provided. Later that evening, DeHart called the appellees and told them that Jerry Odom had changed his mind on the agreement because he did not want the lot after seeing it. Appellees then brought this action for specific performance asking the court to order Pierce-Odom, Inc., to deliver the particular mobile home they had selected and also asking the court to require Pierce-Odom, Inc., to take the lot at Fairfield Bay. The Court granted the petition for specific performance and this appeal resulted.

The Court held that part performance of the contract by the appellees took this contract out of the Statute of Frauds. Ark. Stat. Ann. § 38-101 (Repl. 1962). In granting appellees' petition for specific performance, it is clear that the chancellor found appellees' testimony concerning the transactions to be credible. It should be noted that Gene DeHart was not called by appellant to refute any of the appellees' testimony regarding the transaction.

We agree with the chancellor that appellees proved a part performance of the contract for the sale of the mobile home so as to take the contract out of the Statute of Frauds. However, we do not believe this was a proper case for specific performance of a contract for the sale of a mobile home based on either prior case law or § 85-2-716 of the Uniform Commercial Code.

The cases prior to the adoption of the Uniform Commercial Code in Arkansas held that courts of equity would generally not order the specific performance of a contract for the sale of a chattel. See *McCallister* v. *Patton,* 214 Ark. 293, 215 S.W.2d 701 (1948), and cases cited therein. There was an exception to this general rule where the goods or chattels had a peculiar, unique, or sentimental value to the buyer not measurable in money damages. See *Morris* v. *Sparrow,* 225 Ark. 1019, 287 S.W.2d 583 (1956); *Chamber of Commerce of Hot Springs* v. *Barton,* 195 Ark. 274, 112 S.W.2d 619 (1938).

Arkansas cases have recognized that a mobile home is goods and therefore covered by the provisions of the Uniform Commercial Code. See *Choctaw Homes of Russellville* v. *Brown,* 1 Ark. App. 171, 613 S.W.2d 848 (1981);

Frontier Mobile Home Sales, Inc. v. *Trigleth,* 256 Ark. 101, 505 S.W.2d 516 (1974). The Uniform Commercial Code [Ark. Stat. Ann. § 85-2-716 (Add. 1961)] provides that "[s]pecific performance may be decreed where the goods are unique or in other proper circumstances." See cases collected at Vol. 3A, *Uniform Commercial Code Case Digest,* § 2716.3 (1981), for different views on the effect of U.C.C. § 2-716 and the remedy of specific performance.

There were no allegations or proof by appellees that this particular mobile home in question had a unique or peculiar value or that there were any circumstances requiring specific performance of the contract. Therefore, specific performance was not a proper remedy for the breach of this contract; but appellees are entitled to damages for its breach.

We hold that appellees should retain ownership to their lot at Fairfield Bay and we reverse and remand this case for the chancellor to determine appellees' damages for breach of the contract. See *Bierbaum* v. *City of Hamburg,* 262 Ark. 532, 559 S.W.2d 20 (1977).

Reversed and remanded.

COOPER, J., not participating.

ARKANSAS EMPLOYMENT SECURITY DIVISION *v.* BEARDEN LUMBER COMPANY, INC.

CA 81-341 632 S.W.2d 438

Court of Appeals of Arkansas
Opinion delivered May 5, 1982
[Rehearing denied June 2, 1982.*]

Thelma Lorenzo, Gary Williams and *Herrn Northcutt,* for appellant.

*MAYFIELD, C.J., and COOPER, J., would grant rehearing.

Bridges, Young, Matthews, Holmes & Drake, for appellee.

TOM GLAZE, Judge. Employment Security appeals from a chancery court decision which reversed an Agency determination requiring Bearden Lumber Company (Bearden) to pay employment security rates based upon the combined rates of Bearden and the now defunct Arkansas Pallet Company, Inc. Employment Security argues on appeal that: (1) Bearden lacks standing; (2) The case has become moot; and (3) The appeal to the Agency was not timely filed. A review of the facts is necessary to understand the legal issues raised in this cause.

Prior to January, 1976, Arkansas Pallet Company, Inc. (APCI) was engaged in the manufacture of pallets at a location in Pine Bluff, Arkansas. Because of difficulties in obtaining raw materials for production, the stockholders and officers decided to discontinue its operation and liquidate the company's assets. Mr. John Ed Anthony decided a pallet operation would fit well into his operation of a lumber company in Bearden, Arkansas, and in January, 1976, he negotiated an agreement with APCI for the sale of its equipment and hard assets. Anthony formed Arkansas Pallet Manufacturing Company (APMC) and located APMC in Bearden, Arkansas. APMC did not acquire any of the accounts receivable, real property or stock of APCI. Upon moving the manufacturing equipment to Bearden, APMC hired local employees. Only two employees of APCI were hired by the new corporation. APCI completely closed its business in February, 1976, and never again resumed business. APMC was formed in March, 1976, and began production in July of that year.

On March 12, 1976, APMC filed its "Report to Determine Liability Under the Arkansas Employment Security Law" as is required under Arkansas law. By letter dated April 20, 1976, Employment Security advised APMC that the employment experience of APCI was being transferred to APMC's account. The letter stated that APMC would assume any benefits risk of the predecessor's employees who might become eligible to draw benefits. APMC was assigned

a rate of 3.1% for 1976. A rating of 3.1% is the rating which is given to any new business that has not developed its own experience rating.

In a letter dated May 6, 1976, APMC's attorney responded to Employment Security's April 20 letter, stating APMC had not acquired all of the business of APCI, and it was, in fact, a separate corporation that purchased only certain equipment from APCI. Although not stated in the May 6 letter, it was apparently APMC's position that it should not be assigned APCI's experience rating since APMC had not purchased all the business of APCI.

The next letter in the record reflects that Employment Security on May 11, 1976, offered to review any additional information or documentation APMC desired to offer pertaining to its acquisition of APMC. In the same letter, Employment Security indicated that after it received this information, Employment Security would notify APMC of the results.

There is nothing in the record which shows APMC submitted additional information. Nor is there any evidence indicating that Employment Security took further action in connection with the exchange of letters between Employment Security or APMC's attorney.

Subsequently, Bearden acquired APMC in October, 1977. By letter dated January 24, 1978, Employment Security notified Bearden that APMC's experience rating would be transferred to Bearden since it had acquired that company. On February 16, 1978, Bearden's accountant wrote Employment Security notifying it of an error in its experience rating notice and requesting Bearden's account to be correctly adjusted. The basis of this alleged error was attributed to the experience rating Employment Security previously had assigned APMC from APCI on April 20, 1976.

After an exchange of correspondence, Bearden challenged Employment Security's rate decision by filing an application for review with the Unemployment Insurance Director on February 27, 1979, approximately one year after

Bearden received its rate assignment. The Director upheld Employment Security's rate assignment to Bearden. He held that since Bearden acquired APMC, Bearden was bound by APMC's previous Employment Security experience rating from which it failed to appeal in 1976.

Bearden appealed the Director's decision to chancery court, and the chancellor reversed. The chancellor found that APMC had timely filed for a review of its rate transfer from APCI by the Employment Security Division and that Employment Security had never notified APMC of any further action or decision. This being true, the chancellor concluded Bearden was not now barred from questioning the prior rate assignment given APMC, which Bearden ultimately fell heir to. The chancellor added that even if APMC had failed to timely file a petition for review, Employment Security had waived this issue as a defense or was otherwise estopped to raise it.

After reaching the merits of Bearden's claim, the chancellor finally concluded that the rating previously transferred to APMC was in error because: (1) Under Ark. Stat. Ann. § 81-1108 (e) (Repl. 1976), it would only be assigned APCI's rating experience if APMC acquired "substantially all of the assets" of APCI; and (2) The evidence reflects APMC did not acquire all of APCI's assets. The chancellor held Bearden's experience rating should be recalculated since its rating had erroneously been based on that previously transferred from APCI to APMC.

We believe the chancellor erred. The controlling law is set forth in Ark. Stat. Ann. § 81-1108 (c) (3) (V) (Repl. 1976), which in relevant part provides:

> The determination of the Director . . . shall become *conclusive and binding* upon the employer, unless within thirty (30) days . . . the employer files an application for review and redetermination, setting forth his reasons therefor. [Emphasis supplied.]

As previously noted in our discussion of the facts in this cause, APMC was notified of its contribution rate by letter

dated April 20, 1976. This letter directed that any objections be presented in writing to the Employment Security Agency within thirty days. In his May 6, 1976 letter, APMC's attorney requested the Agency to inform him as to "what procedure is followed in appealing the transfer of experience rating." He also offered to produce any and all documentation to satisfy the Agency that APMC did not acquire the business of APCI. When the Agency replied in its letter of May 11, 1976, it stated:

> We will be happy to review any additional information and documentation pertaining to the acquisition which you may wish to submit. After our review you will be notified of the results.
>
> If you or your client cannot accept the decision then you may write to Mr. Cecil L. Malone, UI Director, and request a hearing.

After the foregoing response by the Agency, neither APMC nor its attorney offered additional information or documentation to the Agency. Nor did APMC appeal in accordance with the procedure outlined in the Agency's May 11 letter or as prescribed under § 81-1108, *supra*. Neither APMC nor Bearden considered this matter any further until several months after Bearden acquired APMC in October, 1977. In fact, until January 24, 1978, APMC and Bearden regularly paid contribution rates in accordance with the earlier April 20, 1976 rate transfer determination, raising no questions as to its validity since the May 6, 1976 letter written by APMC's attorney.

From the record before us, we fail to find any evidence that APMC timely and correctly filed an application for review of the April 20, 1976 rate determination. Employment Security's May 11 letter clearly suggested APMC could submit additional information or appeal by writing the Unemployment Insurance Director, requesting a hearing. APMC did neither. Section 81-1108 (c) (3) (V), *supra*, clearly provides for a finality of contribution rates assigned employers. If the law had not so provided, the Employment Security Agency would be endlessly reviewing, recalculating

and reimbursing contribution amounts. Here, there simply was no timely appeal. We fail to see, on the record before us, how this responsibility for failure to appeal can be placed with anyone except APMC. Bearden subsequently purchased the business of APMC, and there is nothing in the record which would indicate that it should not be charged with APMC's rating experience as is provided under § 81-1108 (e).

Reversed.

MAYFIELD, C.J., and COOPER, J., dissent.

MELVIN MAYFIELD, Chief Judge, dissenting. Under the majority opinion the appellee does not lose on the merits of the case but on what I regard as a bureaucratic technicality.

It is said that the appellee is stuck with the payment of contributions to the unemployment compensation fund based on the experience rating of a company which failed to appeal from a determination made by the Employment Security Agency in April of 1976.

That determination is held to have been made when the agency wrote another company saying it was transferring to it the experience of the first company. This letter ended with the sentence, "If you have any objections to this transfer, notify this Agency in writing within 30 days; otherwise, the transfer will become final."

Sixteen days later there was a reply which, in addition to asking what procedure is followed in appealing, said any documentation the agency desired to satisfy it that the transfer should not be made would be produced. The agency answered with a letter dated May 11, 1976, containing these paragraphs:

> We will be happy to review any additional information and documentation pertaining to the acquisition which you wish to submit. *After the review you will be notified of the results.* (Emphasis added.)

> If you or your client cannot accept the decision then you may write to Mr. Cecil L. Malone, UI Director, and request a hearing.

The majority opinion states no additional information was submitted and no hearing was requested, and, therefore, there was no timely appeal.

But from its letter of May 11 it is clear that the agency had not yet made a final determination and that it promised to notify the company when such a decision had been made. The letter specifically said *then* a hearing could be requested. Rather than stick this company with something it does not owe because nothing further was sent to the agency, I would let the company pay only what it owes because nothing further was sent to the company by the agency *as it promised to do.*

In *Foote's Dixie Dandy* v. *McHenry,* 270 Ark. 816, 607 S.W.2d 323 (1980), the Arkansas Supreme Court held that the Employment Security Agency could be estopped by statements made by its auditor and in *Rainbolt* v. *Everett,* 3 Ark. App. 48, 621 S.W.2d 877 (1981) the Arkansas Court of Appeals also held the agency could be estopped by representations of its agents. In the instant case, I would hold that the agency is estopped to claim that there was a final determination back in 1976.

COOPER, J., joins in this opinion.

ALLEN CANNING COMPANY, Self-Insured Employer
v. Nancy Jane McREYNOLDS, Employee

CA 81-433 632 S.W.2d 450

Court of Appeals of Arkansas
Opinion delivered May 12, 1982

Walter B. Cox of *Davis, Cox & Wright,* for appellant.

Gary D. Person, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant Allen Canning Company appeals from that part of the decision of the Arkansas Workers' Compensation Commission awarding disability benefits to the appellee Nancy Jean McReynolds beyond September 5, 1979. The Commission found that appellee had sustained a compensable injury while employed by appellant on February 23, 1979, and as a result was temporarily totally disabled from February 24 to September 5, 1979, and again beginning November 7, 1979 to January 10, 1980, when her healing period ended. The Commission further found that appellee had sustained permanent partial disability to her body as a whole of at least 5% but deferred a finding as to any additional permanent partial disability pending investigation by the parties of the feasibility of vocational rehabilitation.

The appellant first contends that there is no substantial evidence in the record to support the Commission's award of any disability benefits or medical expenses beyond September 5, 1979. It is well settled that this court on appeal is required to review the evidence in the light most favorable to the findings of the Commission and to give the testimony its strongest probative value in favor of its order. The issue on

appeal is whether the evidence supports the finding which the Commission made. When a commission makes a finding of fact, that finding carries the weight of a jury conclusion. The decision of the Commission must stand if supported by substantial evidence. *Bankston* v. *Prime West Corporation,* 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981).

It was not disputed that appellee sustained a compensable injury on February 23, 1979. She was initially examined by Dr. F. E. Shearer, and later by Dr. Marvin Mumme, an orthopedic surgeon. On April 13, 1979 Dr. Mumme released her to return to light duty and she did return to her former employment. She testified she was assigned clean-up duty and work on a "pick table" and tried to work for a part of two days but was unable to do so. She returned to Dr. Mumme and remained under his treatment until July 26, 1979. Dr. Mumme released her to return to regular duties on September 5, 1979. It was appellee's testimony that during the entire period since the date of her injury she continued having pains in her back and difficulty in movement.

Between September 5th and November 7th, 1979 appellee did part-time work at a hamburger establishment where she had worked prior to her employment with the appellant and where she performed substantially the same duties that she had performed there previously. She testified that during this period she had continuous problems with her back and increasing pain. On November 7th she returned to Dr. Mumme who found these symptoms significant enough to warrant additional testing. She was hospitalized due to these complaints and symptoms and when Dr. Mumme released her on January 10, 1980 he assessed her permanent physical disability at from 0 to 5%.

Appellant contends that as Dr. Mumme had released her on September 5th and since his reports of tests and treatment after she returned to him on November 7th all indicated her condition to be normal, it was "obvious" that something unrelated to her injury happened to her after September 5th to cause the additional problems and there was no substantial evidence to support permanent disability

in any amount. In support of this position the appellant relies upon hearsay testimony that subsequent to September 5th, while working in her part-time employment, appellee slipped on some rocks and fell while crossing the street. It contends that her present injury was a result of that fall or other causes unrelated to her compensable injury. The appellee testified that the cause of the fall was a severe painful pinching in her back. She testified that her symptoms were the same thereafter as they had been before except that she now had some bowel control difficulties.

The medical testimony in the record, coupled with appellee's testimony about her continued symptoms and difficulty from her original injury, is fully supportive of the Commission's findings. According to the evidence her symptoms were the same after September 5th as they were prior thereto. Appellee did complain of fecal incontinence and appellant argues that it was this difficulty that caused her to seek additional medical treatment. It was appellee's testimony that any difficulty in controlling her bowels was a direct result of the increasing pain she suffered from the initial injury. She said she had never had this kind of problem prior to the compensable injury.

We conclude that there was substantial evidence on which the Commission could find that all symptoms for which appellee received treatment after September 5th were fully related to the compensable injury received while in appellant's employ. When symptoms of a back injury persist and culminate in a second disability without the intervention of a new injury, the second disability is properly classified as a recurrence of the first injury and the insurance carrier and employer at the time of the original injury remain liable. *Halstead Industries* v. *Jones,* 270 Ark. 85, 603 S.W.2d 456 (Ark. App. 1980).

The appellant next contends that the Commission erred in reserving a determination of additional permanent partial disability above 5% to the body as a whole until investigation by the parties into the feasibility of vocational rehabilitation. The action of the Commission was as follows:

7. The claimant has a permanent partial disability in the amount of at least 5% to the body as a whole. The issue of additional disability will not be decided until the parties have investigated the feasibility of vocational rehabilitation.

Ark. Stat. Ann. § 81-1310 (f) (Supp. 1981) provides that an employee entitled to receive permanent disability compensation is also entitled to reasonable expense of a program of vocational rehabilitation. It further provides that no employee shall be compelled to enter such a program without his consent and if he so elects a request must be filed with the Commission prior to the time that determination of the amount of permanent disability is made. The appellant contends that as the appellee made no request for such a program prior to the determination by the Commission she is barred from now requesting it, and that the Commission exceeded it authority in this regard. We do not agree. While § 81-1310 (f) (Supp. 1981) does require that a request for rehabilitation be made prior to the determination of disability we construe it as requiring the request prior to entry of a *final* order. A final order contemplates action which concludes all rights of the interested parties and leaves no issues undetermined. Here the Commission in its order expressly reserved the issue of disabiity for subsequent determination.

Our Workers' Compensation Act is remedial in nature and is intended to afford the injured worker all of the benefits to which the Act entitles him. While the worker cannot be compelled to enter such a program, we see nothing which prohibits the Commission from calling to the claimant's attention his right of election where it deems this action appropriate or determines that such a procedure might resolve doubtful issues. It is well settled that administrative agencies are better equipped by specialization, insight, experience and flexibility of proceedings to analyze and determine the issues. *Copeland* v. *Alcoholic Beverage Control Board,* 4 Ark. App. 143, 628 S.W.2d 588 (1982). In determining the merits of each claim the members of this Commission are expected to fully utilize that expertise. We do not interfere with the actions of the Commission unless

we find that it has acted without or in excess of its authority, or that its order is not supported by substantial evidence. Ark. Stat. Ann. § 81-1325 (b) (4) (Supp. 1981).

This case is remanded to the Workers' Compensation Commission for further proceedings and with the direction that it provide proper safeguards against undue delay in final determination of remaining issues.

Chester John GUFFIN *v.* Bonnie P. GUFFIN

CA 81-328 632 S.W.2d 446

Court of Appeals of Arkansas
Opinion delivered May 12, 1982

Smith & Nixon, by: *Griffin Smith, Jr.,* for appellant.

Gill, Skokos, Simpson, Buford & Owen, for appellee.

LAWSON CLONINGER, Judge. Appellant, Chester John Guffin, Jr., and appellee, Bonnie P. Guffin, were divorced in 1969, and appellant was ordered to pay $350 per month for the support of the three minor children of the marriage.

The parties' eldest child became 18 on November 9, 1979, and on September 26, 1980, appellant petitioned the trial court to enter an order relieving appellant of responsibility for the support of the eldest child. In response, appellee moved for an increase in child support payments, owing to changed circumstances and the increased cost of supporting children. The second of the parties' three children became 18 on May 5, 1981.

On May 7, 1981, the trial court entered an order increasing the support payments for the one remaining minor child to $425 per month and found appellant in arrears for past support payments. Appellant urges on this appeal that the trial court abused its discretion in awarding the increased payment, and urges that the trial court was in error in awarding support payments for the eldest child subsequent to appellant's filing his petition for relief.

We hold that the basis for the increase in support payments is unsound, but the decision is otherwise affirmed.

Chancery courts have broad powers to modify child support provisions when such modification is in the best interest of the child, and no hard and fast rule can be

established regarding specific changed circumstances or the necessary degree of change. *Hurst* v. *Hurst,* 269 Ark. 778, 602 S.W.2d 137 (Ct. App. 1980). Some of the factors to be considered by the court in fixing an amount to be contributed for child support enumerated in *Barnhard* v. *Barnhard,* 252 Ark. 167, 477 S.W.2d 845 (1972), include the needs of the children, the assets of each parent, earning capacities and income and indebtedness. The court in *Barnhard* further observed that modifications of amounts are to be made according to the necessity of one parent and the ability of the other.

The assumption is that the chancery judge correctly fixed the proper amount for child support in the original decree, *Clinton* v. *Morrow,* 220 Ark. 377, 247 S.W.2d 1015 (1952), and an increase in child support must be based upon a showing of changed circumstances. *Barnes* v. *Barnes,* 246 Ark. 624, 439 S.W.2d 37 (1969). One seeking modification has the burden of proving that there has been a change of circumstances requiring a modification, *Stovall* v. *Stovall,* 228 Ark. 1077, 312 S.W.2d 337 (1958), and whether a modification is justified by changed circumstances is within the sound discretion of the chancellor. *Hurst* v. *Hurst, supra.*

In fairness to both of the parties, it is necessary for this case to be remanded to the trial court for further development. There was little effort by the parties to show a change in circumstances since the entry of the original decree of support. We must assume that the court was correct in setting the original figure, but the record does not reflect what appellant's income or other circumstances were at that time.

The trial court reached the conclusion that appellant's weekly net income is presently $879.71 upon extremely ambiguous evidence. In response to a written interrogatory relative to his income, appellant stated: "Paid bi-weekly, $1,346.15 Gross each check, $879.71 net each week." Appellant argues for the first time on this appeal that he obviously intended to state that his net income each *check* was $879.71. The error, if there is an error, would not warrant a reversal,

because appellant registered no objection to the finding of the chancellor. Inasmuch as the case must be remanded on other grounds, appellant should be allowed to clarify the matter of his income.

The record indicates that the trial court based its order solely on the child support chart applied to what the court believed was appellant's income. There was no evidence that the increase in support payments was based upon any substantial change of circumstance, the relative incomes of appellant and appellee, or the fact that all three of the parties' children are employed in the business owned by appellee. All those factors should be considered, although the child support chart can justifiably be a useful guide.

Appellant could not, of his own volition, reduce the monthly support payments. The court alone has that right. The original award of $350 monthly was for the support of three children, and appellant had no right to conclude that one-third of that sum was for each child. *Jerry* v. *Jerry,* 235 Ark. 590, 361 S.W.2d 81 (1962).

The case is reversed and remanded to the trial court for the taking of any further evidence offered by the parties relative to the setting of an award of support for the one remaining minor child. The order of the trial court on the question of arrearages is affirmed.

Eddie Lee SMALL *v.* STATE of Arkansas

CA CR 81-136 632 S.W.2d 448

Court of Appeals of Arkansas
Opinion delivered May 12, 1982

Henry N. Means, III and *James H. Phillips,* for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant was convicted by the trial court, sitting without a jury, of burglary, and

sentenced to five years in prison. He urges on this appeal that the trial court should have granted his motion for a directed verdict at the conclusion of the state's case, and contends that there is insufficient evidence to sustain the conviction. We find no error and we affirm.

A directed verdict of acquittal is proper only when no fact issue exists, and this court will review the evidence in the light most favorable to the appellee, the state, and affirm if there is any substantial evidence to support the verdict. *Harris* v. *State,* 262 Ark. 680, 561 S.W.2d 69 (1978).

There was ample evidence that a burglary and theft were committed at a truck maintenance shop occupied by Haygood of Arkansas some time prior to 7:15 a.m. on November 7, 1979. A chain link fence surrounding the Haygood building was cut with bolt or wire cutters, and entry was gained to the building by pulling away a piece of siding by the use of a screwdriver and some type of pliers. Tools were scattered from the point of entry through the chain link fence and into a weeded field. A tool box was found along with the tools.

Appellant was a passenger in an automobile stopped by the police at 12:30 p.m. on the same day as the break-in, after appellant attempted at about 9:00 to sell tools. The vehicle was obviously loaded and tools were found in the front and rear floorboards. In the trunk of the automobile, a large tool box filled with tools, weighing approximately 225 pounds, was found. A Haygood employee identified the box and tools as property taken from Haygood's, and the trial judge found that the tools recovered belonged to Haygood's and Haygood employees. The chief trace evidence analyst at the Arkansas State Crime Laboratory compared a plaster cast of a distinctive shoe print, found at the point where the chain link fence at Haygood's was cut, to the shoes worn by appellant at the time of his arrest, and testified that the size, design, and soil found on the sole of appellant's shoe were consistent with those found on the shoe print.

Ark. Stat. Ann. § 41-2002 (Repl. 1977) provides that a person commits burglary if he enters or remains unlawfully in an occupiable structure with the purpose of committing

therein any offense punishable by imprisonment. The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *In re Winship,* 397 U.S. 358 (1970); *Patterson* v. *New York,* 432 U.S. 197 (1977). The principle was restated by the Arkansas Supreme Court in *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980).

There was direct evidence that the Haygood building had been broken into; that a large quantity of tools had been stolen from the Haygood premises; and that appellant was in possession of some of the tools about noon on the day of the break-in. There was circumstantial evidence sufficient to support an inference that the tools in appellant's possession were items taken from the Haygood building and that appellant entered the building.

The possession of recently stolen property is a proper circumstance to consider on the charge of burglary. *Klimas* v. *State,* 259 Ark. 301, 534 S.W.2d 202 (1976). In addition to the circumstance of possession by appellant, a distinctive shoe print consistent with appellant's shoe was found at the scene, and the stolen tools were scattered widely from the point of entry to the Haygood building. Evidence that appellant attempted to sell the tools within less than two hours after the break-in was discovered is also a circumstance to be considered.

The fact that much of the evidence was circumstantial does not render it insubstantial. The law makes no distinction between direct evidence of a fact and evidence of circumstances from which a fact may be inferred. *Williams* v. *State,* 258 Ark. 207, 523 S.W.2d 377 (1975).

The trial court correctly denied appellant's motion for a directed verdict, and there was substantial evidence to support the verdict.

Affirmed.

COOPER, CORBIN and GLAZE, JJ., dissent.

CRAIGHEAD MEMORIAL HOSPITAL *v.* Sibyl HONEYCUTT

CA 81-267 633 S.W.2d 53

Court of Appeals of Arkansas
Opinion delivered May 19, 1982

Barrett, Wheatley, Smith & Deacon, for appellant.

Skillman & Durrett, by: *Chad L. Durrett, Jr.,* for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from the Arkansas Workers' Compensation Commission. The commission affirmed and adopted the administrative law judge's opinion finding the claimant "currently totally disabled" as a result of an injury to her back sustained on March, 16, 1978, while employed by appellant Craighead Memorial Hospital.

The appellant's sole contention on appeal is that the commission erred in not apportioning liability pursuant to the provisions of the second injury section of the Workers' Compensation Act, Ark. Stat. Ann. § 81-1313 (f) (2) (ii) (Repl. 1976).

Appellant's contention is based upon the fact that the appellee had a previous injury to her back which was not job related but which contributed 12.5% to the 30% anatomical disability to the body as a whole which the commission found the claimant sustained as a result of both injuries. The law judge's opinion points out that section 81-1313 (f) (2) (ii)

provides, if the second injury is not scheduled under section 13 of the act, the injured employee shall be paid compensation for the degree of disability that would have resulted from the second injury if the previous disability had not existed. Citing the case of *Wilson Hargett Const. Co.* v. *Holmes,* 235 Ark. 698, 361 S.W.2d 634 (1962) which held that a previous heart attack was not producing any disability at the time of a second attack because the claimant had returned to work with no impairment of earning capacity, the law judge quoted from *McDaniel* v. *Hilyard Drilling Co.,* 233 Ark. 142, 343 S.W.2d 416 (1961) as follows:

> To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident.

Finding that the claimant in the instant case returned to gainful employment after the first injury and continued working without difficulty from that time until her second injury almost four years later, it was the law judge's conclusion that the claimant was not disabled, within the meaning of the compensation law, prior to the second injury.

In affirming, the commission stated that any reluctance it had in the matter was brought about as a result of the opinion of the Arkansas Supreme Court in *Chicago Mill and Lumber Co.* v. *Greer,* 270 Ark. 672, 606 S.W.2d 72 (1980), since that case seemed to hold that the first injury need not be job related in order to evoke apportionment and this appeared to be inconsistent with the Court of Appeals' decision in *Marshall* v. *Ouachita Hospital,* 269 Ark. 958, 601 S.W.2d 901 (Ark. App. 1980).

It is true that those cases are inconsistent but the Court of Appeals has clarified its position in the case of *Harrison Furniture* v. *Chrobak,* 2 Ark. App. 364, 620 S.W.2d 955 (1981). We said in *Harrison* that we recognized and agreed with *Greer* and explained that our second decision in the Marshall case, *Ouachita Hospital* v. *Marshall,* 2 Ark. App.

273, 621 S.W.2d 7 (1981), was a result of the application of the law of the case and not that we thought the original *Marshall* opinion was correct.

While we said in *Harrison* that apportionment did not depend upon the preexisting disability being job related, we also said that it is clear that apportionment does not apply unless the prior impairment was independently causing disability prior to the second injury and continued to do so after that injury. This is the law applied by the law judge and affirmed by the commission in the instant case. We agree with that decision as to the law and we believe there is substantial evidence to support its factual determination. Under those circumstances it is our duty to affirm the decision of the commission. *Taylor* v. *Plastics Research & Dev. Corp.*, 245 Ark. 638, 433 S.W.2d 830 (1968); *Fairview Kennels* v. *Bailey*, 271 Ark. 712, 610 S.W.2d 270 (Ark. App. 1981).

Affirmed.

ARLINGTON HOTEL *v.* DIRECTOR OF LABOR

E 81-207 633 S.W.2d 46

Court of Appeals of Arkansas
Opinion delivered May 19, 1982

House, Holmes & Jewell, P.A., by: *J. Bruce Cross* and *Donna Smith Galchus*, for appellant.

Bruce H. Bokony, for appellee.

MELVIN MAYFIELD, Chief Judge. This is an employer's appeal of an award of unemployment compensation. Claimants were nonunion employees of the Arlington Hotel in Hot Springs. On March 12, 1981, several of the employees and a union official requested that the hotel recognize the International Ladies Garment Workers' Union as the exclusive bargaining agent for the employees. The hotel's general manager told them they could file a petition with the National Labor Relations Board to request an election but that he disputed their contention that the union represented the employees. The employees then staged a strike, setting up picket lines around the hotel on March 13, 14, 15, 16, 1981, in an attempt to induce recognition of the union.

During this period, the general manager called the local unemployment office to request that applicants be referred to him so he could hire new employees, but this request was refused as a labor dispute was in process. Information about the vacant positions apparently then was passed from one person to another until the hotel again had a full staff. At no time, however, did the hotel cease operations because of the strike.

On March 16, without having achieved its intended purpose, the strike ended, picket lines were removed, and the employees requested their jobs back. The following day they reported to the general manager with written unconditional requests for reinstatement. In individual interviews, he informed them that former positions were no longer available because permanent replacements had been hired during the strike but he told them that they would be called back if their former positions became vacant. A call-back list was established, and by the time of the hearing from which this appeal comes, several of the former employees had been rehired.

The employees who were not rehired filed claims for unemployment benefits which were allowed by the agency. The employer then appealed and the agency's determination was upheld by both the appeals tribunal and the board of review. The statute involved is Ark. Stat. Ann. § 81-1105 (f) (Repl. 1976), which provides:

> If so found by the Director no individual may serve a waiting period or be paid benefits for the duration of any period of unemployment if he lost his employment or has left his employment by reason of a labor dispute . . . *as long as such labor dispute continues,* and thereafter for such reasonable period of time (if any) as may be necessary for such factory, establishment, or other premises to resume normal operation. (Emphasis added.)

The board of review found that the claimants left their jobs due to a labor dispute which ended on March 16 and the claims for benefits were allowed with March 16 considered to be the first day of unemployment.

The employer has appealed to this court and contends the board erred in ruling that the labor dispute ended when the strike ended. Appellant argues that the labor dispute over recognition of the union still continues, pointing out that after the strike ended the union filed a petition for election with the National Labor Relations Board; that an election was held on May 29, 1981; that the employees' votes for the union carried; and that 19 ballots were challenged by the hotel. Additionally the union filed a charge alleging an unfair labor practice in the method by which the hotel returned strikers to work and a union representative testified that a hearing had been scheduled on this charge.

Appellant argues that, considering these poststrike activities and the fact that appellant has steadfastly refused to recognize the union and that no negotiations have taken place since the strike, the labor dispute has not ended.

In support of its position, the appellant cites *Guinn* v. *Arkla Chemical Corp.*, 253 Ark. 1029, 490 S.W.2d 442 (1973)

and says it "dispels any doubt that a labor dispute may continue beyond the duration of any strike which happens to be associated with the underlying dispute." But we think the situation there was different from the situation here. There, while a strike was in progress, the employer closed the plant for economic reasons and all strike activity ceased. In its letter notifying the union representative of its decision to close, the company said it was ready to continue negotiations "in the hope that we can reach an agreement in the event that the plant is to be reactivated." The union replied with the request that it be notified if and when the decision to reopen materialized "so that negotiations can be resumed." Against that factual background, the court said it is "clear to us that the labor dispute continues."

Here, however, the hotel employees ceased all strike activity on March 16, 1981, and on that day, and the day following, they applied unconditionally for reinstatement. The record shows the hotel continued its operation throughout the strike, and with the replacement workers filling positions to full staff complement, it was operating normally on March 16.

In *City of Ft. Smith* v. *Moore,* 269 Ark. 617, 599 S.W.2d 750 (Ark. App. 1980), this court said "when the employees cease all strike activity and apply unconditionally for reinstatement and the employer has resumed all normal operations, the labor dispute is regarded as terminated and claimants may not be disqualified under the 'labor dispute' provision." In support of that statement we cited *Burkhart/Randall Div.* v. *Daniels,* 266 Ark. 1060, 599 S.W.2d 392 (Ark. App. 1979) where, noting that the term "labor dispute" had not been defined by statute in Arkansas we did not attempt to define it but said "we believe all the facts and circumstances in each case must be considered in determining whether a labor dispute exists or has terminated." That case was affirmed by the Arkansas Supreme Court, *Burkhart/Randall Div.* v. *Daniels,* 268 Ark. 375, 597 S.W.2d 71 (1980), and that approach was there approved.

Our duty, therefore, is to determine whether, in this case, the decision of the board of review is supported by

substantial evidence and is in accordance with the law enacted by the General Assembly. Under the authority of the cases discussed above, we find that the decision appealed from is supported by the law and the evidence and it is affirmed.

Robbie ARMSTRONG *v.* STATE of Arkansas

CA CR 81-143 633 S.W.2d 51

Court of Appeals of Arkansas
Opinion delivered May 19, 1982

William R. Simpson, Jr., Public Defender, and *Jeff Rosenzweig,* Deputy Public Defender, by: *Deborah R. Sallings,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant was found

guilty of obtaining a controlled substance with a fraudulent prescription in violation of Ark. Stat. Ann. § 82-2619 (2) (Repl. 1976). The jury fixed her sentence at fifteen years as a habitual offender and a fine of $5000. On appeal, it is contended that the evidence was insufficient to support the conviction. We believe the evidence was sufficient and we affirm.

On September 2, 1980, appellant presented a prescription for Tussionex, a Schedule III narcotic cough suppressant, at Baker Drug in North Little Rock. The prescription was written on a St. Vincent prescription pad and bore what purported to be the signature of Dr. Jess Clanton. Because the writing on the prescription pad was out of the ordinary and because he knew Tussionex to be a frequently abused substance, the pharmacist telephoned the North Little Rock Police. The pharmacist then filled the prescription from his larger pharmaceutical container of Tussionex and the prescription bottle was given to appellant. Appellant was arrested as she left the pharmacy and the bottle was seized.

At trial, appellant objected to the testimony of the pharmacist that the substance in the prescription bottle was Tussionex. She based her objections on the grounds that the substance had not been scientifically and chemically tested and she asserted there, and asserts here, that the state failed to prove that she obtained a controlled substance. We know of no Arkansas case which requires chemical analysis as a precondition to the identification by a pharmacist of a substance which he dispensed. Appellant cites only one case, *Lee* v. *State*, 264 Ark. 384, 571 S.W.2d 603 (1978), in support of this contention. That case is readily distinguishable.

Lee was charged with the theft of four men's suits. The only testimony as to the value of the property stolen was that of a store security guard, who based his valuation on the price tags he had observed on the suits. The court held this to be inadmissible hearsay, but noted "no salesperson or any other employee, who had knowledge of the property's value from the business books or records of the store, was called as a witness."

An argument similar to appellant's was made in *United States* v. *Dolan,* 544 F.2d 1219, 1221 (4th Cir. 1976) where the court said "lay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identify [sic] of the substance involved in an alleged narcotics transaction." The court added:

> Such circumstantial proof may include evidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence. (Citations omitted.)

In *Moser* v. *State,* 262 Ark. 329, 557 S.W.2d 385 (1977), the Arkansas Supreme Court sustained a conviction where the substance involved had not been chemically analyzed and said lay testimony was "competent evidence." In the instant case we have the testimony of a licensed pharmacist who testified that he filled the prescription bottle from his larger container of Tussionex. Obviously he relied upon the representations of the supplier of the larger container in giving his opinion, but this is in keeping with *Milburn* v. *State,* 262 Ark. 267, 555 S.W.2d 946 (1977), and is authorized by Uniform Evidence Rule 703. In *Dixon* v. *Ledbetter,* 262 Ark. 758, 561 S.W.2d 294 (1978) the court quoted from Field, *A Code of Evidence for Arkansas,* 29 Ark. L. Rev. 1, 30 (1975) as follows:

> The plain intention of the rule is to bring judicial practice into line with the practice of experts themselves when not in court. For example, a physician in his own practice bases his diagnosis on information from a variety of sources such as hospital records, X-ray

reports, statements by patients, and reports from nurses and technicians.

We can take judicial notice that manufacturers and suppliers of pharmaceutical products are subject to numerous laws and regulations as are the pharmacists who dispense those products. We also know that the medical profession and the public rely on these professionals in life and death situations.

If lay testimony and circumstantial evidence are sufficient to sustain a conviction where the controlled substance has not been chemically analyzed as in *Dolan* and *Moser*, we have no trouble holding, under the circumstances of the instant case, that the evidence is sufficient to sustain the appellant's conviction.

Marcia HATMAN *v.* William F. EVERETT, Director of Labor & LITTLE ROCK CARDIOLOGY CLINIC

E 81-360 633 S.W.2d 379

Court of Appeals of Arkansas
Substituted Opinion delivered May 19, 1982

Appellant, *pro se.*

Thelma Lorenzo, for appellee.

JAMES R. COOPER, Judge. Appellant worked several years for Little Rock Cardiology Clinic. Appellant's husband was scheduled to be transferred to Russellville and in anticipation of her relocation, she wrote approximately ten letters to prospective employers in the Russellville area prior to her last day of employment. Appellant arrived at her new place of residence on July 31, 1981, and on August 3, 1981, she registered with the employment office in Russellville.

Appellant was disqualified from benefits on a finding that she had not made an immediate entry into the labor market, because she had not had any face to face contact with employers. There was little testimony at the hearing, but a letter from appellant to the Appeal Tribunal was read into the record. In that letter, appellant stated that she had contacted three of the prospective employers to whom she had written and had contacted one other prospective employer during the period in question.

The facts in this case are remarkably similar to those in *Whitlow* v. *American Greetings Company,* 268 Ark. 1122, 599 S.W.2d 410 (Ark. App. 1980). In the *Whitlow* case, the appellant had worked for the same employer for thirteen years. Prior to moving to accompany her spouse to a new place of residence, she contacted two prospective employers. Three days after her last day of work at her previous location, and on the second business day following her last day of work, she registered at the local employment office in Jonesboro. Eighteen days after her registration for work, she had a face to face interview with a local employer. This Court said that in determining whether a claimant has made

an immediate entry into the new labor market, the claimant's job contacts made prior to separation from her previous employer must be taken into consideration.

We hold that the *Whitlow* case is controlling in the case at bar. In determining whether a claimant has made sufficient job contact, we know of no statutory or case law authority for the proposition that face to face contacts are required. Appellant obviously made an immediate entry into the new labor market, when her contacts prior to termination and after her arrival at her new place of residence are considered. The decision of the Board of Review is reversed and remanded, with directions to award benefits.

MAYFIELD, C.J., dissents.

Hugh J. TAYLOR, d/b/a TAYLOR BUILDING ASSOCIATES and AMERICAN FIDELITY FIRE INSURANCE COMPANY *v.* GREEN MEMORIAL BAPTIST CHURCH et al

CA 81-309 633 S.W.2d 48

Court of Appeals of Arkansas
Opinion delivered May 19, 1982

Hardin, Grace, Downing, Napper, Allen & East, by: *Jack East, III,* for appellants.

Patten, Brown & Leslie, by: *Charles A. Brown,* for appellees.

TOM GLAZE, Judge. This appeal and cross-appeal arise out of a construction contract executed by appellant, Taylor Building Associates (Taylor), and appellee, Green Memorial Baptist Church (Green Memorial). The contract was for the remodeling of and addition to the church building owned by Green Memorial. The parties signed the contract on February 23, 1978, and appellant, American Fidelity Fire Insurance Company (American Fidelity), bonded payment for the prompt, full performance of Taylor. Under the contract, Taylor was to complete his work by June 30, 1978, but failed to do so. He continued on the job after the June 30 date, but on or about November 6, 1978, Green Memorial declared Taylor in default and demanded that American Fidelity complete the performance of the project. American Fidelity caused the work to be finished, but the certificate of substantial completion was not executed by the architect in charge of the project until January 4, 1979, more than six

months after the June 30, 1978, date to which Taylor had agreed originally.

In June, 1979, Taylor filed suit against Green Memorial, alleging it had breached the parties' contract by failing to pay Taylor under the terms of their agreement. Green Memorial answered and counterclaimed, alleging Taylor breached their contract, and, among other things, Green Memorial claimed it had incurred interest damages due to Taylor's failure to complete the job by the June 30 date called for by the contract. Green Memorial also joined American Fidelity as a party by filing a cross-complaint.

At trial, the jury returned a verdict in favor of Taylor and American Fidelity in the sum of $6,313.03. The jury additionally awarded Green Memorial $6,401.74 on its counterclaim and cross-complaint. The award to Green Memorial included $2,500 interest damages the jury concluded was incurred by the church due to the delay in the completion of the project caused by Taylor.

On direct appeal, Taylor challenges the award of interest damages to Green Memorial, contending there was no substantial evidence from which the jury could have ascertained an amount of such damages. On cross-appeal, Green Memorial argues the amount of damages it was awarded by the jury was inadequate as a matter of law. We reject the arguments made by the parties in their respective appeals, and, therefore, affirm the verdicts awarded by the jury in each instance.

First, we consider Taylor's multifaceted argument that Green Memorial failed to meet its burden of proving interest damages. Taylor argues that Green Memorial authorized a change order for added work on July 5, 1978, and thereby extended the agreed completion date of June 30. Thus, at the least, Taylor contends this July 5 change order imposed upon the church the burden of proving the change order did not delay substantial completion as of June 30, 1978. Next, Taylor urges that there is sufficient evidence in the record which shows that the project was actually completed by it well before January 4, 1979, the date the architect actually

certified substantial completion. In sum, Taylor claims that Green Memorial failed to offer evidence that Taylor caused any delay (since the July change order was approved by Green Memorial) and that it failed to show January 4, 1979, was the date of completion.

Admittedly, the record substantiates that part of Taylor's argument that Green Memorial agreed to an extended completion date since it approved the July 5 change order. However, there was no evidence presented by any of the parties which indicated that the delay in performing the contract should have lasted until January 4, 1979. In fact, the architect testified that the added work required by the change order might have extended the work on the project, but it should have been completed at least by August 1, 1978. From the evidence, we believe it is clear that Green Memorial extended the original completion date established by the parties' contract, but we also find that a factual issue was presented to the jury to determine how long it would take for Taylor to finish the work called for by the change order authorized by Green Memorial.

Once the jury decided the date on which the project should have been completed, it then was required to calculate the amount of interest Green Memorial paid on its interim loan until the date Green Memorial commenced paying interest on its permanent loan, *i.e.*, the date the project was finally completed. Without reciting all the evidence in the record before us, we find substantial proof introduced at trial to support several different, possible dates from which the jury could have computed interest damages. One example may be derived from the testimony of the project's architect who concluded that Taylor could have completed the project on or before August 1, 1978. If the jury had so surmised, the record would further have substantiated a jury finding that Green Memorial's interim financing was extended from August 1, 1978, to January 4, 1979, the date the architect designated as the substantial completion date for the project. Thus, although we believe there are other dates and time frames the jury could have considered from the evidence when calculating interest damages, the August 1 to January 4 period is one illustration, based on the

evidence, that we know could support the jury verdict of $2,500.

We suggest the real problem that prompted this appeal was Green Memorial's failure to offer direct testimony or proof on the exact loss of interest it suffered once it was determined when Taylor should have finished the project. Green Memorial never introduced an amortization table or testimony via a bank loan officer to show the amount of interest it paid on advances extended to Green Memorial during the life of the interim loan. However, as the court stated in *Harris Manufacturing Company* v. *Williams,* 164 F. Supp. 626 (1958), when the cause and existence of damages have been established by the evidence, recovery will not be denied merely because the damages are difficult to ascertain. In the instant proceeding, the jury was required to compute the interest damages from the terms of the interim finance note and the printout which reflected the activity on such note. The interim note was in the principal amount of $125,000 at 10% interest. Since this note was for construction, the principal amount was broken down and paid in varying amounts at different stages of construction. Accordingly, the amounts and dates of payments were set out in the printout which was in evidence and properly before the jury. Taking the terms of the note and payments reflected on the loan activity printout, it was certainly possible for the jury to calculate damages. For instance, let us consider the August 1, 1978 to January 4, 1979, time period we previously discussed. The printout reflects that the amount of loan proceeds extended by August 1, 1978, was no less than $63,000. If we were to compute interest damages on this loan amount, Green Memorial would have paid $2,589.04 in interest, basing the calculation on a 360-day year. Obviously, additional monies were loaned as the construction progressed to completion and, given the August 1 to January 4 date, the interest damages would necessarily have been in excess of $2,500.

The purpose of illustration is not meant to imply that August 1, 1978 to January 4, 1979 was the period used by the jury in rendering its decision. However, our example certainly serves to illustrate the method by which interest

damages could be calculated once the jury decided when the project should have been completed by Taylor. The evidence presented the jury offered more than one choice in project completion dates and, in turn, the choice made would necessarily vary the amount of interest to be calculated and paid by Green Memorial. These variables, however, are not based on speculation or conjecture. Rather, there were various dates from which the jury could choose and they were all based on evidence presented at trial, albeit from conflicting testimony rendered by opposing parties and witnesses. Although we might agree the interim loan interest could have been presented to the jury in a form easier to apply once the jury decided Taylor had delayed performance of the parties' contract, for a designated period of time, we still are of the opinion the evidence was sufficient for the jury to make the verdict it rendered.

On its cross-appeal, Green Memorial is met with some of the same problems which we have discussed in the issue raised by Taylor. In sum, Green Memorial asks us to find the damages awarded by the jury were inadequate as a matter of law. Again, a review of the entire record reflects the conflicting evidence and countervailing arguments of the parties, all of which were clearly before the jury. The opposing parties offered extensive testimony and other evidence which afforded the jury the opportunity to accept some items listed as damages and to reject other items. It is the province of the jury to pass on the weight of the evidence, and when the sufficiency of the evidence is challenged on appeal, we will not disturb the finding of the jury if there is any substantial evidence to support it. *Guerin Contractors, Inc.* v. *Reaves,* 270 Ark. 710, 606 S.W.2d 143 (Ark. App. 1980). It is not this Court's function to reconstruct how the jury reached its verdict so long as the verdict was based on substantial evidence. Our study of the record shows the jury verdict was consistent with the evidence before it.

Affirmed.

ABC BOARD OF THE STATE OF ARKANSAS et al
v. William Arnold BLEVINS et al

CA 81-339 633 S.W.2d 380

Court of Appeals of Arkansas
Opinion delivered May 19, 1982
[Rehearing denied June 16, 1982.]

Donald R. Bennett, for appellant ABC Board.

Morgan E. Welch, for appellant William K. White, Jr.

Norman C. Wilber, for appellee William Arnold Blevins.

Marshall N. Carlisle, of *Murphy & Carlisle,* for appellees George Buchner and Larry Satterwhite.

TOM GLAZE, Judge. This appeal is from a judgment of the Pulaski Circuit Court, reversing the Arkansas ABC Board's decision to grant the application of appellant, William K. White, Jr., for requisite permits to operate a retail package liquor store in the community of Mountain Home, Baxter County, Arkansas. The trial court based its decision on the finding that there was no substantial evidence from which the Board could have found the issuance of the permits would serve the public convenience and advantage. We cannot agree.

We review the facts in this case in light of the tests enunciated in *Snyder* v. *Alcoholic Beverage Control Board,* 1 Ark. App. 92, 613 S.W.2d 126 (1981), and *Gordon* v. *Cummings,* 262 Ark. 737, 561 S.W.2d 285 (1978). Accordingly, we are limited in our judicial role on appeal (1) to review the entire record and determine whether there is substantial evidence to support the ABC Board's findings; and (2) to not substitute this court's judgment and discretion for that of the Board. In applying these principles, we have no doubt that sufficient evidence exists in the record to support the Board's decision to grant the requisite permits to White. A brief summary of the evidence relied on by the Board in making its decision will quickly bear out this finding.

The record reflects that when Baxter County voted wet in 1979, the Arkansas Beverage Commission issued four retail liquor and beer permits to be operative in the Mountain Home area. However, one of these permittees never opened a liquor store, leaving only three liquor stores presently operating in this area. Thus, the antecedent actions by the Commission clearly indicate that it had decided, even before White's application here, that the public convenience and advantage of the Mountain Home area would be served by the issuance of four permits. Since only three of the previously issued permits were being used at the time of White's application, the Commission obviously felt reasonably compelled to issue another permit to an acceptable applicant if all other circumstances justified its doing so.

Some of these other circumstances considered by the Commission were:

(1) Mr. White possessed complete qualifications and experience to operate and manage a liquor store.

(2) A large segment of population resides in the south side of Mountain Home which does not presently have immediate, easy access to a liquor store. In fact, three liquor permit holders now have stores located either in the northeast portion of the city or are situated northeast of the city limits of Mountain Home. All three of these stores are within 2.5 miles from each other.

(3) Mr. White has a store located one mile southwest of the city limits of Mountain Home. It is located three miles from the closest liquor store operating in the northeast part of Mountain Home, and it is nearly four miles distant from the next closest liquor store situated southeast of the city limits.

(4) U.S. Highway 62 presently traverses Mountain Home in a northeasterly to southwesterly direction. A proposed bypass to Highway 62 is planned to route traffic around the east and south boundaries of the city proper. The bypass will connect with Highway 62 again at a point located on the southwest side of the city. The point at which the proposed bypass bisects Highway 62 on the southwest side of Mountain Home is approximately three-quarters mile from Mr. White's store. White testified that he intended to serve the tourists and local citizens who use this bypass.

The foregoing factors considered by the ABC Board are certainly substantial enough to support its decision to issue White a permit to be used on the southeast side of Mountain Home. In arriving at this conclusion, we are not unmindful of the testimony, letters and petitions submitted to the Board by the appellees who opposed the issuance of a permit to White. Although appellees' evidence may have tended to show valid reasons why a fourth liquor permit should not be

issued to White, it did not significantly detract from or negate the evidence offered by White, and relied upon by the Board, in support of the issuance of the permit. Most of appellees' proof dealt with the general lack of need for another liquor store, the danger and hazards it might produce, the inability of law enforcement to police the area and the reduction of the value of surrounding property. The Board had before it all of this evidence, as well as that provided by White. Much of the evidence was in conflict and required the Board to weigh and decide which testimony and proof it chose to believe. In considering all of the evidence, we conclude the Board had sufficient proof upon which to base its decision to grant White a permit. If we were to hold otherwise, we would doubtless be substituting our judgment for that of the Board, an exercise in discretion we are clearly not afforded under the rule established in *Gordon* v. *Cummings, supra.* Thus, even though we may have reached a different decision than that rendered by the Board, it was the Board's decision to make and not ours.

In conclusion, we note that the ABC Board also raised the issue of whether appellees actually had the required standing to appeal the Board's action in this case. Since we find and hold that the record contains sufficient evidence to support the Board's decision in this cause, it is unnecessary to consider the standing issue.

Reversed and remanded.

Elton I. THOMPSON *v.* Rupert BROWN

CA 81-212 633 S.W.2d 382

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

Jon R. Sanford, for appellant.

Young & Finley, by: *James K. Young,* for appellee.

MELVIN MAYFIELD, Chief Judge. This appeal involves the trial court's failure to grant appellant's motion to amend his pleadings to conform to the evidence. We think the motion should have been granted and we discuss only those matters necessary to an understanding of that issue.

As the pleadings stood on the day of trial, the appellant Elton Thompson and MFA Mutual Insurance Company were plaintiffs in a suit against the appellee Rupert Brown. The plaintiffs were contending that Brown was negligent in the operation of a motor vehicle which collided with a car that Thompson claimed to own and MFA claimed to insure. Both plaintiffs alleged the car was damaged in the amount of

$1,092.77 and that MFA paid $992.77 of that amount and Thompson paid the remaining $100.00.

After trial, the jury returned a verdict for Thompson in the sum of $100.00 and for MFA in the sum of $992.77. The next thing disclosed by the record is a motion notwithstanding the verdict filed by Brown. The motion contends, as far as is applicable here, that no evidence was introduced to show a policy of insurance issued by MFA — or subrogation agreement of any kind — and if MFA paid anything on the damages to the car it did so voluntarily and has no claim against Brown. A response was filed in opposition to that motion and later a motion to amend the pleadings to conform to the evidence was filed. The response and motion to conform were filed on behalf of both Thompson and MFA and were filed by the same attorney who had represented both of them in the trial and who represents Thompson in this appeal.

Brown's motion for judgment notwithstanding the verdict was granted but the motion to conform to the evidence filed by Thompson and MFA was denied. As a result, judgment was then entered for Thompson against Brown for $100.00 in accordance with the jury's verdict, but the claim of MFA against Brown was dismissed.

Regardless of the propriety of the ruling on the judgment N.O.V., there is no appeal by MFA. We turn, therefore, to the appeal by Thompson on his motion to conform. That motion asked the court to amend Thompson's pleadings to pray judgment against Brown in the sum of $1,092.77. Arkansas Civil Procedure Rule 15 (b) provides:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . . .

We note, first, that Thompson's son, who was driving his father's car at the time of the collision, testified that it cost $1,092.77 to repair the car; and that the owner of the body shop where it was repaired, who also did some trading in used cars, testified its value before the collision was $1,500.00 and its value after the collision was $300.00 or $400.00. This evidence was introduced without objection.

Next, we note that Thompson's son testified, without objection, that his father owned the car and that a deductible of $100.00 was paid on the cost of repairs.

And, finally, we note that the jury was instructed, without objection, that:

> If you should find that the occurrence was proximately caused by negligence on the part of Rupert Brown, then Elton I. Thompson and MFA Mutual Insurance Company are entitled to recover the full amount of any damages you may find they have sustained as a result of the occurrence.

In the case of *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S.W.2d 566 (1950), the court said where an insurance company has paid only a portion of the loss the insured is the real party in interest and may maintain in his own name an action against the tortfeasor for his own benefit and the benefit of the insurer, and that he stands in the relation of trustee to the insurer as to any amount recovered. *Accord, Erwin, Inc.* v. *Arkansas Louisiana Gas Company,* 261 Ark. 537, 550 S.W.2d 174 (1977).

Thus, in the case at bar, by the evidence introduced without objection and by the instructions given the jury without objection, the parties have tried by implied consent the amount of damage caused by the negligence of Rupert Brown and sustained to the motor vehicle owned by Elton Thompson. 6 Wright & Miller, *Federal Practice and Procedure,* § 1493 (1971), says Rule 15 (b) of the Federal Rules of Civil Procedure permits amendments to "request increased damages" and in section 1494 at 474-75 it is said:

> Thus, the rule permits the motion to be made throughout the entire period during which the action is in the district court, including . . . after the return of the verdict or the entry of judgment, and on rehearing or on remand following an appeal. Since the rule also provides that a failure to amend will not affect the actual result of the trial as it relates to the adjudication of the unpleaded issues, as long as they are tried with the consent of the parties, the timing of the motion to conform is of little moment.

Our Rule of Civil Procedure 15 (b) is identical with the Federal Rules of Civil Procedure 15 (b), and in *Milne* v. *Milne,* 266 Ark. 900, 587 S.W.2d 229 (Ark. App. 1979), we cited rule 15 as supportive of the statement that "a party should be allowed to amend a pleading at any time as long as it does not prejudice his adversary."

Here, from evidence introduced without objection, the jury found the car in question to have been damaged in the sum of $1,092.77. Since the court found that the evidence did not show that MFA was subrogated to a portion of that amount, we think the court should have allowed Thompson to increase the prayer of his complaint to ask for the full amount of the damages found by the jury. After all, he was the real party in interest and he was entitled to recover for all the damages to his car. *Page* v. *Scott,* 263 Ark. 684, 567 S.W.2d 101 (1978); *Dowell, Incorporated* v. *Patton,* 221 Ark. 947, 257 S.W.2d 364 (1953).

We remand Thompson's judgment against Brown with directions for the trial court to grant Thompson's motion to conform and enter judgment in his favor for the sum of $1,092.77 with interest from January 14, 1981, plus costs.

Mac CARDER, Director of Alcoholic Beverage Control Division et al *v.* Clifford E. HEMSTOCK

CA 81-317 633 S.W.2d 384

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

Donald R. Bennett and *Marshall N. Carlisle,* for appellants.

Evans, Ludwig & Evans, by: *James E. Evans, Jr.,* for appellee.

GEORGE K. CRACRAFT, Judge. The appellants, the Director and members of the Arkansas Alcoholic Beverage Control Board, bring this appeal from an order of the Circuit Court of Washington County which reversed appellants' decision denying appellee, Clifford E. Hemstock, a retail liquor permit.

Appellee's application was first rejected by the Director. On appeal the Alcoholic Beverage Control Board made certain findings and again denied the application. Having reviewed the case on appeal to it pursuant to the Administrative Procedure Act, the Washington County Circuit Court remanded the matter to the Board, directing that it make specific findings on certain issues. On remand the Board heard additional evidence and filed its supplemental findings with the circuit court, reaffirming its decision not to issue the permit. After its second review the circuit court held that the findings and conclusions of the Board were not supported by substantial evidence and that its denial of the permit was arbitrary and capricious. The circuit court ordered issuance of the permit.

Ark. Stat. Ann. § 48-301 (Repl. 1977) declares it to be the public policy of this state that the number of permits for the sale of alcoholic beverages be restricted. It empowers the Director of the ABC to determine, in carrying out the express public policy, whether public convenience and advantage will be afforded by the increase or decrease of permits. The

Director and the Board are given broad discretionary powers to decide the number of permits and to issue them only when it is determined that public convenience and advantage would be promoted.

The rules governing judicial review of decisions of administrative agencies are settled and are the same for both the circuit and appellate court. This review is limited in scope and such decisions will be upheld if supported by substantial evidence and not arbitrary, capricious or characterized as an abuse of discretion. *First National Bank of Paris* v. *Peoples Security Bank,* 1 Ark. App. 224, 614 S.W.2d 521 (1981); *Snyder* v. *Alcoholic Beverage Control Board,* 1 Ark. App. 92, 613 S.W.2d 126 (1981).

The substantial evidence rule applicable to these cases requires a review of the entire record and not merely that evidence which supports the Board's decision. Substantial evidence is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Satterfield* v. *Mathews,* 483 F. Supp. 20 (1979). Although hearsay evidence is admissible in hearings before administrative bodies, hearsay alone is not substantial evidence. *Woods* v. *Emp. Sec. Div.,* 269 Ark. 613, 599 S.W.2d 435 (Ark. App. 1980). On numerous occasions in recent years our court has reaffirmed its earlier declarations that the questions of credibility of witnesses and weight to be accorded evidence presented to a board is the prerogative of the board and not of the reviewing court, and that courts must rely on their findings because they are better equipped by specialization, insight and experience in matters referred to them. The reviewing court may not displace the Board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it *de novo.* The reviewing court may not set aside a board's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial. *First National Bank of Paris* v. *Peoples Bank,* supra.

The question of whether a board's action is arbitrary and capricious is a narrow one, more restricted than the

substantial evidence test. To set aside an agency decision on that basis, it must be found to have been willful and unreasoning and in disregard of the facts and circumstances of the case. This standard applies only where the board's action was unreasoned; its decision was not supported by any reasonable basis, and was made in willful disregard of the facts and circumstances. *Arkadelphia Federal Savings & Loan Ass'n* v. *Mid-South Savings & Loan Ass'n,* 265 Ark. 860, 581 S.W.2d 345 (1979); *First National Bank of Paris* v. *Peoples Security Bank,* supra.

The Board found from the evidence submitted that there was significant opposition to the permit by adjacent property owners, and that there was significant opposition from area public officials. It found that placing the outlet at this location would increase the traffic hazard and traffic burden which already exists at the intersection and that police protection would be difficult to provide due to limited resources at the sheriff's office which had jurisdiction over that area. It further found that it was charged with the duty of restricting the number of permits and that the evidence before the Board led to the conclusion that the present number of eight permits for the City of Springdale is sufficient and that the public convenience and advantage would not be served by the issuance of an additional permit at this time at that location.

The trial court first held that the Board's finding that the location selected was a hazardous intersection and that an outlet there would increase that hazard was not supported by substantial evidence. The sheriff and two of his deputies offered testimony that due to its particular layout the intersection was dangerous and that a liquor store at that site would tend to increase the existing hazard. Two residents of the area gave testimony in corroboration of that fact and testified about fatal accidents which had occurred at the intersection in the past. While no testimony to the contrary was offered, on cross-examination it was sought to diminish the effectiveness of this testimony, particularly of the two residents, by questioning their opportunity for observation and actual knowledge of the facts about which they testified.

The prosecuting attorney in his written statement corroborated the sheriff's opinion that "this location would be difficult to properly patrol and is a dangerous intersection with one person having been killed there in the past fifteen months by a drunk driver." Other public officials submitted written objections because of the congested condition the store would create. An agent of the Alcoholic Beverage Control Board investigated the application. Contained in his report were statements of several inhabitants of the immediate area that they objected to the location based on the hazardous condition and the number of accidents that had occurred at the intersection. A large number of adjacent landowners petitioned that the permit be denied for the same reason. These hearsay statements are admissible in administrative hearings and may be given such weight as the agency may determine.

The trial court, declaring that the finding of the Board in this regard was not supported by substantial evidence, observed that all highway intersections create a danger to traffic and that there was no evidence that this intersection was substantially different from other intersections in the area. Police officers testified that the hazards created here were the result of the peculiar layout of the intersection. The trial court further commented that there was no evidence of visual observation or steep elevations on the approaches and that the finding that accidents have occurred at this intersection did not indicate that any more accidents occurred here than at similar intersections within the city and that the Board may have attached too much weight to the testimony of the two residents.

While these might have been permissible findings in a trial *de novo,* we conclude that in its reversal of these administrative determinations the trial court substituted its judgment and discretion in weighing the evidence for that of the agency. Judging both the credibility of the witnesses and the proper weight to be accorded evidence presented to the Board is within the Board's domain. *Northwest S & L Ass'n* v. *Fayetteville S & L Ass'n,* 262 Ark. 840, 562 S.W.2d 40 (1978).

The trial court also held that the Board's finding that the area's economy did not justify the liquor permit ignored the fact that Springdale had phenomenal economic and population growth since 1969, the date the last permit was issued in that city. He found that due to that growth the failure to grant a permit during a twelve year period without finding of adverse effect on existing outlets was itself arbitrary and capricious and tended to create an unreasonable monopoly of the existing outlets. Again we think the trial court invaded the prerogative of the Board. The Board in its findings recognized the legislative mandate that it be charged with the duty of restricting the number of permits under the Act. The Board was not required to find that the issuance of a new permit would have an adverse effect on any existing permit; it was required to find only whether the issuance of the additional permit in this area would "promote the public convenience and advantage." There was no testimony that the existing outlets did not adequately serve the public need or that any of the evils of monopolistic control existed in the area. Nor can we agree with the trial court that the mere fact that no permits were issued in the City of Springdale during a period of twelve years was in and of itself arbitrary. No evidence has been pointed out to us which might indicate that the Board had systematically denied applications in the area or even that such applications had been made.

The words "public convenience and advantage" are not defined in the Act and we find no cases in which our court has construed them. We conclude that these words should not be restricted to a colloquial sense as synonymous with "handy or easy of access" but construed in that sense which connotes suitable and fitting to supply the public needs to the public advantage. We further conclude that even if the Board could or should have found that due to economic expansion an additional outlet was desirable, it was not required to grant this particular application for this specific location since the Board found the location would disadvantage not only those utilizing the facility but the general public.

The Board further found that police protection would

be difficult to provide at the location mentioned in the application. This outlet was 400 feet outside the Springdale city limits and under the sole jurisdiction of the sheriff's department. It was the sheriff's testimony that, while adequate protection might be afforded in daylight, at night his patrol cars were assigned to the outlying areas in the county and no other protection was available. He noted that this type of business was usually open until midnight. He and his deputies testified that due to the limited manpower and resources of the department it would be difficult to offer protection and surveillance of the proposed premises during these late hours. The sheriff objected to the issuance of the permit for that reason, adding that no other police department would respond to a call to that location and that he had two less patrol cars now than at the time of the initial board hearing. The Board recognized that liquor and convenience stores both pose security problems, particularly at night. As security and public safety are factors to be considered in determining whether public convenience and advantage are to be promoted the Board properly considered this testimony.

The trial court found this testimony insubstantial since the sheriff could "always use more cars" and there was no finding that the loss of two patrol cars would cause a recall of any retail permits already in existence. Again we think the trial judge invaded the province of the Board. It was for the Board to determine whether the public security and safety would be adequately protected at this particular location and there was substantial evidence to support a finding that adequate protection would not be available. The trial court also apparently lost sight of the fact that the hearing was not to determine the wisdom of permits issued previously but only whether the public convenience and advantage would be supported by the issuance of a new one in this particular location.

The trial court, citing *Snyder,* supra, concluded that the fact that a number of public officials and adjacent landowners opposed the issuance of the permit was not conclusive. We did so state in *Snyder,* but we further held that the reasons why those persons opposed or supported the

permit application might be "very significant." Here, unlike in *Snyder,* those opposing the application did give their reasons. Written statements from public officials and a petition signed by a large number of persons were received in evidence. The stated reasons for opposing the application in these written documents were substantially the same as those given by the sheriff, his two deputies and the two local residents in their sworn testimony. While hearsay standing alone is not substantial evidence it may be considered by the agency in reaching its determination if supportive of other non-hearsay evidence. *Woods* v. *Emp. Sec. Div.,* supra. The weight to be given such evidence is for the Board to determine.

We conclude that the findings and order of the Alcoholic Beverage Control Board are supported by substantial evidence and that the trial court erred in not so holding. The case is reversed and remanded to the circuit court with directions to enter an order affirming the determination of the Board.

COOPER, J., concurs.

EMERSON ELECTRIC *v.* Donald CARGILE

CA 82-3 633 S.W.2d 389

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

Croxton & Boyer, by: *Ronald L. Boyer,* for appellant.

Evans, Ludwig & Evans, by: *James E. Evans, Jr.,* for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Emerson Electric, brings this appeal from a decision of the Arkansas Workers' Compensation Commission which refused to allow it a setoff against an award for a compensable injury under the Arkansas Workers' Compensation Act in the amount of privately insured disability benefits paid to the appellee, Donald Cargile.

Emerson made group medical and disability insurance available to its employees. The full premium for the insurance was paid by the employee through payroll deductions. Emerson made no contributions to the premiums. The appellee, who was employed by Emerson, subscribed to the group insurance and was issued a group policy. He subsequently received an injury, the compensability of which was denied by Emerson. During the pendency of his claim before the Workers' Compensation Commission the appellee made claim under his private group insurance and received direct payments from the carrier in the amounts of $2,227 for medical expense and $1,606 in weekly disability benefits.

Before the Commission the appellee contended that he received a compensable injury while in the employ of

Emerson. Emerson contended that his injury was not compensable, but if it were, Emerson was entitled to set off against the compensation award all amounts of medical expense and disability paid to Cargile under the group policy. The Commission found that the injury was compensable and awarded full benefits under the Act, allowing the setoff for medical expenses but denying any setoff for disability payments. The appellant appeals only from the Commission's determination that appellant could not set off the private disability benefits. We agree with the appellee that there was no error in the award.

Ark. Stat. Ann. § 81-1319 (m) (Repl. 1976) reads:

> Credit for compensation or wages paid. If the employer has made *advance payments of compensation* he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. If the injured employee receives full wages during disability he shall not be entitled to compensation during such period. (Emphasis supplied)

Under this section if Emerson made *advance payments of compensation* to the appellee then credit should have been allowed. If the payment received by appellee was anything other than advance payment of compensation then the award of the Commission was correct. *Southwestern Bell Telephone Co.* v. *Siegler,* 240 Ark. 132, 398 S.W.2d 531 (1966).

The general rule is set out in *Larson's Workers Compensation Law,* § 97-51 as follows:

> As to private pensions or health and accident insurance, whether provided by the employer, union, or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits.

Our court in *Southwestern Bell Telephone Co.* v. *Siegler,* supra, adopted the rule cited by Larson insofar as it dealt with health and accident insurance provided by the employer. In that case the employer provided a "Plan"

which included disability payments to an injured employee during his period of disability. The company fully funded the "Plan" and the employees made no contribution to it. The "Plan" did not contain any indication that benefits received under it were to be treated as advance payments of compensation. The employer contended that it should be allowed a setoff against the worker's compensation award for any amounts paid the employee under the "Plan."

The court commented that in the absence of any designation in the "Plan" itself, the monies received by that employee might have been wages, gratuities, benefits or advance payment of compensation, and until the company showed that under the "Plan" such payment "could have been nothing except advance payment of compensation the company failed to establish its case." The court held that only where the employer clearly establishes that the sums paid or provided by it to an injured employee are advanced payments of compensation could it be entitled to any offset. In all other instances the employee could recover the full amount of his disability benefits provided by the Act.

No cases have been cited to us in which our court has addressed the question of whether or not benefits paid under private insurance may be considered advance payments for compensation. We conclude that the sounder rules to apply are that where the insurance, whether private or company administered, is provided and funded by the employer the rule announced in *Southwestern Bell Telephone Company,* supra, should be followed and the employer afforded the right to show, if he can, that the payments were "payments of compensation in advance." But where, as here, the employer does no more than to make the group coverage available at the employee's sole expense, no setoff should be allowed. Since the policy of insurance issued to the employee at his sole expense is a matter of private contract it could not affect the rights of the injured employee to recover under the compensation law or be considered as payments of compensation in advance. Under our statute only compensation paid in advance may be setoff against an award. *Southwestern Bell Telephone Co.* v. *Siegler,* supra. We

conclude that private insurance procured by the employee does not come within that provision of our statute.

We affirm.

A. G. HAYGOOD and ROCKWOOD INSURANCE COMPANY *v.* Jessie Lee BELCHER

CA 82-28 633 S.W.2d 391

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

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

Howell, Price & Trice, P.A., for appellee.

GEORGE K. CRACRAFT, Judge. The appellants appeal from a decision of the Arkansas Workers' Compensation Commission awarding the appellee benefits for permanent total disability. The appellee, Jessie Belcher, a timber cutter employed by appellee A. G. Haygood, sustained a compensable injury on April 19, 1976 when a tree fell on him breaking his right leg. He was treated first by Dr. Wynne and subsequently by Dr. Shuffield, who released him to return to work on January 3, 1977, rating his permanent partial disability at 25% to the right leg. When he returned to work his employer said no work was available for him and he has not worked since the injury.

At his first hearing before the Administrative Law Judge on March 29, 1977 appellee contended that he had suffered disability beyond the anatomical rating set by his physician and sought an award for permanent disability benefits in excess of those accepted by the employer. At this hearing appellee and his wife testified to prove that he was forty-four years old with only a fourth grade education and practically illiterate, that since his accident he had continued to suffer pain and was unable to work even in his very limited field. Medical reports of Dr. Wynne and Dr. Shuffield were introduced but there was no medical testimony from any doctor who had seen appellee after his January 3, 1977 release or which evaulated his mental capabilities.

On May 4, 1977 the Administrative Law Judge determined that although appellee's wage earning capacity had been diminished substantially beyond that commensurate with his anatomical rating, these factors did not constitute permanent total disability. Relying on *Anchor Construction Co.* v. *Rice,* 252 Ark. 460, 479 S.W.2d 573 (1972) he correctly ruled that, in a scheduled injury, absent a finding of permanent total disability, the award must be limited to anatomical disability and entered an award applicable to 25% disability to the right leg. It is only where the facts justify a finding of total disability that the wage loss factors may be considered in increasing benefits for a scheduled injury. *Meadowlake Nursing Home* v. *Sullivan,* 253 Ark. 403, 486 S.W.2d 82 (1972).

Shortly thereafter appellee changed his counsel, who obtained additional medical and initial mental evaluations. A subsequent request made to the Administrative Law Judge to reopen the case for presentation of additional evidence bearing on the question of permanent total disability was denied. On June 16, 1977 appellee filed a formal pleading with the Commission requesting that the matter be remanded to the Administrative Law Judge for taking this additional evidence. Attached to that motion was a copy of the report of Dr. Douglas A. Stevens, a clinical psychologist who first saw the appellee after the hearing before the Administrative Law Judge. Dr. Stevens had reported that appellee had not only sustained an injury to his leg but had experienced an emotional reaction to that injury which was totally disabling in itself, and which in combination with his problems associated with the injury created a condition of "vocational overkill." Stevens further concluded that appellee was illiterate and mentally defective to such an extent that he was legally incompetent and functioned on such a limited level that he would be difficut to work with even in a sheltered therapeutic workshop.

On July 28, 1977 the Full Commission affirmed the award of the Administrative Law Judge and dismissed the petition to present additional evidence, saying:

Claimant's request to present additional evidence is

> denied as the claimant was afforded opportunity to present all of his evidence at a full hearing before the Administrative Law Judge. *To allow the claimant to present evidence accumulated after the Administrative Law Judge's opinion would be to allow him to try the same issue a second time.*" (Emphasis supplied)

The appellee filed a timely notice of appeal to the Bradley County Circuit Court, on which no action was taken until December 22, 1978, some eighteen months later. The Circuit Court found that the Full Commission erred in not allowing claimant to present additional, newly discovered evidence that he was totally and permanently disabled. It remanded the case to the Commission and directed them to grant an additional hearing before the Administrative Law Judge in order for claimant to produce "such evidence as he may have showing that he is permanently and totally disabled."

At the hearing before the Administrative Law Judge held pursuant to the Circuit Court's order the appellee and his wife testified about his working ability before the accident, his present inability to work, and his nervousness and tension. Dr. Stevens testified that appellee had suffered a loosening of ties with reality. His condition was consistent with severe retardation or schizophrenic reaction in that he had not only sustained an injury but experienced a severe emotional reaction to it which was of a totally disabling nature, resulting in legal incompetency which required full-time care. The Administrative Law Judge found the physical disability coupled with the mental disability resulting from his injuries constituted permanent total disability. His opinion was affirmed by the Full Commission.

Appellants do not question that the award finally entered by the Commission is supported by substantial evidence. This court in the past has found it proper to combine a scheduled injury with resulting mental condition in reaching a determination of total permanent disability. *Turner v. Haynie,* 270 Ark. 1014, 607 S.W.2d 86 (Ark. App. 1980); *Rooney & Travelers Ins. Co.* v. *Charles,* 262 Ark. 695, 560 S.W.2d 797 (1978). The sole issue is whether the circuit

court erred in directing that the evidence, on which the Commission ultimately based its award, be admitted for consideration at all.

We do not agree with the appellants that their objection to the testimony of appellee and his wife should have been sustained as repetitious and outside the purview of the circuit court's order. The order did not limit the testimony to medical evidence but permitted the claimant to produce such evidence as he may have to show that he is permanently and totally disabled.

Nor can we agree that the order of the circuit court "allowed appellee to do something that applicable law does not permit, i.e. to introduce additional evidence after an award is made." In this case the appellee did not seek to introduce evidence after the award was made. He first requested the Administrative Law Judge to reopen for hearing additional evidence and then applied to the Commission, before its award was made, to remand the matter to the Administrative Law Judge.

Ark. Stat. Ann. § 81-1323 (b) (Repl. 1976) in pertinent part provides:

> The full Commission *may* remand to a single member of the Commission or a referee, any case before the full Commission for the purpose of taking additional evidence. Such evidence shall be delivered to the full Commission and shall be taken into consideration before rendering any decision or award in such case. (Emphasis supplied)

Rule 14 of the Rules of the Workers' Compensation Commission is set forth in *Williams* v. *Coca-Cola Bottling Co.*, 266 Ark. 736, 585 S.W.2d 372 (Ark. App. 1979), as follows:

> Introduction of evidence — All oral evidence or documentary evidence will be presented to the designated representative of the Commission at the initial hearing on a controverted claim, which evidence shall be stenographically reported. Each party shall present all

> evidence at the initial hearing. *Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or Commission.* (Emphasis supplied)

Clearly the Commission is vested with discretion in determining whether and under what circumstances a case appealed to them should be remanded for taking additional evidence. On appeal an exercise of that discretion will not be lightly disturbed. However, in the case at bar, neither the hearing officer nor the Commission appear to have exercised any discretion at all; they merely applied a hard and fast rule.

In *Williams, supra,* the court declared that the clear intent of Rule 14 is that all parties should have and present all evidence at the initial hearing to enable the Commission to render an opinion upon a settled state of facts, and that there could be no argument that the rule was not necessary and appropriate. The court further held, however, that these considerations were less important than justice and there are instances where "bending the rule ought to occur to insure the fair and judicious consideration of claims, rather than adherence to the rule for the sake of the rule itself." Especially is that true where, as here, the proffered evidence considered on the mandate of the trial court convinced both the hearing officer and the full Commission that the appellee's claim was meritorious. The exclusion of that evidence under the application of Rule 14 would have resulted in a manifest injustice.

At the time the Administrative Law Judge refused to open the matter for taking additional evidence and when the Commission refused to direct him to do so, both had the report of Dr. Stevens before them, along with appellee's proffer to produce additional similar evidence. This proffered evidence was not merely repetitious or cumulative but was highly relevant to the question of the full extent of claimant's wage earning disability. In denying the motion neither the hearing officer or the Commission appears to have considered the proffer itself and its impact on the case, but denied the motion without regard to relevance of the new evidence.

We also do not agree with appellants' contention that the evidence of Dr. Stevens and those other medical witnesses who testified at the final hearing was within appellee's knowledge and therefore not newly discovered or otherwise obtained in a manner or time which justified reopening the case. In *Mason* v. *Lauck,* 232 Ark. 891, 340 S.W.2d 575 (1960) our court addressed the question of when and under what circumstances a matter should be remanded by the Full Commission or to the Full Commission on proffer to present newly discovered evidence. There the Supreme Court set out the following prerequisites:

(1) Is the newly discovered evidence relevant?

(2) Is it cumulative?

(3) Would it change the result?

(4) Was the movant diligent?

Certainly evidence showing the extent of mental impairment resulting from the injury was relevant to a determination of total disability. This evidence was not merely cumulative. The medical evidence introduced at the final hearing consisted of new medical evaluations of appellee's mental and physical capabilities. Obviously it would change the result; the result *was* changed. The remaining question concerns appellee's diligence. At the time of the initial hearing the only medical testimony offered was short statements of Drs. Wynne and Shuffield setting out the nature and extent of the leg injury and assigning an anatomical disability. Neither of those doctors had seen appellee subsequent to his release, nor had they ever evaluated his mental condition. According to the evidence subsequently introduced the appellee was, at the time of the initial hearing, schizophrenic and so mentally impaired as to border on legal incompetency. He had not received a mental evaluation by anyone qualified to make such a report. The full extent of his mental impairment was not known until examination by Dr. Stevens which took place after the initial hearing. To hold that one as mentally incapacitated as the appellee, who apparently did not realize

the full extent of his own condition, did not act with diligence in determining that fact would be unduly harsh.

The Commission should have exercised its discretion based on these considerations. We agree with the Circuit Court that it did not do so.

Affirmed.

Joe Bob GARNER & Nancy GARNER, Howard R. JOHNSON & Bennie F. JOHNSON, Howard R. JOHNSON, Jr. *v.* ARKANSAS STATE HIGHWAY COMMISSION

CA 81-355 633 S.W.2d 710

Court of Appeals of Arkansas
Opinion delivered May 26, 1982
[Rehearing denied June 23, 1982.]

Callahan, Wright, Crow, Bachelor & Lax, by: *George M. Callahan* and *Carl A. Crow, Jr.,* for appellants.

Thomas B. Keys, James N. Dowell and *Philip N. Gowen,* for appellee.

LAWSON CLONINGER, Judge. On June 26, 1980, appellee filed its Complaint and Declaration of Taking, condemning one acre of appellants' 1.6 acre tract of land for construction of a new Ouachita River bridge and approaches. The tract fronts on Lake Hamilton and Highway 70 in Garland County, west of Hot Springs.

On May 30, 1981, a jury verdict was returned, awarding appellants $60,000 for the taking of the land. On this appeal, appellants charge that the trial court erred in refusing to permit the jury to consider, as evidence of market value, a contract of sale dated August 20, 1979, by which appellants Howard R. Johnson, Bennie F. Johnson and Howard R. Johnson, Jr. sold the 1.6 acre tract to appellants Joe Bob Garner, Jr. and Nancy L. Garner for a consideration of $250,000; that the trial court erroneously refused to give instructions requested by appellants; and that a new trial should have been ordered on the ground that the verdict was by lot.

We find no error in the trial court and we affirm.

For their first point for reversal, appellants urge that the contract should have been considered by the jury as evidence of the fair market value of the property before the taking. The trial court permitted the introduction of the contract for the limited purpose of showing the relation of the appellants Garner and the appellants Johnson, but admonished

the jury that it was not to be considered as an indication of market value.

In *Arkansas State Highway Commission* v. *Hubach,* 257 Ark. 117, 514 S.W.2d 386 (1974), the Arkansas Supreme Court stated that when a parcel of land is taken by eminent domain, the price which the owner paid for it when he acquired it is one of the most important pieces of evidence in determining its present value, provided that the sale was recent, was a voluntary transaction between the parties, and that no change in condition or marked fluctuation of values has occurred since the sale. That ruling was reaffirmed in *Arkansas Highway Commission* v. *First Pyramid Life Insurance Company of America,* 265 Ark. 417, 579 S.W.2d 587 (1979).

Appellee recognizes the rule as set out in *Hubach,* but argues that the contract in this case represented only the value of the land to the parties if the proposed development of the property for condominium purposes was successful. In excluding the contract as evidence of market value, the trial court adopted appellees' view, and we believe that view is correct.

The contract provides that in the event of default by the buyers, the appellants Garner, the sellers, the appellants Johnson, can enforce their lien against the property in the following manner only:

> Sellers shall also have, upon default of the buyers, the right to declare this contract void, and retain whatever may have been paid on said contract, and all improvements that may have been made on said premises, as liquidated damages for failure to perform this contract and may consider and treat the party of the second part as a tenant holding over without permission, and may take immediate possession of the premises.

The instrument sought to be introduced by the appellants as evidence of market value is no ordinary lien agreement. There is no foreclosure or repossession remedy available to

the sellers other than to repossess the property and treat the sums paid as liquidated damages.

The latitude allowed the parties in bringing out collateral and cumulative facts to support value estimates made by witnesses is left largely to the discretion of the presiding judge. *Little Rock Junction Railway* v. *Woodruff,* 49 Ark. 381, 5 S.W. 792 (1887); *State Highway Commission* v. *First Pyramid Life Insurance Company,* 269 Ark. 278, 602 S.W.2d 609 (1980).

Appellants were permitted to present evidence of three expert witnesses that the highest and best use of the tract was for the development of condominiums. One of the appellants' witnesses, a realtor, placed the value of the tract at $280,000 before the taking, and the value after the taking at $1,000; another of appellants' witnesses, an architect and realtor, testified that the value before taking was $350,000 and that the value after the taking was $1,000; a third witness for appellants, a professional appraiser and realtor, placed the before-taking value at $298,000 and the after-taking value at $3,000. Appellant Joe Bob Garner, Jr. testified that the highest and best use of the property was for the development of condominiums; that the $250,000 consideration in the contract was based upon future development of the property; and that the value of the tract at the time of the taking was $680,000. There was evidence that the tract was sold for $34,000 only 21 months prior to the taking.

Appellants were given the opportunity to fully develop their thesis that the highest and best use of the property was for condominium development. The jury heard and considered the testimony of appellants and their expert witnesses, both as to use and as to value, and the trial court excluded only the contract.

Evidence of the contract as an indication of the market value of the tract was a cumulative fact to support the value estimates of the witnesses. The trial court was justified in finding that the contract represented the value of the tract if the condominium venture proved successful, and that it was too speculative and conjectural to be admitted for the jurors'

consideration as evidence of market value. We find no abuse of discretion by the trial court.

The trial court refused to give the following instruction requested by appellants:

> You are instructed that a recent purchase price is one of the most important factors in determining the present value provided the sale has been recent and voluntary and that there have been no changes in market conditions or marked fluctuation in value in the property since the sale.

The requested instruction is a correct statement of the law as set out in *Hubach, supra,* but appellants in this case were not entitled to have the instruction given. In the *Hubach* case, the sale of the property was a bona fide sale; in the present case, the buyers could retreat from the contract at any time and suffer liquidated damages only in the amount they had paid on the purchase price and the sums spent for improving the tract. The sellers and the purchasers had entered into an agreement under which all the parties hoped to benefit. However, for the purpose of indicating market value the amount set as the purchase price in the agreement was too speculative for the jury to properly consider. In *Arkansas Highway Commission* v. *Leavell,* 246 Ark. 1049, 449 S.W.2d 99 (1969), the court said: "... We are concerned only with present market value and not those values based upon speculative anticipation of future development."

The court also refused to give the following instruction requested by appellant:

> The owner has a right to obtain the market value of the land based upon its availability for the most valuable purpose for which it can be used.

The language in the requested instruction was used by the Arkansas Supreme Court in the case of *Gurdon and Fort Smith Railway Company* v. *Vaught,* 97 Ark. 234, 133 S.W.2d 1019 (1911), but not in the context of giving instructions to the jury. The statement was made in regard to the competency of testimony offered for the purpose of proving market value.

The court in the instant case properly instructed the jury as to the law on the highest and best use of the property, and appellants are not entitled to an instruction which is fully covered by other instructions. *Bly* v. *State,* 213 Ark. 859, 214 S.W.2d 77 (1948).

After the jury returned its verdict the jury foreman reported to the court the method which the jurors had employed in arriving at their verdict:

> Jury Foreman: Okay. First, we had a round table talk, one at a time, to give our views on the trial. And, we let everybody talk as much as they wanted. And, then it was decided to try to arrive at a figure. So we had everybody write a figure on a piece of plain paper without their name, and then we gathered them and added up the total and divided by the 12, and we came out to $57,300, I believe. And, then we talked a little bit more and we decided we'd make it $60,000. And, then we had a show of hands and 10 out of the 12 jurors agreed that was what we should do and so that's what we did.

The law in Arkansas on the issue is clearly stated in *Scheptmann* v. *Thorn,* 272 Ark. 70, 612 S.W.2d 291 (1981), as follows:

> Where the jurors each submit a figure and agree in advance that the verdict will be one-twelfth of the total, the verdict is by lot and cannot be upheld. If, however, there is no agreement in advance to be bound by the procedure, but the jurors do adopt the result, it is a quotient verdict and is valid. *National Credit Corporation* v. *Ritchey,* 252 Ark. 106, 477 S.W.2d 488 (1972).

We hold that the verdict in this case is a quotient verdict and valid.

Affirmed.

CORBIN and GLAZE, JJ., dissent.

Beverly HAYWOOD et al *v.* William F. EVERETT, Director of Labor

E 81-287 633 S.W.2d 395

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

Central Arkansas Legal Services, by: *James R. Cromwell,* for appellant.

Bruce H. Bokony, for appellee.

LAWSON CLONINGER, Judge. This is an appeal by six claimants from a determination by the Board of Review that claimants are ineligible for unemployment benefits under § 4 (c) of the Arkansas Employment Security Act, Ark. Stat. Ann. § 81-1105 (c) (Repl. 1976), on a finding that they were not fully able and available for suitable work.

We reverse the decision of the Board of Review.

All the claimants were employees of the Jefferson County Headstart Program, and they had worked in the program for periods varying from two school years to eleven. Each earned minimum wage, or slightly higher, and each worked until May, 1981, when the school year ended. Claimants had not been told that one or all of them would be called back to the Headstart Program when the new school year began, but the record indicates that they hoped to be recalled. Over the years a pattern had developed that the employees would be advised about the third week in August when to report. All the claimants, except Ivory Lockhart,

who did not appear at the Tribunal hearing, testified that they had not worked during the program's summer recess in any previous years, and all reported that they had looked for work during those recesses. Ivory Lockhart testified by affidavit, but she did not refer to work in previous summers. Each claimant testified that she had searched for work, and would have accepted work at or near minimum wage.

In *Loftin* v. *Daniels,* 268 Ark. 611, 594 S.W.2d 578 (Ark. App. 1980), the claimants were also employees of a Headstart Program and were laid off without pay for the summer recess. The court held that the employees were not "available" for work in view of the Board of Review finding that their circumstances limited their availability. The court found "a tie of expectation" between the Headstart Program and the claimants; an expectation on the part of the program that the claimants would return and an expectation on the part of the claimants that their jobs would be available to them; that as long as that mutuality of expectation existed no meaningful effort to find work elsewhere was likely to occur.

There are notable differences in the circumstances in *Loftin* and in the present case: In *Loftin* the claimants were subject to recall during the summer for a workshop; the employer assumed that claimants remained a part of its staff; and the claimants expected to return to the Headstart Program in September. In the present case, there were no summer workshops; the employer, on July 9 when the Tribunal hearing was held, refused to say that any of the claimants would be employed when the new school term began; and there is no evidence that the claimants had more than a hope of employment for the new year.

In *Loftin* the court specifically found that it was clear that a mutual expectation of employment for the new school year was present. We believe the ruling in *Loftin* should be confined to the facts of that case, and we are unable to find "a tie of expectation" between employer and the claimants in this case.

The decision of the Board of Review is reversed, and the

case is remanded to the Board of Review to determine whether the claimants are otherwise eligible for unemployment benefits.

GLAZE, J., would award benefits.

MAYFIELD, C.J., and CORBIN, J., dissent.

Ronald L. DANIELS, Administrator *v.* COMMERCIAL UNION INSURANCE COMPANY et al

CA 81-350 633 S.W.2d 396

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

Eugene D. Bramblett of *Brown, Compton & Prewett, Ltd.*, for appellant.

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

DONALD L. CORBIN, Judge. Appellant, Ronald L. Daniels as administrator of the estate of Thomas Daniels, deceased, brought this wrongful death action against the appellees, Commercial Union Insurance Company and Jerri Gaskin. Commercial Union Insurance Company was the automobile liability carrier for the Union County Center for the Handicapped and/or its parent entity, the South Arkansas Regional Health Center (SARHC). Commercial Union Insurance Company was granted summary judgment and from that decision this appeal arises. We affirm.

Thomas Daniels, the deceased, was an employee of South Arkansas Regional Health Center. SARHC, a charitable organization, is an umbrella agency which operates the Union County Center for the Handicapped, the Union County Sheltered Workshop, the Retired Senior Citizens Volunteer Program, an alcohol and drug abuse program and two psychiatric treatment programs. At the time of his death, Thomas Daniels worked as a janitor for two of these agencies — the Sheltered Workshop and the Center for the Handicapped. Based on his productive capacity he was paid $1.60 per hour for his janitorial services.

At the time that Daniels was first employed in 1972, his mother brought him to the workshop and returned him home in the evening. Later, the State of Arkansas made funds available for the purpose of purchasing vans. After these vans were purchased, they were used to pick up the employees of the Sheltered Workshop and also students of the Union County Center for the Handicapped. Thomas Daniels was one of the employees regularly picked up by a van. On Jan. 14, 1980, Thomas Daniels was killed in a

head-on collision while riding as a passenger in one of the vans registered to Union County Center for the Handicapped. Jerri Gaskin was the driver of the van when the accident occurred.

Jack Wright, the administrator of SARHC, testified through deposition that Daniels was an employee of SARHC and that the vans were used to pick up students and employees. According to Wright the buses were not used to transport patients. The testimony reflects that Daniels had never been a student of the Union County Center for the Handicapped. Wright also testified that the transportation furnished to Mr. Daniels did not affect his status in any way but was just an additional benefit to him.

Appellee moved for summary judgment on the grounds that the complaint against Commercial Union Insurance Company should be dismissed because the appellant's remedy was exclusively within the Arkansas Workers' Compensation Act and because the insurance policy contained an exclusion for bodily injury to any employee of SARHC arising out of or in the course of his employment. This appeal is from an order granting summary judgment in favor of Commercial Union Insurance Company.

Appellant's sole point for reversal is that the trial court erred in granting appellee's motion for summary judgment on the basis of the exclusive remedy of the Workers' Compensation Act. Ark. Stat. Ann. § 81-1304 provides as follows:

> The rights and remedies herein granted to an employee subject to the provisions of this Act, on account of injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next kin, of anyone otherwise entitled to recover damages from such employer . . . on account of such injury or death . . . .

The Arkansas Supreme Court in *C & L Rural Electric Coop. Corp.* v. *Kincaid,* 221 Ark. 450, 256 S.W.2d 337 (1953), has interpreted Section 4 of the Arkansas Workers' Compensa-

tion Act to provide that an employer who is covered under the Arkansas Workers' Compensation Act cannot be sued in tort.

The issue before us is whether the injury and death of Thomas Daniels was an accidental injury arising out of and in the course of his employment. We believe that it was and the summary judgment was properly granted.

We agree with the appellant that a summary judgment is an extreme remedy which should be granted only when there is no genuine issue of material fact. *Ollar* v. *George's Place,* 269 Ark. 488, 601 S.W.2d 868 (1980). We recognize that the burden is upon appellee to show that no justiciable issue exists. *Ollar* v. *George's Place,* supra.

The general rule is that injuries sustained by employees when going to and returning from their regular places of work are not deemed to arise out of and in the course of their employment. *O'Meara* v. *Beasley,* 215 Ark. 665, 221 S.W.2d 882 (1949). An exception to the so-called "going and coming" rule exists where the transportation is furnished by the employer as an incident of the employment. *Hunter* v. *Summerville,* 205 Ark. 463, 169 S.W.2d 579 (1943); *Blankinship Logging Co.* v. *Brown,* 212 Ark. 871, 208 S.W.2d 778 (1948); *O'Meara* v. *Beasley, supra.* As was stated by the court in *Blankinship Logging Co.* v. *Brown, supra,* "[t]his exception to the rule may arise either as a result of custom or contract, express or implied. It may be implied from the nature and circumstances of the employment and the custom of the employer to furnish transportation." In *Owens* v. *Southeast Arkansas Transportation Co.,* 216 Ark. 950, 228 S.W.2d 646 (1950), citing *Micieli* v. *Erie Railroad Co.,* 131 N.J.L. 427, 37 A.2d 123 (1944), the court expressed the view that "an employee who is carried to and from his place of employment as a part of his contract of service, or as a privilege incidental thereto with no deductions from his regular wages for such transportation, is considered by the weight of authority to be a servant and not a passenger."

We believe that applying either of the two above enumerated rules to the case at hand, the SARHC was

furnishing transportation to the deceased as either a custom or as a privilege incidental to his employment.

There was no material variance in the testimony of any of the witnesses regarding the deceased's employment or the transportation furnished by the employer. When these facts are considered in light of the applicable law, there is no genuine issue of material fact or justiciable issue and summary judgment was properly granted because appellant's remedy is exclusively within the Workers' Compensation Act.

Affirmed.

MAYFIELD, C.J., COOPER and CLONINGER, JJ., dissent.

MELVIN MAYFIELD, Chief Judge, dissenting. My disagreement with the majority decision in this case begins with the opinion's statement that "the issue before us is whether the injury and death of Thomas Daniels was an accidental injury arising out of and in the course of his employment."

If that were the issue, and if the decision were ours to make, I might agree with the results reached by the majority. But I think the issue before us is whether the appellees have shown that there is no genuine issue as to any material fact as to whether the injury and death of Thomas Daniels arose out of and in the course of his employment.

To determine if that burden has been met requires more than the recognition that summary judgment is an "extreme remedy." The Supreme Court of Arkansas has said that the theory underlying the motion is the same as that underlying a motion for directed verdict and that the evidence must be viewed "in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party." *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S.W.2d 89 (1963). If the evidence is not in material dispute, but inconsistent hypotheses might be reasonably drawn and reasonable men might differ, summary judgment is not proper. *Braswell* v. *Gehl,* 263 Ark. 706,

567 S.W.2d 113 (1978); *Deltic Farm & Timber Co.* v. *Manning*, 239 Ark. 264, 389 S.W.2d 435 (1965). And if there is any doubt whatever as to the existence of issues of fact, summary judgment should be denied. *Trace X Chemical, Inc.* v. *Highland Resources, Inc.*, 265 Ark. 468, 579 S.W.2d 89 (1979).

On the other hand, when the question is before, or on appeal from, the Workers' Compensation Commission we have an entirely different point of view. For example, *Williams & Johnson* v. *Nat'l. Youth Corps.*, 269 Ark. 649, 600 S.W.2d 27 (Ark. App. 1980), involved two boys working in a federally funded work-study program supervised and administered by a local school district. They were injured while riding home in the school bus after work. The commission allowed their claims for compensation but the circuit court reversed. This court reversed the circuit court and said:

> It was the duty of the commission to draw every legitimate inference possible in favor of the claimants and to give them the benefit of the doubt in making factual determinations.... Further, the commission in considering a claim is required to follow a liberal approach .... (Citations omitted.)

Also, the court said, the decision of the commission must be affirmed if supported by substantial evidence and in making that determination the evidence must be viewed in the light most favorable to the findings of the commission.

Here, the mother of Thomas Daniels testified by deposition that shortly before his death, Thomas started working at the Handicapped Center and would ride the van from his home to the center in the mornings but he did not ride the van home in the afternoon because he did not get off work until after the van left. It was her testimony that she made arrangements for her mentally and physically handicapped son to ride the van and she did not understand this was part of his work.

The majority cites the cases of *Blankinship Logging*

Co. v. *Brown,* 212 Ark. 871, 208 S.W.2d 778 (1948) and *Owens* v. *Southeast Arkansas Transportation Co.,* 216 Ark. 950, 228 S.W.2d 646 (1950) in support of their holding in the instant case that the motion for summary judgment was properly granted. *Blankinship* simply held that the finding of the commission was supported by substantial evidence and *Owens* held that the commission's finding was not supported by substantial evidence because it was undisputed that free transportation was part of the employment contract.

We are not, however, reviewing the findings of a Workers' Compensation Commission and we should not apply a rule that draws every legitimate inference in favor of coverage and affirms the commission if there is any substantial evidence to support its findings. We are reviewing the granting of a motion for summary judgment and we should apply the rule that says we must resolve all doubts and inferences against the moving party and if there is any doubt as to the existence of issues of fact, the motion should be denied. In my opinion, the application of that rule means the motion in this case should have been denied.

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

Luvada VAUGHN *v.* William F. EVERETT,
Director of Labor

E 81-363 633 S.W.2d 401

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

Hunt Law Office, by: *Zenola M. Hilliard,* for appellant.

Bruce Bokony, for appellee.

TOM GLAZE, Judge. The question on this Employment Security benefits appeal is whether the Board of Review was correct in its findings that appellant should be required to reimburse the Employment Security Agency for an overpayment made to her.

The appellant applied for benefits and was found to be disqualified by the Agency. Upon appeal to the Appeal

Tribunal, the appellant was granted benefits of $70 per week. The employer appealed this determination and the Board of Review reversed the decision of the Appeal Tribunal. The Court of Appeals affirmed the decision of the Board of Review.

The Board of Review found that the appellant was paid a total of $840 in benefits. A hearing was held to determine whether the appellant was paid benefits to which she was not entitled and whether it would be against equity and good conscience to require her to repay that amount.

The facts, as developed at the hearing below, are that the appellant worked for Watson Chapel School District as a school teacher before her termination. She was married and her husband had an annual income of $14,000 per year. The appellant and her husband owned their own home and she owned a car.

There was no finding that the overpayments made to the appellant were due to fraud, misrepresentation, willful nondisclosure or other fault on the part of the appellant. However, fault, if it be that, of the Employment Security Division, in making the overpayment does not necessarily prevent recovery. A recovery of overpayment may be required so long as it does not violate the standard of "equity and good conscience." This standard requires the trier of fact to draw upon precepts of justice and fairness as opposed to the application of rigid or specific rules. In applying the "equity and good conscience" standard, the factfinder may consider such matters as whether claimant received notice that he would be liable to repay any overpayments, whether the claimant received only normal unemployment benefits or some extra duplicated benefit, whether the claimant changed his position in reliance upon receipt of the benefit, the cause of the overpayment, and whether recovery of the overpayment would impose extraordinary hardship on the claimant. From the evidence before us, and the standard to be applied in repayment cases, we are unable to say that there was no substantial evidence to support the Board's decision to require appellant to repay benefits. Here, appellant was initially denied benefits by the Agency and had some reason

to know that her claim was in dispute during the period it was on review. Moreover, the facts fail to show she changed her position in reliance upon receiving the benefits nor does the evidence indicate that the recovery of the overpayment will serve to impose an extraordinary hardship on appellant. As we previously stated, appellant and her husband own their home and car and continued to receive a family income of $14,000 per year even after appellant became unemployed. For these reasons, we affirm the Board's decision.

Affirmed.

Paul RUIZ *v.* STATE of Arkansas

CA CR 82-2 633 S.W.2d 399

Court of Appeals of Arkansas
Opinion delivered May 26, 1982

Lessenberry & Carpenter, by: *Thomas M. Carpenter,* for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. This is a criminal case in which appellant's sole issue on appeal is that the trial court erred in failing to grant a directed verdict on the offense of escape in the first degree. A jury found him guilty of two crimes, *viz.,* (1) escape in the first degree, and (2) kidnapping.

The record reflects that the charges against appellant arose out of a prisoners' takeover of the maximum security building at the Cummins Unit of the Arkansas Department of Correction on January 1, 1979. Appellant's contentions are two-fold: (1) There is no evidence that appellant permitted other prisoners to escape; and (2) There is no evidence to support the proposition that he escaped from the correctional facility. Aside from appellant's second contention, we believe the evidence was sufficient for the jury to find he aided other prisoners to escape.

Escape in the first degree is defined in Ark. Stat. Ann. § 41-2810 (1) (a) and (b) (Repl. 1977) as follows:

> First degree escape. — (1) A person commits the offense of first degree escape if:
>
> (a) aided by another person actually present, he uses or threatens to use physical force in escaping from custody or a correctional facility; or
>
> (b) he uses or threatens to use a deadly weapon in escaping from custody or from a correctional facility.

In addition to the State's charge that appellant violated § 41-2810 as a principal, the trial court also instructed the jury to consider whether appellant was an accomplice to an escape. Under our Criminal Code, there is no distinction between principals and accomplices insofar as criminal liability is concerned. *Parker* v. *State,* 265 Ark. 315, 325, 578 S.W.2d 206 (1979), and *Ruiz* v. *State,* 265 Ark. 875, 582 S.W.2d 915 (1979). Concerning the issue on whether appellant was an accomplice, the proof at trial showed that ten prisoners escaped the correctional facility during the occurrence of the events that led to the criminal charges filed

against appellant. To convict appellant as an accomplice to first degree escape, the State was required to prove he aided, agreed to aid or attempted to aid another person to escape as that crime is defined under § 41-2810, *supra.* When we view the evidence in the light most favorable to the State, as we must do, we have no doubt that there was substantial evidence to support the jury's verdict. See *Chaviers* v. *State,* 267 Ark. 6, 588 S.W.2d 434 (1979), and *Harris* v. *State,* 262 Ark. 680, 561 S.W.2d 69 (1978). A review of the evidence, we believe, especially supports the view that appellant acted as an accomplice to the escape by other inmates.

The uncontradicted evidence shows that a prison inmate named Johnny Wiggins precipitated the events which transpired at Cummins on January 1, 1979. Wiggins gained entrance, by force, into the correctional facility control room in the maximum security building, and subsequently, other inmates, including appellant, were released from their cells. The inmates then caused all of the correction officers in the building, six in number, to be locked in one cell. At a later time, appellant came to this cell to retrieve one of the correctional officers and proceeded to take the officer with him to the control room. While in the control room, appellant threatened the officer with a homemade knife and told him to call the officers outside the facility and to ask them to "back off." The officer, who was held as a hostage by appellant, testified that appellant intended to kill him if the officers outside attempted to come in. The proof is clear that appellant had control of an officer and the controls for the entire maximum security building.

At this point in time, the warden of the Cummins Unit appeared on the scene and learned of the hostage situation. He and eleven other officers armed themselves with shotguns, rifles and pistols and proceeded to secure and retake control of the building.

Sometime during these described events, ten prisoners escaped the Cummins facility. Although there was no direct proof that appellant released these ten inmates from their cells, the record is replete with evidence that shows appellant held control of the entire maximum security building at the

time the prisoners were in flight. Because appellant had commandeered the control room of the building, he caused six correction officers to be held hostage while twelve more officers were held at bay outside the building. In sum, appellant was responsible for fully occupying the time of eighteen officers while ten prisoners were fleeing the Cummins Correctional Facility. It is difficult to conceive of another more realistic set of facts than that posed here where one person could have done more to aid others in an escape. Based on these facts, we hold that the jury's verdict is supported by substantial evidence and should be affirmed.

Since the evidence clearly supports appellant's conviction as an accomplice to first degree escape and his criminal liability is the same as if he were a principal, it is unnecessary to discuss the ancillary issue concerning whether appellant escaped. Therefore, we affirm for the reasons stated above.

Affirmed.

Jimmy Lee WESSON *v.* STATE of Arkansas

CA CR 82-7 633 S.W.2d 713

Court of Appeals of Arkansas
Opinion delivered June 2, 1982

William R. Simpson, Jr., Public Defender, and *Howard Koopman,* Deputy Public Defender, by: *Carolyn P. Baker,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. The jury found appellant guilty of burglary. In the penalty phase of his bifurcated trial, evidence was introduced to show that he had previously been convicted of sexual abuse, false imprisonment and theft by receiving and the jury was told a finding of at least two previous felony convictions would authorize a sentence under the provisions of the habitual offender statute, Ark. Stat. Ann. § 41-1001 (Repl. 1977). Apparently, this statute was used because it was the one in effect at the time of the commission of the burglary. See *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981) and *Sims* v. *State,* 262 Ark. 288, 556 S.W.2d 141 (1977).

At any event, the only issue raised on appeal is the contention that these prior convictions arose from one continuing course of conduct, in essence one criminal episode, and as they were not separate occurrences, the trial

court should have considered them as only one conviction for the purpose of applying the habitual offender statute.

The only evidence in the record in this regard is the information in which all three crimes are alleged to have occurred on the same day with the same woman alleged to have been the victim of what the jury found to be sexual abuse and false imprisonment. Assuming, however, that the evidence was sufficient to raise the point, we do not agree with appellant on its merits.

Appellant argues that the Arkansas legislature intended to encourage the treatment of one continuous course of conduct as a single offense and suggests this intent is reflected in Ark. Stat. Ann. § 41-1001 (3) which provides that "a conviction or finding of guilt of burglary and of the felony that was the object of the burglary shall be considered a single felony conviction or finding of guilt." In the first place, this is the only instance in the habitual offender act where the legislature specifically provided for two convictions to be treated as one. Had it intended for other convictions to be so counted it could have so provided. And in the second place, contrary to appellant's suggestion, the purpose of the provision seems clearly limited as the commentary to the section explains:

> Although prior to the Code's enactment most circuit judges treated convictions for burglary and grand larceny as a single prior conviction for purposes of habitual offender sentencing, a few apparently considered such a disposition to constitute two convictions. To achieve some parity of treatment in calculating the number of prior convictions, subsection (3) consolidates a burglary and the offense that was its object into a single felony conviction for habitual offender purposes.

Neither do we accept appellant's argument that the three prior convictions constituted one continuous course of conduct. As noted in *Britt* v. *State,* 261 Ark. 488, 549 S.W.2d 84 (1977), examples of this type of offense would be nonsupport, promoting prostitution, erecting or maintain-

ing a gate across a public highway, and obtaining a license from a state medical board by false or fraudulent representations. Other examples taken from *Corpus Juris Secundum* and set out in *Britt* are: "carrying concealed weapon; continuous keeping of a gaming or a disorderly house; desertion and neglect to provide for family; embezzlement; engaging in business without license; maintaining nuisance; offenses relating to intoxicating liquors; and a conviction for violating a Sunday law."

Appellant's prior convictions do not meet the continuous-course-of-conduct criteria set out in *Britt*. Also, in *Conley* v. *State,* 270 Ark. 886, 607 S.W.2d 328 (1980), the court said "the criminal code does not excuse a defendant for multiple crimes committed during an escapade."

We affirm.

ALLSTATE INSURANCE COMPANY *v.*
Jerry D. MARTENS

CA 81-388 633 S.W.2d 715

Court of Appeals of Arkansas
Opinion delivered June 2, 1982

Jones & Segers, for appellant.

Herdlinger, Jacoway & Stanley, P.A., for appellee.

JAMES R. COOPER, Judge. In August of 1980, tools belonging to the appellee were stolen from a locked metal storage building located on Bridgewater Lane in Fayetteville, Arkansas. The appellee was constructing a new residence for himself on this lot. The storage building was a construction office, temporarily placed on the building site. The appellant had issued a homeowner's insurance policy to appellee, which covered appellee's home and its contents, located on Greenbriar Street, Springdale, Arkansas. The appellee made demand on the appellant for payment under the policy. The appellant denied liability, and this lawsuit resulted. The trial court found in favor of the appellee, and entered a judgment for damages, statutory penalty and attorney's fees. The appellant appeals from the trial court's decision.

The homeowner's policy on the Greenbriar Street home[1] is written in "plain language" and provides, in part, as follows:

> Part 2 — Coverage C
> Personal Property Protection
> We Will Cover:
> 1 Personal property owned or used by an *insured person* anywhere in the world. . . .
>
> * * *
>
> We do not cover:
> b) theft in or from a dwelling under construction, or of materials and supplies for use in construction, until the dwelling is completed and occupied. . .

We must construe the words used by the parties as they are taken and understood in their plain and ordinary meaning. *Farm Bureau Mutual Ins. Co.* v. *Milburn,* 269 Ark. 384, 601 S.W.2d 841 (1980). This is especially appropriate where the insurance policy itself is written in "plain language".

The appellant argues that the insurance policy did not cover the appellee's loss. The appellant contends that the loss was excluded because it was a "theft in or from a dwelling under construction" or that the tools were "materials and supplies for use in construction".

It is clear that the loss suffered by the appellee is a covered one, unless it is excluded by one of the exceptions. Exclusions are strictly construed against the insurer and in favor of the insured, the reason being that the insurer wrote the policy without any consultation with the insured. *Southern Title Ins. Co.* v. *Oller,* 268 Ark. 300, 595 S.W.2d 681 (1980); *Security Ins. Co. of Hartford* v. *Owen,* 252 Ark. 720, 480 S.W.2d 558 (1972), appeal after remand 255 Ark. 526, 501 S.W.2d 229 (1973).

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[1]The record does not indicate that any policy was issued on the Bridgewater Lane house, which would provide coverage for this loss.

The tools were not located in the dwelling, and therefore they could not have been taken "in or from" the dwelling. Had the appellant desired, it could have defined "in or from a dwelling" so as to include the entire premises on which the dwelling is located, including outbuildings. It did not do so, and we hold that the loss is covered by the terms of the policy.

We also find no merit to the argument that the tools were "materials and supplies for use in construction." "Materials" are the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made. Webster's Third New International Dictionary, 1976. Materials enter into and become a part of the structure. Black's Law Dictionary (4th ed. 1968). "Supplies" are things other than labor, which are consumed in, but do not become a physical part of, the structure. Black's Law Dictionary (4th ed. 1968). Tools do not meet either of these definitions. They are not consumed in, nor do they become a physical part of a structure.

The appellant also argues that Part 1, Coverage A, Dwelling Protection excludes coverage in this case, since it excludes "Theft of any property at a dwelling while it is under construction until it is completed and occupied". The appellant did not argue this to the trial court, and cannot raise it on appeal. Further, even if the appellant had raised this issue before the trial court, this provision is inapplicable, since the exclusion applies only to losses which have occurred at the policyowner's "residence premises".

Affirmed.

CORBIN, J., dissents.

Willie WORTHAM *v.* STATE of Arkansas

CA CR 82-18 634 S.W.2d 141

Court of Appeals of Arkansas
Opinion delivered June 2, 1982
[Rehearing denied June 30, 1982.]

Webb & Imboden, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant, Willie Wortham, was found guilty of the offense of burglary in violation of Ark. Stat. Ann. § 41-2002 (Repl. 1977). Appellant was sentenced to three years in the Department of Correction. He was credited for eight months jail time spent awaiting trial.

Summarizing the evidence in the light most favorable to the appellee, the facts below establish that the offense with which appellant was charged occurred on November 29, 1980, at the home of Paula Lambert, age 13 years. About 4:00 or 5:00 P.M., Paula and her friend, Angie, also 13 years, were painting in Paula's bedroom. The girls testified that they had the radio in the living room playing loudly. Angie went into the kitchen and walked back to the living room. When she entered the living room, she saw a black man she identified as the appellant standing in the doorway of the house. He was wearing a long leather coat and was standing inside the house in the doorway. She screamed and the appellant ran away.

Paula did not see the appellant but did hear her friend scream. The two girls first called a neighbor, and then Paula's mother. The parents of the girls reported the incident to the police, and on December 12, 1980, appellant was charged with burglary.

There was evidence presented at trial which tended to prove that the girls knew the appellant before the incident

and that Angie was therefore able to recognize him on November 29, 1980.

At the close of the State's case (as outlined above), appellant moved for a directed verdict, which was denied. The case proceeded to the jury which convicted the appellant of burglary.

A person commits burglary when he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein an offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (1) (Repl. 1977). While this Court recognizes that criminal intent or purpose is a fact which cannot be positively known to others, we do not believe that a jury may find the intent required by this statute merely on the fact that appellant was found inside a house where he did not belong and ran when a young girl screamed. The facts presented fail to offer any direct proof that appellant was in the house for the purpose of committing a crime. Of course, if he had such a purpose in mind, it could have also been shown by circumstantial evidence, if any existed. However, such circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion. *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981). When circumstantial evidence alone is relied upon, it must exclude every other reasonable hypothesis but the guilt of the accused. *Ayers* v. *State,* 247 Ark. 174, 444 S.W.2d 695 (1969).

There are any number of situations that come to mind that would be inconsistent with a finding of guilt. Both girls testified that one year before this incident, appellant had talked to them in the park and had asked the girls to be his girlfriends. While it may be conceivable that appellant intended to commit some crime when he entered the open door of the Lambert home, it is equally reasonable to believe that he wanted to ask the girls to be his girlfriends once again. This episode took place during the day and there is no evidence showing appellant was in any way armed or that he made any improper approach towards either girl. Nor is there evidence to indicate appellant touched anything in the household or that anything was missing.

From the evidence presented, it is not unreasonable to assume that appellant came to the house with no criminal purpose in mind and that he entered the open side door of the house when he could not get anyone to hear his knock above the noise of the music. When the young girl saw appellant and screamed, he could have panicked and then fled.

When circumstantial evidence leaves the jury solely to speculation and conjecture, it is insufficient as a matter of law and the test is whether there was substantial evidence to support the verdict when viewing the evidence in the light most favorable to the state. *Ayers* v. *State, supra.*

In *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980), the Court quoted with approval from *Pickens-Bond Construction Company* v. *Case,* 266 Ark. 323, 584 S.W.2d 21 (1979), as follows:

> Substantial evidence has been defined as 'evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture.' Ford on Evidence, Vol. 4, § 549, page 2760. Substantial evidence has also been defined as 'evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent theories.' Wigmore on Evidence, Vol. IX, 3rd ed. § 2494, footnote at page 300. See also *Tigue* v. *Caddo Minerals Co.,* 253 Ark. 1140, 491 S.W.2d 574; *Goaz* v. *Central Ark. Dev. Council,* 254 Ark. 694, 496 S.W.2d 388.

In the instant case, the appellant was merely seen inside the open door of the Lambert residence. The State made no attempt to show the purpose which the appellant might have for being there. The State did not offer proof, for instance, that appellant may have intended to commit arson or rape or maybe theft of property. The record is silent as to

any crime which the State claimed appellant intended to commit. The State is required to prove beyond a reasonable doubt every element of the crime charged. See *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975); *Patterson* v. *New York,* 432 U.S. 197 (1977). It was not the burden of the appellant to prove he did not intend to commit an offense punishable by imprisonment. The State simply failed to meet the burden of proof to show appellant committed burglary.

A case substantially similar to the one at bar is *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980). In that case, the Court said:

> At most, the evidence revealed that appellant was standing inside the doorway of an office building which he had illegally entered and from which nothing was taken, speaking to his friends passing by. Although criminal intent is by nature subjective and usually provable only by circumstantial evidence, it remains an independent and indispensible element of the crime of burglary and cannot be presumed from another fact, the establishment of which is also essential to a conviction of burglary.

In the instant case, the State contends that since appellant ran when this young girl screamed, his flight was evidence of his felonious intent. *Grays* v. *State,* 264 Ark. 564, 572 S.W.2d 847 (1978). However, unlike in *Grays,* here there is no evidence that appellant was eluding arrest. Flight from a scene of a crime has long been regarded as a circumstance *corroborative of "other proof" of guilt. Cassell* v. *State, supra.* The "other proof" in the case at bar is dismally missing and can only be supplied by pure guesswork.

The jury's finding that appellant intended to commit an offense punishable by imprisonment could only have been based upon speculation and conjecture, and for this reason, we reverse. However, we reverse and remand with instructions to reduce the charge since we find the proof was sufficient to establish the lesser offense of criminal trespass. Ark. Stat. Ann. § 41-2004 (Repl. 1977).

Reversed and remanded.

CRACRAFT and CORBIN, JJ., dissent.

GEORGE K. CRACRAFT, Judge, dissenting. I am in full accord with the opinion of the majority that specific criminal intent, which is an essential element of the crime of burglary, cannot be presumed from a mere showing of an unexplained illegal entry of an occupiable structure. The burden is on the State to prove every element of the offense charged and cannot, without violating constitutional requirements of due process, shift to the accused the burden of explaining his illegal entry. Our Supreme Court expressly so held in *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980). My point of departure is at the majority's conclusion that in reaching its verdict the jury was required to rely on speculation, surmise or prohibited presumption. It is my opinion that there was evidence from which the jury could properly infer the requisite intent and that it was not error for the trial court to submit that issue to it.

Criminal intent or purpose, a fact which cannot in the nature of things be positively known to others, is difficult if not impossible to prove by direct evidence. It is, however, an inference of fact that a jury may draw from other facts and circumstances which are shown by direct evidence. *Barksdale* v. *State,* 262 Ark. 271, 555 S.W.2d 948 (1977). This principle was reaffirmed in the recent opinion of *Johnson & Carroll* v. *State,* 276 Ark. 56, 632 S.W.2d 416 (1982), in which our Supreme Court stated that, in determining whether criminal intent existed, the jury is allowed to draw on their common knowledge and experience in reaching a verdict from other facts directly proved.

In *France* v. *State,* 68 Ark. 529, 60 S.W. 236 (1900) the court stated that flight to avoid arrest may be evidence of guilt and, while standing alone might not be strong enough to sustain a conviction, may be one of a series of facts and circumstances from which guilt may be inferred. The weight to be given it is a matter for the jury to determine. Here there was evidence not only of an illegal entry by the appellant but it was shown that the house was fully furnished and

contained items of value, including a radio playing at the time on high volume which made the appellant's movements in the house difficult to detect. There was also evidence that appellant was aware that a young female resided there. When his presence within the dwelling was discovered by a lawful occupant he fled. I am of the opinion that when all of the facts and circumstances are considered along with his flight from the scene there was sufficient evidence upon which the issue of his intent might be submitted to the jury.

In *Norton* v. *State, supra,* the Supreme Court made the same distinction I would make here. There the court said:

> We are not unmindful that our decision in *Grays* v. *State,* 264 Ark. 564, 572 S.W.2d 847 (1978), may suggest that the specific intent requirement of burglary may be presumed from the unexplained illegal entry of an occupiable structure. In *Grays,* however, the defendant fled, eluding the police officers, when his presence was discovered in the occupiable structure. We have consistently suggested that the flight of an accused to avoid arrest is evidence of his felonious intent. See, e.g., *France* v. *State,* 68 Ark. 529, 60 S.W. 236 (1900), *Smith* v. *State,* 218 Ark. 725, 238 S.W.2d 649 (1951), *Russell & Davis* v. *State,* 262 Ark. 447, 559 S.W.2d 7 (1977). Notwithstanding our holding in *Grays,* however, we find no evidence here other than appellant's illegal entry to sustain a conclusion that appellant's entry was for the purpose of committing an imprisonable offense.

While this is a case in which the jury might have found that his illegal entry was without criminal intent, I am unwilling to hold that this was not a question for the jury to determine or that it could not do so without resort to speculation, surmise or constitutionally prohibited presumptions flowing merely from proof of the illegal entry.

I am authorized to state that Judge CORBIN shares these views. We respectfully dissent.

Timothy W. LUCAS *v.* STATE of Arkansas

CA CR 81-111 634 S.W.2d 145

Court of Appeals of Arkansas
Opinion delivered June 9, 1982

Herdlinger, Jacoway & Stanley, P.A., by: *Thurston A. Thompson,* for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant was charged and convicted under Ark. Stat. Ann. § 41-2804 (Repl. 1977) which makes it a violation to knowingly employ, or threaten to employ, physical force against a law enforcement officer engaged in performing his official duties. The sentence was a year in county jail and a $1000.00 fine.

It is contended on appeal that the trial court erred in refusing to instruct the jury on justification for the use of physical force in defense of another person. We agree that the instruction should have been given.

The evidence reveals that law enforcement authorities learned that during a Labor Day Picnic or "hoedown" to be held September 1, 1979, on private property in rural Benton County, the organizers were planning to sell alcoholic beverage in violation of the law. The party was raided, a quantity of beer was confiscated, the musicians were ordered to quit playing, and several of the promoters and invitees were arrested.

As could be predicted, some of the several hundred young people who had gathered to participate in the activities became upset. Fights broke out and one officer of the sheriff's department, Dean Pennington, observed a young man by the name of Robert Bellamy on the back of another officer. Pennington went to the assistance of the other officer and there was testimony that Bellamy resisted arrest and that Pennington struck him with his flashlight two times, knocking him to the ground with the second

blow. The appellant said he saw what happened to Bellamy and that Bellamy did not strike or offer to strike the officer; that he didn't know whether Bellamy was going to get up or not so he went over to the officer, pointed out the gash in Bellamy's head, and asked for the officer's name and badge number; and another witness said Bellamy was crying and saying the handcuffs were too tight and that appellant asked the officer to loosen them. But there was other testimony that the appellant was pushing Officer Pennington and trying to free Bellamy and yelling at the officer to let Bellamy go, and that Officer Ron Cruse came to Pennington's assistance and they placed appellant under arrest.

The appellant requested Arkansas Model Criminal Instruction 4104 as follows:

> Tim Lucas asserts as a defense to the charge of interference with a law enforcement officer that he was defending Robert Bellamy. This is a defense only if:
>
> First: Tim Lucas reasonably believed that Dean Pennington or Ron Cruse was using or about to use unlawful physical force upon Robert Bellamy; and
>
> Second: Tim Lucas only used such force as he reasonably believed to be necessary.
>
> Tim Lucas would not have been justified in using physical force upon another if
>
> (a) with the purpose to cause physical injury or death to Pennington or Cruse defendant provoked the use of unlawful physical force or
>
> (b) he was the initial aggressor.
>
> However, if you find that Tim Lucas withdrew from the encounter and effectively communicated to the other person his intention to withdraw, then the defendant was no longer the initial aggressor when the other person continued or threatened to continue the use of unlawful physical force.

> Tim Lucas, in asserting this defense, is required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to his guilt of interference with a law enforcement officer, then you must find him not guilty.

The instruction was refused by the court and the defendant properly made his objection to the court's action in that regard. It is his argument here that the instruction should have been given because there was evidence from which the jury could have found that he reasonably believed the officers were using excessive force in their arrest of his friend Bellamy.

In *Barnes* v. *State,* 4 Ark. App. 84, 627 S.W.2d 552 (1982), we held that Ark. Stat. Ann. § 41-512 (Repl. 1977) which prohibits the use of force to resist arrest by a law enforcement officer does not deprive one of the defense of justification if the officer uses excessive force in making the arrest. We agree with the appellant's statement that "the distinction is between the illegality of the use of force to resist arrest and the legality of defending oneself or another from excessive force used to carry out the arrest."

The State argues that the evidence does not support the giving of appellant's requested instructon and says "since the appellant testified under oath that he did not touch the officer, he certainly is not entitled to an instruction that his touching may have been justified under the law." But in *Cooper* v. *State,* 86 Ark. 30, 109 S.W. 1023 (1908), the court said:

> The jury is not bound to accept all of a witness' testimony, or all of the theory of the State or of the defendant, but may find the truth to lie partly on one side and partly upon the other. When such is the case, it is right and proper for the court to submit an instruction covering the phase of the evidence which may be fairly deduced, partly from one side and partly from the other.

There was testimony from which the jury might have found that appellant reasonably believed the law enforcement officers were using, or about to use, excessive physical force upon Bellamy. Under Ark. Stat. Ann. § 41-506 (Repl. 1977), use of the degree of force reasonably believed necessary to defend another person would be justified under those conditions.

In *Hill* v. *State*, 253 Ark. 512, 520, 487 S.W.2d 624 (1972), the court said that "instructions must fully and fairly declare the law applicable to any defense as to which the defendant has offered sufficient evidence to raise a question of fact." We think AMCI 4104, requested by appellant, should have been given. We do not suggest, however, that it would not have been proper to modify that instruction to explain more fully the distinction between the illegality of resisting arrest or interfering with an officer who is making an arrest and the legality of defending against excessive force used to carry out the arrest.

Reversed and remanded.

COOPER and CLONINGER, JJ., dissent.

ARKANSAS STATE HIGHWAY COMMISSION
v. Woodrow W. THOMPSON

CA 81-386 634 S.W.2d 147

Court of Appeals of Arkansas
Opinion delivered June 9, 1982

Thomas B. Keys and *Philip N. Gowen,* for appellant.

Roy Whitehead, Jr., for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, the Arkansas State Highway Commission, appeals from a jury verdict awarding appellee compensation in the amount of $13,830 for lands taken for highway purposes. The sole issue raised by this appeal is whether the trial court erred in refusing to exclude two comparable sales used by an expert witness called by the appellee.

Harold Lewis, a qualified real estate appraiser, in giving his evidence as to the value of appellee's land before the taking, stated that he had used the market value approach and considered its highest and best use to be a single-family residence and hobby farm. He defined the market value approach as the comparing of a parcel that is "as near like what you are appraising as you can find."

The lands belonging to the appellee were on a well traveled, gravel road known as Philpot Road. The appraiser

used as his comparables one transaction involving lands with frontage on U.S. Highway 64 and another tract located a short distance from another paved highway. Both tracts were located about two miles from the appellee's property. He did not use land sales nearer the appellee's land because he found the lands to be dissimilar. The expert testified that he had used these two comparable sales because they were single-family residence and hobby farm properties and he found them to be more similar to that of the appellee. One of them was located on the same creek that ran through appellee's land. The other was very similar and, although located on a major highway, could be used as a comparable with a proper adjustment for that fact. He indicated that he had adjusted that value down by a considerable amount to account for this.

After the testimony of this witness was complete the appellant moved to strike those comparables for the following reasons:

> With reference to Mr. Lewis' opinion on the before value of the property I feel that the plaintiff used sales which are not subject to be adjusted to make them comparable to the subject property. He used two sales in a different area of the county, one sale fronting on a major highway and the other a short distance from a major highway; and he attempted to adjust these sales to make them comparable to the subject property. I am asking that the court rule these sales are not comparable as *a matter of law* because I believe they are misleading to the jury. (Emphasis supplied)
>
> THE COURT: The Court will overrule your motion at this time. I think he has explained them well enough and I think that what you're saying may go to the credibility but this would be the basis for it. And save Mr. Gowen's exception to the court's ruling.

The expert witness in this case testified that he had used these two sales as comparables because the tracts were similar and that he had rejected other sales nearer the subject property because he found them to be dissimilar. It is well

settled that an expert witness must be given reasonable latitude in evaluating the sales which he considers to be supportive of his opinion and there is no definite or fixed definition of similarity or comparability. *Ark. State Hwy. Comm.* v. *Clark,* 247 Ark. 165, 444 S.W.2d 702 (1969); *Ark. State Hwy. Comm.* v. *Witkowski,* 236 Ark. 66, 364 S.W.2d 309 (1963). It is also settled that a determination of whether the conditions surrounding another tract of land or its sale are sufficiently similar to the circumstances of the pending case rests within the sound discretion of the trial court. *Ark. State Hwy. Comm.* v. *N.W.A. Realty,* 262 Ark. 440, 557 S.W.2d 620 (1977). Where the testimony indicates that two tracts of land are similar, the fact that the comparable sale is located some distance from that being condemned or is larger or smaller in size does not affect the admissibility of the evidence. Since it cannot be said as a matter of law that the lands are in different localities and the question of similarity or dissimilarity is a question for the trial judge to determine, the discretion of the trial judge in such matters should not be interfered with unless it is found to have been abused. *Ark. State Hwy. Comm.* v. *N.W.A. Realty, supra; Ark. State Hwy. Comm.* v. *Roetzel,* 271 Ark. 278, 608 S.W.2d 38 (Ark. App. 1980); *Ark. State Hwy. Comm.* v. *Oakdale Development Corp.,* 1 Ark. App. 286, 614 S.W.2d 693 (1981). We find no such abuse here.

In his testimony Mr. Lewis explained that he had made adjustments in the price of his comparables to take into account the fact that the properties were located on or near a major highway where the property in question was not. In *Ark. State Hwy. Comm.* v. *N.W.A. Realty, supra,* the court stated: "Many times it will be necessary, as it was here, for an opinion witness to make adjustments or to explain the difference between similar tracts."

We find no error in the trial court's refusal to strike the testimony.

Affirmed.

Alice L. BACK and Rose H. LASKER, Individually and as Trustee *v.* UNION LIFE INSURANCE COMPANY

CA 81-375 634 S.W.2d 150

Court of Appeals of Arkansas
Opinion delivered June 9, 1982

C. Richard Crockett of *Eichenbaum, Scott, Miller, Crockett, Darr & Hawk, P.A.*, for appellants.

Davidson, Plastiras, Horne, Hollingsworth & Arnold, P.A., for appellee.

JAMES R. COOPER, Judge. Appellants agreed to sell certain real property to Mr. Arch Pettit for the sum of $161,000.00, with $45,000.00 as a down payment and a remaining balance of $116,000.00 secured by a note and mortgage. A deed of trust was also executed, contemporaneously with the execution of the mortgage, in favor of the appellee in the original principal sum of $200,000.00. Appellants agreed to subordinate their mortgage to the

appellee's deed of trust. Mr. Pettit defaulted on his payments to appellee, and appellee filed a suit seeking foreclosure. Appellants argued at trial that appellee was under a duty to supervise the disbursement of the loan proceeds to Mr. Pettit and that Mr. Pettit had wrongfully induced appellants to subordinate their mortgage. Appellants alleged that their mortgage should be found to be superior to the appellee's deed of trust. The trial court found that the appellee did not owe any duty to appellants concerning the disbursements of loan proceeds; that appellee had no notice of any misrepresentations, if any had occurred; that appellee's deed of trust was superior to the appellants' mortgage; and that appellants had waived their vendor's lien. From that decision comes this appeal.

A vendor of land has an equitable lien on the land for the unpaid purchase price, as against the purchaser and subsequent purchasers with notice. *Hogue* v. *Hogue,* 247 Ark. 914, 448 S.W.2d 627 (1969), after remand, 250 Ark. 102, 464 S.W.2d 67 (1971); *Wilson* v. *Shocklee,* 94 Ark. 301, 126 S.W. 832 (1910). The vendor, by taking a mortgage on the lands sold in order to secure the payment of the purchase price, waives his equitable lien and must rely on the mortgage. *Neal* v. *Speigle,* 33 Ark. 63 (1878); *Jack Collier East Company* v. *E. C. Barton & Company,* 228 Ark. 300, 307 S.W.2d 863 (1957). A mortgagee, who accepts a mortgage which recites a prior mortgage, is estopped to deny the superiority of the prior mortgage. *Mark* v. *Maberry,* 222 Ark. 357, 260 S.W.2d 455 (1953).

In chancery cases, the decision of the chancellor will be reversed only when the appellate court finds his decision to be clearly erroneous or against a preponderance of the evidence, after giving due regard to his opportunity to determine the credibility of the witness. Ark. Rules of Civ. Proc., Rule 52 (a); *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981).

Appellants testified that Mr. Pettit induced them to agree to subordinate their mortgage to the appellee's deed of trust, by telling them that he planned to use the proceeds from the appellee's loan to substantially improve the

property purchased from appellants. It is essentially uncontradicted that Mr. Pettit did discuss with the appellants his plans for the property, but it is disputed whether that representation induced appellants to agree to subordinate their mortgage. In any case, there is no evidence to show that appellee had knowledge of any representation made by Mr. Pettit to appellants. Appellants had the opportunity, prior to agreeing to subordinate their mortgage, to require that the funds be disbursed as a construction loan, *i.e.,* funds would be disbursed as construction progressed on the subject property. They did not choose to do so. Even if Mr. Pettit misrepresented the facts to appellants, which we do not find, appellants have waived, as to appellee, any right to complain regarding the use to which Mr. Pettit put the proceeds of the appellee's loan. The chancellor's decision holding that appellee's deed of trust was superior to the appellants' mortgage is not clearly erroneous or against a preponderance of the evidence.

Affirmed.

Dick SHERER, d/b/a S & J MOTORS *v.*
Raymond DeSALVO, Jr.

CA 81-389 634 S.W.2d 149

Court of Appeals of Arkansas
Opinion delivered June 9, 1982

Blevins, Pierce & Stanley, by: *Robert E. Marston,* for appellant.

Jim O'Hara, for appellee.

LAWSON CLONINGER, Judge. Appellee Raymond DeSalvo, Jr. filed a complaint against appellant Dick Sherer, d/b/a S & J Motors, alleging that appellant had sold a car to appellee, and that during the course of negotiations had misrepresented the mileage reading on the automobile's odometer. Appellee asked for compensatory and punitive damages, and made claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301-2312 (Supp. 1975-1980), for an attorney's fee of $2,435.00 and expenses of litigation in the sum of $527.14.

Upon trial, the jury awarded appellee $300 for the conversion of personal property in the automobile when it was repossessed by appellant; awarded no punitive damages; found in favor of appellee on the question of breach of implied warranty but awarded no damages; found that appellee's promissory note for the remaining debt on the car should be cancelled; and found that appellee was entitled to possession of the car. The trial judge then awarded appellee an attorney's fee of $1,000 and litigation expenses of $527.14.

The only issue for consideration on this appeal is the propriety of the award of attorney's fee and expenses of litigation. We find no error and we affirm.

The Magnuson-Moss Warranty Act provides:

> 15 U.S.C. Sec. 2310 (d) (1) . . . a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other equitable relief —
>
> > (A) In any Court of competent jurisdiction in any state . . .

. . . .

> (2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the Court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorney's fees based on actual time expended) determined by the Court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the Court in its discretion shall determine that such an award of attorney's fees would be inappropriate.

Appellant contends that a portion of the claim for attorney's fee and expenses was attributable to defending a separate action brought by appellant against appellee on the promissory note, and to pursuing issues besides claims which were brought under the Magnuson-Moss Warranty Act. Appellee's attorney acknowledges that his time and expenses on all the issues were intermingled, but states that the issues were inseparable. The record indicates that the trial judge considered appellant's contention, and accordingly reduced the attorney's fee from the requested amount of $2,435 to $1,000.

The award, under the circumstances of this case, was highly appropriate and conservative. The issues were inseparable and they all arose out of appellant's breach of warranty. The Act authorizes the court to award costs and expenses, including attorney's fees, unless the court in its discretion shall determine that such award would be inappropriate.

Appellant cites no authority for his point, and we find no merit to his argument that the award is unreasonable and inappropriate.

Affirmed.

Sam BROWN and Deborah H. BROWN *v.*
STATE of Arkansas

CA CR 81-173 636 S.W.2d 286

Court of Appeals of Arkansas
Opinion delivered June 9, 1982
[Rehearing denied August 18, 1982.]

[5

Lessenberry & Carpenter, by: *Jack Lessenberry,* for appellants.

Steve Clark, Atty. Gen., by: *Leslie M. Powell,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellants were each charged and convicted of the manufacture of a controlled substance, marijuana, in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1981).[1] They raise six points for reversal, and we consider each in the order presented by appellants.

I. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

In this argument, appellants rely heavily on the holding in *Sanders* v. *State,* 264 Ark. 433, 572 S.W.2d 397 (1978), a 4-3 Supreme Court decision. In sum, appellants argue both, or at least one of the two marijuana patches, discovered by law enforcement officers are entitled to Fourth Amendment protection.

From the outset, we must admit that the facts described in *Sanders,* although distinguishable in part, are strikingly similar to those at bar. For the sake of clarity, we first consider the chronology of events which transpired in the instant case.

On May 17, 1980, an employee, Harold Lepel, of the Arkansas State Game and Fish Commission was patrolling a national forest in Newton County, Arkansas. Apparently, there is private land located within the national forest, and during his search for illegal game hunting, Lepel crossed a fence onto private land owned by one of the appellants, Sam

[1]Appellants lived as husband and wife although they never had benefit of formal marriage. In this opinion, we refer to appellant Deborah H. Phillips as Deborah H. Brown since she used Mr. Brown's last name.

Brown. Lepel testified that he crossed such fenced areas when he was performing his duties, and that all of the property, public and private, was extremely forested and mountainous. While on Brown's property, Lepel found ten to fifteen marijuana plants growing near an abandoned house trailer. The next day, he reported his find to Ray Watkins, the Newton County Sheriff, and they both returned to Brown's property to examine the marijuana. On this occasion, the Sheriff saw a black hose. He discovered the hose actually began at a water pond and by way of a tee connection it led not only to the small marijuana patch discovered by Lepel but also to a larger marijuana field, located approximately two hundred feet from the smaller patch.

After Lepel and Watkins found the second marijuana field, they went to Jasper, Arkansas, picked up two deputy sheriffs, and proceeded to the appellant's home. Although the testimony is somewhat conflicting as to whether appellants were arrested immediately, Lepel testified that Sheriff Watkins advised Brown that he was under arrest for manufacturing marijuana and then read both appellants their rights. At this point, appellants discussed the two marijuana patches freely and, in fact, led the officers to where the marijuana was located.

The larger patch of marijuana was the closest to appellants' house, some 100 to 150 yards away. A well worn path led down to but did not connect with the large patch. Both patches were located on a second level of terrain not visible from appellants' home, but the roof of the home was visible when standing where the larger patch was located. This larger patch was enclosed by a high fence which contained over 100 stalks of well cultivated marijuana.[2] At the site of the large patch, there was a shed where dried marijuana was stored. Although appellants testified they maintained a "vegetable garden" where the marijuana was located, Sheriff Watkins testified he saw some onions, two or three tomato plants and some beans, all of which were

[2]The testimony of Lepel and Watkins was in conflict as to the fence. Lepel said that a wire fence enclosed the large patch, but Watkins did not remember a fence.

covered and unnoticeable until the marijuana was pulled and removed.

We painstakingly described the foregoing set of events since appellants ardently contend that such facts merit a reversal in view of *Sanders* v. *State, supra.* However, the most that *Sanders* stands for is that an open field may be searched without a warrant whereas a warrant (or other legal means) is required before law enforcement officers can gain entry to one's dwelling and curtilage.

We believe the test we announced in *Gaylord* v. *State,* 1 Ark. App. 106, 613 S.W.2d 409 (1981), is applicable to the case here, *viz.*, whether appellants exhibited a reasonable expectation of privacy covering the area of the search or seizure. Stated another way, the issue is whether the two marijuana patches lay within the appellants' reasonable expectations of privacy. We think not. We find it significant that appellants' house is situated within the boundaries of a national forest and the acreage on which the house sits contains the same foliage and terrain as that within the forest. As Lepel testified, it was customary and necessary to cross fences and private lands when patrolling the public forest area. Moreover, there were no signs evidencing that a person was trespassing on or should keep off the appellants' property. The first, smaller patch of marijuana was near the national forest and it was by virtue of a black plastic hose which was used to water the small patch, that the law enforcement officers discovered the second but larger patch. Even at the site where the second patch was discovered, the officers were in a forested, mountainous area where the next nearest cultivation known to the officers was a quarter of a mile away. Once the officers were led to the second marijuana field by following the hose, they could see the roof of a building on the next level of terrain but could not tell if it was a cabin or a barn. At this point of the officers' investigation, they were unaware that appellants' house was on the next terrain of land. Further, if we accept Sheriff Watkins' testimony, the appellants' "vegetable garden" was not noticeable to the officers so as to indicate the land where the marijuana was found might be a part of some person's

curtilage. Watkins testified he later learned that the land appeared to be owned by appellants.

On these facts, we simply cannot agree that appellants had any reasonable expectation of privacy. On the contrary, we believe they should have fully expected officers, hunters or other passersby to frequent the national forest and, by chance, to venture onto their marijuana operation. Appellants' attempt to bring this case within the curtilage exception noted in *Sanders* v. *State, supra,* cannot be countenanced. We do not believe the Supreme Court in *Sanders* intended to permit a person to invoke the curtilage right to Fourth Amendment protection merely by the planting of vegetables in and about his or her cultivation of marijuana plants. We hold the search by the officers did not require a warrant; under the facts before us, we conclude the motion to suppress was properly denied by the trial court.

II. THE MOTION FOR CONTINUANCE SHOULD HAVE BEEN GRANTED.

In considering this issue, the law is well settled that the trial court's action will not be reversed absent a clear abuse of discretion amounting to a denial of justice and the burden is on appellants to demonstrate such abuse. See *Russell* v. *State,* 262 Ark. 447, 559 S.W.2d 7 (1977). Moreover, in *Tyler* v. *State,* 265 Ark. 822, 581 S.W.2d 328 (1979), we recognized the rule that the matter of a continuance is within the discretion of the trial court and that not every denial of a request for a continuance violates due process, even if the party is compelled to defend without counsel.

In the instant proceeding, appellants had hired four different attorneys and fired three of them. The third attorney hired was an out-of-state attorney, Roy Gene Smith, who failed to appear at two different trial settings. The fourth attorney had been hired as local, associate counsel to assist Smith. This was done at the urging and prompting of the prosecuting attorney because he complained that his efforts to get the case to trial had been futile.

Prior to the trial on September 8, 1981, Smith had indicated to his local counsel that he was ill and would send a formal written motion to this effect with a doctor's certificate attached. The prosecuting attorney said that he had spoken to Smith and Smith indicated he would be well by the trial date. On the morning of September 8, appellants requested the local counsel to renew Smith's motion to continue and that his services as local counsel would no longer be needed. Smith failed to show at trial nor did he call the trial judge concerning his absence.

At the trial, appellants chose to represent themselves even though local counsel was present. There is no indication that the local attorney could not have adequately and properly proceeded to represent appellants. In fact, it was this attorney's explanation to the court that it was not his choice or position to withdraw but rather appellants were terminating his employment. After appellants terminated their local counsel and decided to represent themselves, we fail to see how they were prejudiced by the trial court's decision to proceed to trial. The trial court is required to consider the public's interest in the prompt disposition of criminal actions. There were sufficient factors existent in this case to warrant concern over the possibility of further delays caused either by appellants' actions or by those of their out-of-state counsel.

III. THE MOTION FOR A SEVERANCE SHOULD HAVE BEEN GRANTED.

As was true concerning the trial court's action relative to continuances as discussed in point two above, the matter of severance also lies within the sound discretion of the trial judge and will not be reversed absent a showing of an abuse of discretion. *Hallman* v. *State,* 264 Ark. 900, 575 S.W.2d 688 (1979). Rule 22.1 of the Arkansas Rules of Criminal Procedure requires such a motion to be made before or at the close of all the evidence if based upon a ground not previously known. Here, the grounds for the severance motions had been known for at least two months prior to trial. In fact, appellants' cases had been consolidated by the trial court without objection for over a year.

The record reflects that appellant, Sam Brown, did not file his motion until immediately prior to jury selection and Deborah Brown's motion was not filed until immediately before the State called its first witness. Clearly, Deborah Brown's motion was untimely since she waited to raise the severance objection until after the jury was selected and sworn. See *Owen* v. *State,* 263 Ark. 493, 500, 565 S.W.2d 607 (1978). Even if we were to hold (which we do not) that appellant Sam Brown had timely filed his severance motion, we cannot consider this issue relative to Deborah because she, herself, must file the motion before the trial commences. To this effect see *Spillers* v. *State,* 268 Ark. 217, 595 S.W.2d 650 (1980). Aside from the timeliness issue concerning Sam Brown's severance motion, we fail to see how he was prejudiced by the court's denial since Deborah's testimony tended to exonerate him of any illegal knowledge or conduct relative to the two marijuana patches. For these reasons, we affirm the trial court's denial of appellants' motion to sever.

IV. THE TRIAL JUDGE ERRED BY PERMITTING THE PROSECUTING ATTORNEY UNREASONABLE LATITUDE IN HIS CROSS-EXAMINATION OF DEBORAH BROWN DURING THE MOTION TO SUPPRESS.

Counsel for appellants on appeal were not representing appellants at any time before or at the trial below. They now, however, attempt to raise this issue on appeal even though there was no objection to the scope of cross-examination at the suppression hearing below. It is well established that this court will not consider an alleged error when it is not presented to the trial court and is first raised on appeal. *Jeffers* v. *State,* 268 Ark. 329, 595 S.W.2d 687 (1980).

V. THE TRIAL JUDGE ERRED BY FAILING TO SUSTAIN THE HEARSAY OBJECTION OF DEBORAH BROWN.

VI. THE TRIAL JUDGE ERRED BY FAILING TO SUSTAIN THE EVIDENTIARY OBJECTION BY SAM BROWN.

Appellants interposed evidentiary objections during the trial on its merits. In each instance, the trial court overruled the respective objections made by appellants.

First, Deborah Brown objected to Sheriff Watkins' testimony that he checked the deed records to determine who owned the land on which the two marijuana patches were situated. The ownership of the land was never in issue. In fact, appellants claimed ownership to this land, they agreed that their home was located on it and they contended the surrounding property on which the marijuana was discovered was curtilage and subject to Fourth Amendment protection. This testimony was cumulative and repetitious to testimony offered by others, including the appellants, and we find no error in the trial court's ruling. See *Graham* v. *State,* 2 Ark. App. 266, 621 S.W.2d 4 (1981).

Second, Sam Brown objected to the prosecutor's question provided to Sheriff Watkins as to whether Mr. Brown appeared to know about the marijuana fields. Here, again, Brown's objection may have been well taken but prior testimony had previously been introduced without objection tending to show the Browns knew marijuana was located and cultivated on their property. We fail to see how appellants were harmed or prejudiced by the trial court's ruling in this instance even if it were incorrect.

For the reasons stated above, we affirm the lower court's judgment.

Affirmed.

CORBIN, J., dissents.

DONALD L. CORBIN, Judge, dissenting. The majority has chosen to overrule the Arkansas Supreme Court's decision of *Sanders* v. *State,* 264 Ark. 433, 752 S.W.2d 397 (1978).

Admittedly, the small patch of marijuana initially "discovered" by Mr. Lepel would fall within the doctrine of

"open field" search and not require a search warrant. This would support a conviction.

However, the evidence obtained by the search of the garden should have been quashed. The evidence in the case at bar seems to be a familiar repeat of the *Sanders* facts. Here, the sheriff described the garden to be "right down below the house." The garden was close enough to hear farm animals and talk with a person in the garden. There was a well-worn path between the house, pond and garden. The area was generally fenced. The garden had a high fence with vines and growth on it. The sheriff saw some of the vegetables in the garden with the marijuana. Phillips had her washing machine on the lower bench where there were two outbuildings and a mobile home. All of these facts support the need for a valid search warrant to search the curtilage and outbuildings. I just don't believe that because this tract of land was within a national forest that Phillips' and Brown's Fourth Amendment rights to privacy should be violated. I would reverse and remand for a new trial excluding any evidence related to the large garden.

SAFEWAY STORES, INC. et al *v.*
R. Lee LAMBERSON

CA 81-357 634 S.W.2d 396

Court of Appeals of Arkansas
Opinion delivered June 16, 1982

Michael E. Ryburn, for appellants.

Dennis L. James of *Southern & James,* for appellee.

MELVIN MAYFIELD, Chief Judge. The employer and its insurance carrier appeal from a decision of the Workers' Compensation Commission awarding appellee a fifty percent permanent partial disability to the left arm. We affirm.

Appellee sustained an injury to his arm in October of 1975 while working for Safeway. The insurance carrier, Travelers Insurance Company, accepted liability and paid all temporary total disability and medical benefits up to the date it received a bill from Dr. Richard Nasco for an office visit made by appellee on March 21, 1979.

The doctors first tried to fix appellee's arm with metal pins and, later, with a bone graft. These procedures were not satisfactory so they finally put a plastic implant in his arm that worked like a hinge. He returned to work but was still

seeing Dr. Nasca who had treated him continuously since his injury.

Appellee saw Dr. Nasca on December 6, 1977, and was scheduled for a return appointment for December of the next year, 1978. The doctor became ill and appellee's appointment was rescheduled for March 21, 1979. On that day the appellee was examined by the doctor but when Travelers received the bill for that examination it refused payment on the basis that it had been over two years since the accident and over one year since the payment, on January 6, 1978, of Dr. Nasca's bill for the December, 1977, office visit.

The commission held against Travelers' claim of limitation in an opinion which reads, in part, as follows:

> Claimant's undisputed testimony was that he notified Travelers that Dr. Nasca would be unavailable for his appointment on December 5, 1978. Travelers had been furnishing medical treatment for claimant since the date of injury on October 22, 1975, including two surgical procedures by and numerous office visits to Dr. Nasca. Dr. Nasca's report of December 6, 1977, which was addressed to Travelers, indicated that claimant's return appointment was scheduled for one year [later]. Travelers was certainly not under the impression that claimant would not require further medical treatment . . . . Since Travelers took no affirmative action to deny further liability and since Dr. Nasca's unavailability to treat the claimant was by no means the fault of the claimant, it is determined that the statute of limitations was tolled and respondents are estopped from asserting it as a defense. Furthermore, Travelers never stopped *furnishing* medical treatment to the claimant until it controverted the claim (by letter to claimant dated September 19, 1979) after receiving Dr. Nasca's statement for the March 21, 1979, visit.

We agree that the respondents are estopped from asserting the bar of limitation set out in Ark. Stat. Ann. § 81-1318 (b) (Repl. 1976). That doctrine was recognized by

this court in *Ashcraft* v. *Hunter*, 268 Ark. 946, 597 S.W.2d 124 (Ark. App. 1980), in a situation somewhat similar to this and we think it is clearly applicable here.

In this case there are nineteen letters in the record from Dr. Nasca to Travelers. Each of them report on the appellee's condition and they cover a four-year period beginning October 27, 1975, and ending October 25, 1979. All of them state or imply that the appellee will be examined again and a letter dated December 6, 1977, specifically states that appellee is to return in one year. It is not until the very last letter, however, that any permanent partial disability is fixed by the doctor. The letters disclose that most of the period they cover was involved with the determination and application of the various procedures used to repair appellee's arm. After the plastic implant, the question was how long it would hold up. And finally, the question was the amount of permanent disability.

Under these circumstances, it was entirely reasonable for the appellee to conclude that it was unnecessary to file a formal claim with the commission. We think the decision of the commission is supported by substantial evidence and is correct as to the law.

Margaret PRITCHETT *v.* DIRECTOR OF LABOR

E 81-367 634 S.W.2d 397

Court of Appeals of Arkansas
Opinion delivered June 16, 1982

Appellant, *pro se.*

Thelma Lorenzo, for appellee.

MELVIN MAYFIELD, Chief Judge. Margaret Pritchett appeals from a decision by the Arkansas Board of Review holding she is disqualified for unemployment benefits because she left her last work without good cause connected with the work.

There was evidence that appellant had worked for her last employer approximately one month and quit because of a dispute over the amount of her check. It was her contention that she was to be paid $525 every two weeks and her employer contended she was to be paid every two weeks at a rate of $1050 per month. An application for employment signed by appellant was introduced into evidence and it shows she was to be paid $1050 per month. The board agreed

with the employer's contention and found that claimant left her job without good cause in connection with the work. We think that finding is supported by substantial evidence and it is affirmed. *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W.2d 954 (1978).

The board, however, made another finding which we do not affirm. The last sentence in the board's decision says, "She shall be liable to repay to the Fund that amount she has received prior to this reversal." If appellant has been paid benefits to which she was not entitled, due process requires that her liability to repay the amount so received must be determined after she has been afforded the opportunity of a hearing, after proper notice, upon all the issues set out in Ark. Stat. Ann. § 81-1107 (f) (2) (Supp. 1981). *Whitford* v. *Daniels,* 263 Ark. 222, 563 S.W.2d 469 (1978); *Paulino* v. *Daniels,* 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980).

Since all those issues were not involved in this proceeding, the board's finding of liability to repay is reversed.

Peter DeFRANCISCO *v.* ARKANSAS KRAFT CORPORATION and WAUSAU INSURANCE COMPANY

CA 82-70 636 S.W.2d 291

Court of Appeals of Arkansas
Opinion delivered June 16, 1982
[Rehearing denied August 18, 1982.]

Richard L. Peel, for appellant.

Friday, Eldredge & Clark, by: *Donald H. Bacon,* for appellees.

GEORGE K. CRACRAFT, Judge. The appellant, Peter DeFrancisco, made claim for disability benefits which were shown to have resulted from an aggravation of a preexisting condition of bursitis in his heels while in the employ of the appellee, Arkansas Kraft Corporation. The Administrative Law Judge found the appellant's healing period had not ended and ordered payment of benefits for temporary total disability until such time as his permanent disability could be determined. On appeal the Full Commission reversed the award on specific findings from which it determined that the rule announced in *Shippers Transport of Georgia* v. *Stepp,* 265 Ark. 365, 578 S.W.2d 232 (1979) was applicable. It was held in *Shippers Transport* that where an employee knowingly makes a false representation as to a physical condition while applying for employment, which was relied upon by the employer and was a substantial factor in hiring, the employee is precluded from benefits if there is a causal connection between the concealed condition and the otherwise compensable injury. The rationale of this rule is based on the fact that the Workers' Compensation Act requires the employer to take the employee as he finds him and places on the employer the risk of employing an infirm employee. The employer therefore should have the right to have health history disclosed to him before employment to avoid liability for disability causally related to infirmity. *Shippers Transport of Georgia* v. *Stepp, supra.*

The evidence in this case presents disputed issues of fact relative to whether the false representation was knowingly

made at the time of appellant's application for employment and whether the reliance on that representation was a substantial factor in the hiring by the employer. Appellant does not seriously argue that there was not a causal connection between the appellant's physical condition at the time of hiring and his present complaints. The Commission made a specific finding that all three factors had been proved.

On appeal this court is required to view the evidence in the light most favorable to the findings of the Workers' Compensation Commission and give the testimony its strongest probative value in favor of the order of the Commission. The issue on appeal is not whether this court would have reached the same result as the Commission or whether the evidence would have supported a finding contrary to the one made. The question here is solely whether the evidence supports the finding the Commission made, and the decision of the Commission must be upheld if supported by substantial evidence. *Bankston* v. *Prime West Corp.,* 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981). Substantial evidence has been defined as more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is evidence of such force and character that it would with reasonable and material certainty and precision compel a conclusion one way or the other. *Satterfield* v. *Mathews,* 483 F. Supp. 20 (1979); *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980). On numerous occasions our court has reaffirmed its declarations that questions of credibility of witnesses and weight to be accorded evidence presented to the Commission is a prerogative of the Commission and not of the reviewing court and that courts must rely on the Commission's findings because they are better equipped by specialization, insight and experience in matters referred to them than are the appellate courts. The reviewing court may not displace the Board's choice between two fairly conflicting views even though the court might have reached a different choice had the matter been before it *de novo.* The reviewing court may not set aside the Commission's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial.

KNOWING CONCEALMENT

In August of 1979, while in employ of appellee, appellant saw Dr. Kimball with regard to bursitis in his left heel. On September 20th he was referred by Dr. Kimball to Dr. Werner, a podiatrist, whose treatment was unable to control the condition and who referred him to Dr. Jones, an orthopedic surgeon. Appellant's disability was determined by those doctors to be chronic tendonitis of the achilles tendon.

It was testified that he was predisposed to this disorder and that the resulting disability was caused by a long-standing irritation due to ambulatory stress; that this condition predated his employment with appellee and was aggravated by the job which required him to be ambulatory eight hours a day. Every step he took was cumulative aggravation of his condition, which would have resulted whether those steps were taken at home, on the job or elsewhere. Although the requirements of his job might be an aggravating factor, the causative factor was his predisposition and ambulatory stress of any kind.

Prior to his employment by the appellee in late January 1979, appellant had filled out a required application form. One of the questions on the form inquired as to "physical limitations," by which appellant wrote "none — glasses." Another asked if he was "in good health to the best of his knowledge" to which he responded in the affirmative.

The evidence shows that as early as 1977 appellant was having difficulty in his left heel from this condition and received injections of cortisone from Dr. Kimball. In 1978 it reoccurred and due to appellant's reluctance to continue cortisone Dr. Kimball treated him with anti-inflammatory drugs. All three doctors agree that the condition for which he now claims benefits stems from that for which he was treated by Dr. Kimball prior to his employment.

Although appellant sought to show that he did not deliberately withhold the information from his employer the Commission was not bound to accept his testimony. *May*

v. *Crompton-Arkansas Mills, Inc.*, 253 Ark. 1080, 490 S.W.2d 794 (1973).

At first appellant stated that the first incident occurred in 1979 and when confronted with medical reports showing the contrary he sought to explain it by stating that the medical reports were mistaken as to which foot had been treated. There were other inconsistencies in his testimony as noted by the concurring member of the Commission who attached no credibility whatever to appellant's testimony. Questions of credibility and weight to be given testimony are for the Commission to determine. His explanation for not having disclosed his prior difficulties and treatment for this infirmity was not acceptable to the Commission. There was substantial evidence on which the Commission could find that his failure to disclose the earlier treatments and the apparent severity of them was not the result of ignorance or mistake but was knowingly concealed from his employer.

RELIANCE

The appellant next maintains that there was not sufficient evidence on which it could have found that the employer relied on a false representation and that reliance was a substantial factor in the hiring.

There was evidence before the Commission from the appellee's industrial relations manager that the employer did rely on the misrepresentation and that the employer would not have hired the appellant if they had known the true facts about his physical condition. He testified that one reason was because "the job is strenuous" and the employer would not want to hire someone in that particular position if he knew of an existing infirmity which the work might aggravate.

There was evidence that after the appellant consulted a physician in August of 1979 and the condition of his feet was made known to appellee, the appellant brought the employer a medical certificate stating that he should be placed in lighter work. Appellee did so in accordance with a long-standing company policy and appellant continued in that

work until December 30th. The appellant argues that if the company had in fact relied upon the misrepresentation they would have terminated the appellant's employment at the time they became aware of it rather than transferring him to lighter work.

The critical question, however, is not whether the appellee had the right and did or did not terminate him, but whether he, under the doctrine of *Shippers Transport of Georgia* v. *Stepp, supra,* made a false representation about pre-employment health conditions upon which the employer relied. *Shock* v. *Wheeling Pipe Line,* 270 Ark. 57, 603 S.W.2d 446 (Ark. App. 1980). The Commission found that the employer did rely upon appellant's representation of his health and that it was a substantial factor in the hiring. There was substantial evidence to support that finding.

CAUSAL CONNECTION

In *Baldwin* v. *Club Products Company,* 270 Ark. 155, 604 S.W.2d 568 (Ark. App. 1980) the third factor required by the *Shippers Transport* rule is defined as a factual showing that the disability for which the claim is brought is causally related to the employee's prior physical condition which was concealed at the time of employment and, "except in most obvious cases the connection must be established by medical evidence." According to all three doctors the disability appellant now claims stemmed from and was an aggravation of a pre-existing condition for which he received cortisone treatment from Dr. Kimball in 1977 and for which drugs were prescribed on a second involvement in 1978. Dr. Jones testified that this was a condition to which appellant was predisposed and one which would be aggravated by ambulatory stress whether work related or otherwise. We find the medical evidence on which the Commission found the required causal relation to be substantial.

We affirm.

Walter E. WILSON *v.* COUNTRYSIDE CASUALTY COMPANY

CA 81-383 634 S.W.2d 398

Court of Appeals of Arkansas
Opinion delivered June 16, 1982

Larry W. Chandler, for appellant.

Floyd M. Thomas, Jr. of *Brown, Compton & Prewett, Ltd.,* for appellee.

DONALD L. CORBIN, Judge. Appellant, Walter E. Wilson, seeks to have a contract of insurance, insuring his dwelling against loss by fire, enforced. He appeals an adverse decision alleging that the policy terms were ambiguous and that the tender of a bad check for the premium was not a conditional payment. We affirm.

The language in the policy which appellant claims is ambiguous reads:

> The binder is effective only if signed by an authorized agent and if the effective date and time of the binder is inserted and binder of any policy issued therein are void if any check tendered in payment of the premium is not honored.

The foregoing language is not ambiguous but is very poor English usage. In order to be ambiguous, a term in an insurance policy must be susceptible to more than one equally reasonable construction. *Union Life Insurance Commission* v. *Rhinehart,* 229 Ark. 388, 315 S.W.2d 920. We believe this provision to have only one meaning: If the check tendered as premium payment is dishonored, the insurance coverage is null and void. In *Appelman, Insurance Law and Practice,* Section 7532, it clearly states that the binder language and the policy issued later must be considered together in order to determine the true intention of the parties. The binder language clearly indicates that any coverage is to be void if the check tendered in payment of the premiums is not honored. The specific language of the policy states that it is being issued in consideration of the payment of the premium. If the premium was not paid, the parties did not intend that the insurance would be effective. See *Jones* v. *American Pioneer Life Insurance Co.,* 255 Ark. 474, 500 S.W.2d 748 (1973).

We affirm.

Nina B. PERKINS *v.* ARKANSAS STATE HIGHWAY DEPARTMENT and PUBLIC EMPLOYEES CLAIMS DIVISION

CA 82-86 634 S.W.2d 399

Court of Appeals of Arkansas
Opinion delivered June 16, 1982
[Rehearing denied June 30, 1982.]

Arnold, Lavender, Rochelle, Barnette & Franks, by: *Charles D. Barnette,* for appellant.

David B. Simmons, Public Employees Claims Div., Ark. Insurance Dept., for appellees.

DONALD L. CORBIN, Judge. Appellant, Nina B. Perkins, alleges that as the common-law widow of Daniel T. Danelley, deceased, she is entitled to weekly benefits as a dependent widow. The commission denied appellant benefits on the basis that the statute of limitations, Ark. Stat. Ann. § 81-1318 (b), barred her claim. We affirm.

The decedent was an employee of the Arkansas State Highway Department and died as a result of injuries which arose out of and during the scope of his employment on June 23, 1978. Appellant caused a letter to be sent to the Workers' Compensation Commission dated August 23, 1978, which stated, among other things, the following:

> Mrs. Perkins has indicated that she does not wish to assert a claim at this time for indemnity benefits as we expect to recover on her behalf sums in excess of her entitlement under the Workers' Compensation Act from the Third-Party Defendant. I am submitting for consideration, however, the statement of Hanner Funeral Service for the expenses of the funeral of Mr. Danelley.

Funeral expenses of $750.00 and an ambulance charge of $30.00 were then paid by the appellees in 1978. No further claim for additional benefits was made by appellant until May 15, 1981, which was more than two years from June 23, 1978, and more than one year from the payment of the funeral expenses and ambulance bill. The commission treated the letter of May 15, 1981, as a claim for widow's benefits and considered it in no other light than a claim for additional benefits since the benefits for the funeral and ambulance bills had been claimed and paid.

The court stated in *Superior Federal Savings and Loan Ass'n* v. *Shelby,* 265 Ark. 599, 580 S.W.2d 201 (1979):

> [T]he primary purpose of the one year statute of limitations is to give the claimant that much extra time to decide whether he has been fully compensated for his injury, and not for the purpose of paying belated medical bills.

We agree with the commission that while the case at bar does not involve the payment of medical expenses, it does involve the payment of compensation, which is a key to invoking a defense provided under Ark. Stat. Ann. § 81-1318 (b). The fact that appellees paid $750.00 in funeral expenses and a $30.00 ambulance bill clearly makes appellant's claim of May 15, 1981, a claim for additional benefits.

Since we hold that the statute bars the claim, we do not have to reach the issue of whether appellant proved she was legally married to the deceased.

We affirm.

COOPER INDUSTRIAL PRODUCTS *v.*
Naeomi MEADOWS

CA 82-59 634 S.W.2d 400

Court of Appeals of Arkansas
Opinion delivered June 16, 1982

Floyd M. Thomas, Jr. of *Brown, Compton & Prewett, Ltd.,* for appellant.

Ronald L. Griggs of *Law Offices of Ronald L. Griggs,* for appellee.

TOM GLAZE, Judge. This is the second appeal in this case to our Court from the Workers' Compensation Commission. Although the legal issue presented in this appeal was raised in the first appeal, we dismissed the earlier appeal on another issue. We found that the previous order of the Commission was not final and therefore not appealable. *Cooper Industrial Products* v. *Meadows,* 269 Ark. 966, 601 S.W.2d 275 (Ark. App. 1980). Subsequent proceedings have since been held before an Administrative Law Judge and the Commission, and this case is now properly before us for decision. Since the issue and facts in this cause were fully set forth in our opinion dismissing the earlier appeal, we now

recap only those necessary facts which will serve to underscore the question we must decide.

On April 17, 1979, the Administrative Law Judge initially heard this case and he filed his opinion on July 12, 1979, denying appellee's claim for additional benefits. On July 17, 1979, appellee's attorney wrote a letter to the Administrative Law Judge, suggesting that the Judge's order should be amended since the attorney believed the order was based on the erroneous assumption that Dr. Lester had withdrawn his disability rating on appellee. By letter dated July 23, 1979, the Judge responded to the July 17 letter and requested appellee's attorney to provide a clarification from Dr. Lester, and the Judge indicated that if the doctor's disability rating had not been withdrawn, he would amend his July 12 order. Unfortunately, neither appellee's attorney nor the Administrative Law Judge informed attorney for appellant of these communications.

On October 11, 1979, appellee's attorney forwarded to the Administrative Law Judge a letter report by Dr. Lester which clearly reflected the doctor never intended to withdraw his disability rating of appellee. On October 31, 1979, the Judge amended his prior July 12 order and awarded appellee benefits based on Dr. Lester's opinion finding appellee had a five to ten percent physical impairment of the body as a whole. It was not until appellant's attorney received the Judge's amended order that appellant learned of the events which had taken place after the July 12 order.

Appellant appealed the Judge's amended order of October 31 to the Commission, contending the prior July 12 order was final under Ark. Stat. Ann. § 81-1325 (a) (Repl. 1976). Appellant argued that since thirty days had passed since the July 12 order was entered and no appeal had been filed, the Administrative Law Judge had no power to amend the order. After a brief interlude when the Commission remanded the matter to the Judge for additional evidence, the Commission finally considered and rejected appellant's contention. By a split decision, the Commission affirmed the Judge's amended order awarding benefits to appellee. We must disagree and reverse the Commission's decision.

The facts of this case have given us much concern. We are confronted with the clear language of Ark. Stat. Ann. § 81-1325 (a) which provides:

> A compensation order or award of a referee *shall become final unless either party* to the dispute shall, *within thirty days from the receipt by him of the order or award, petition in writing for a review by the Full Commission* of the order or award. [Emphasis supplied.]

Appellee did not appeal the Administrative Law Judge's July 12 order nor did the Judge set aside or amend this order within thirty days after it was issued and received.[1] Admittedly, the appellee by letter protested the Judge's decision, but he did not perfect an appeal, presumably because the Judge indicated that he would reconsider the order upon receipt of clarifying information from Dr. Lester. The Judge simply did not have the authority or power to make such an assurance, at least after the thirty-day period expired under § 81-1325 (a). See *Arkansas State Highway and Transportation Department* v. *Godwin,* 270 Ark. 743, 606 S.W.2d 127 (Ark. App. 1980).

Awards may be modified by the Commission in accordance with Ark. Stat. Ann. § 81-1326 (Repl. 1976), but only on the showing of a change in physical condition or upon proof of an asignment of an erroneous wage rate. *Southern Wooden Box Company* v. *Smith,* 5 Ark. App. 15, 631 S.W.2d 620 (1982).

Our Workers' Compensation Law does not provide for rehearing or reconsideration procedures, a fact we noted in *Walker* v. *J & J Pest Control,* 270 Ark. 941, 606 S.W.2d 597 (Ark. App. 1980).[2] The Commission, however, does have

[1]In the instant proceeding, the Administrative Law Judge did not withdraw or set aside his order within the thirty-day statutory period. Whether he had the inherent power to do so and thereby prevent the appeal time from running under § 81-1325 (a) is an issue not before us. Therefore, we find it unnecessary to discuss and decide this question at this time.

[2]The *Walker* case involved a motion for rehearing before the Commission which was filed by the claimant within the thirty-day period

authority under Ark. Stat. Ann. § 81-1326 (Repl. 1976) to modify a final award but only upon a showing of a change in physical condition or proof of an assignment of an erroneous wage rate. *Southern Wooden Box Company* v. *Smith, supra.*

Ordinarily compensation review procedures are specifically established by statute, and when they are the courts will not countenance alternative forms of review. 3 Larson, Workmen's Compensation Law, § 80.50. It is also pointed out by Professor Larson in the foregoing section of his treatise that time periods for appeal are ordinarily strictly enforced. However, appellee directs our attention to the State of Arizona which has taken a more liberal view on the subject of timely appeals in Workers' Compensation cases.

Arizona has a statute comparable to Ark. Stat. Ann. § 81-1325 (a) (Repl. 1976). In 1972, the Supreme Court of Arizona broke with longstanding precedent, and held that when the facts appear to warrant relief and the delay is neither excessive nor unfair in its consequences to the carrier, the Commission in the interest of justice may waive the untimeliness of the filing of an appeal. *Parsons* v. *Bekins Freight,* 108 Ariz. 130, 493 P.2d 913 (1972). In more recent decisions, the Arizona courts have continued to apply the rule laid down in *Parsons. Janis* v. *Industrial Commission,* 111 Ariz. 362, 529 P.2d 1179 (1974), and *Citizens Savings and Loan* v. *Industrial Commission,* 120 Ariz. 424, 586 P.2d 985 (Ariz. App. 1978).

Although we may find some merit in the rule adopted by the Arizona courts, we have problems in applying such a rule to the case at hand. To do so, we undoubtedly would be creating by case law a new review or appellate procedure not heretofore provided by Arkansas law. Moreover, most juris-

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after the Commission's order. The Commission, in effect, questioned the propriety of the motion and therefore denied it. On appeal to this Court, we cited § 81-1326 and remanded the case to the Commission with directions to determine the merits on the claimant's motion for rehearing. Although the *Walker* case concerned a rehearing motion before the Commission rather than an Administrative Law Judge, by this decision today we clarify and limit the holding rendered in *Walker.*

dictions have adopted the view that procedural requirements such as those set forth in § 81-1325 (a) are mandatory or jurisdictional and must be strictly complied with. For example, see *Henry MacAllister House Mover* v. *Johnson,* 281 So.2d 306 (Fla. 1973); *Kissell* v. *Labor and Industrial Relations Appeal Board,* 57 Haw. 37, 549 P.2d 470, cert. denied, 429 U.S. 898 (1976); *Smith* v. *Fireman's Fund Insurance Company,* 141 Ga. App. 578, 234 S.E.2d 156 (1977); *Workmen's Compensation Appeal Board* v. *Budd Company,* 29 Pa. Cmwlth. 249, 370 A.2d 757 (1977); *Roadway Express, Inc.* v. *Gray,* 40 Md. App. 66, 389 A.2d 407 (1978); *McKenna* v. *Industrial Commission,* 42 Colo. App. 305, 596 P.2d 405 (1979); and *State ex rel. Valve Casting Company* v. *Johnston,* 60 Ohio App.2d 170, 396 N.E.2d 240 (1978). See also, 3 Larson's, Workmen's Compensation Law, § 80.50 and 100 C.J.S. Workmen's Compensation § 660.

In sum, we reject appellee's invitation to embrace the rule adopted by Arizona in *Parsons* v. *Bekins Freight, supra.* In the first place, we doubt our authority to create such a procedural or appellate remedy. However, even if we had such authority, it would prove questionable on our part to adopt a rule which is contrary to that recognized in almost every other state. The Arkansas General Assembly has not enacted a law which would authorize the statutory appeal time to be extended. Unless the General Assembly provides such a remedy or procedure, neither Administrative Law Judges nor the Commission have the power to waive or otherwise extend the appeal time provided in § 81-1325 (a) and (b).

We address a final point which was raised in the Commission's opinion. The Commission expressed some reluctance in affirming the Administrative Law Judge's opinion but did so by applying an estoppel theory against the Commission because the evidence showed appellee was prepared to file a timely appeal but for the Administrative Law Judge's ex-parte letter of July 23, 1979. Obviously, the Commission has attempted to share some of the responsibility for appellee's plight. While we share in and appreciate the concern expressed by the Commission, we are unaware of any precedent employing the estoppel theory against the

Commission and in favor of a claimant or respondent. Nor does the Commission cite us any cases on the subject. An analogous sitaution occurred in *State ex rel. Valve Casting* v. *Johnston, supra,* and the holding by the Ohio court fails to support the Commission's decision here. In Ohio, a party must file any appeal within sixty days after the Industrial Commission's order. In *Johnston,* the claimant failed to do so. He had, however, telephoned the Commission's vice chairman within the sixty day period. The vice chairman assured the claimant his appeal would be heard if he would forward a copy of the notice of appeal. The court held the Commission lost jurisdiction over the appealed order, and that the Commission could not unilaterally bestow a greater period of jurisdiction upon itself by oral assurances to a litigant. The court stated further:

> Although we are concerned by the apparent injustice done to this particular respondent if in fact he relied, in good faith, on the assurances of the vice chairman of the commission, we are also mindful of the fact that he could have pursued a vacation of the order, while at the same time preparing a notice of appeal to be filed if such a vacation was not granted within the sixty day period.

The saying, "Bad cases make bad law" can all too often be a reality unless our courts apply the law evenly as well as knowledgeably. One's inclination might be to "stretch" or "create" law to assure that justice is done in every case. Such a proclivity, once indulged, might prove to foster justice in one case but prove disastrous in the next.

Although we have great sympathy for appellee's position in this case, we must find that the Administrative Law Judge and Commission lost jurisdiction of this proceeding after appellee failed to file her appeal within the thirty day period provided by § 81-1325 (a). We therefore reverse the Commission's decision and remand with directions to reinstate the Administrative Law Judge's order filed on July 12, 1979.

Reversed and remanded.

Wendall WILSON *v.* DIRECTOR OF LABOR

E 82-46 635 S.W.2d 5

Court of Appeals of Arkansas
Opinion delivered June 23, 1982

Appellant, *pro se.*

Alinda Andrews, for appellee.

MELVIN MAYFIELD, Chief Judge. This case presents a question which results from a 1981 amendment to the Arkansas Employment Security Law.

Under Section 5 (a) of the Act, Ark. Stat. Ann. § 81-1106 (a) (Supp. 1981), an individual is disqualified for unemployment benefits if he left his work voluntarily and without good cause connected with the work. This section, however, makes three exceptions to the rule: (1) an individual is not disqualified if, after making reasonable efforts to preserve his job rights, he left work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification; (2) if after making reasonable efforts to preserve his job rights, he left his work because of illness, injury, pregnancy or other disability; and (3) he left his work to accompany, follow, or join the other spouse in a new place of residence and, upon arrival, made an immediate entry into the new labor market.

Section 5 of Act 43 of 1981 amended Section 3 of the Employment Security Law, Ark. Stat. Ann. § 81-1104 (h) (Supp. 1981), by adding subsection (h), which reads, in part, as follows:

> (h) Notwithstanding any other inconsistent provisions of this law, for benefit years beginning during the period commencing July 1, 1981 and ending December 31, 1983, any individual who has voluntarily left any employment with a base period employer without good cause connected with the work and who has been determined monetarily eligible for benefits under other provisions of this law shall have his base period wages paid by any such employer reduced by

> twenty-five percent (25%), and such individual's weekly benefit amount, maximum benefit amount, and potential duration shall be redetermined accordingly. In no event, however, shall such individual's maximum benefit amount be reduced to an amount less than his weekly benefit amount.

In the instant case, the appellant was allowed benefits but they were reduced by 25% in accordance with Section 3 (h) and he appeals from that reduction.

Appellant worked for the Carroll County Newspaper in Berryville. In July of 1981 he consulted a doctor for what was diagnosed as "severe episodic hives." His condition was resistant to normal forms of treatment and he was eventually referred to an allergy specialist. In September the specialist wrote a letter asking that appellant be excused from work for one week to allow his allergic condition to improve. He was given the week off and his condition improved, but when he went back to work, the allergies and hives broke out again.

In October the specialist recommended that appellant seek employment in another company "where he will be exposed to less stress in an attempt to control his multiple allergies." The doctor also said appellant was exposed to certain chemicals in "his present employment which also dictates some change to control upper respiratory and skin allergies." Appellant quit his employment with the newspaper on October 10 and says since about the 20th or 25th of October his allergies have been relieved.

The referee and the board of review found that appellant did not quit work with good cause connected with his work. Prior to the 1981 amendment the phrase "good cause connected with the work" was of much less significance than it is now. Benefits were allowed if, after making reasonable efforts to preserve his job rights, one left his work for any of the reasons set out in the exceptions to Section 5 (a). Many of our appellate cases turned on factors other than good cause "connected with the work" and only a few cases directly considered that term.

Jackson v. *Daniels,* 269 Ark. 714, 600 S.W.2d 427 (Ark. App. 1980) is a case which consciously applied the phrase to the facts involved. The claimant was a sewing machine operator who quit her job because she thought too many items were being returned to her for repair of seams she had sewn. Her pay was based on the number of seams she sewed per hour; she said other operator's mistakes were being presented to her; and she was also having to resew seams previously approved by her supervisor. In finding the evidence established the claimant quit with good cause connected with the work, the court said:

> Although we would not approve benefits for an employee who left her work for general economic reasons not connected with some specific alleged unfairness perpetrated by her employer, an act by the employer which does economic injury to the employee may be "good cause connected with the work."

In *McKnight* v. *Daniels,* 268 Ark. 1056, 598 S.W.2d 436 (Ark. App. 1980), the claimant quit his work because of a "troublesome back problem." The court affirmed the board's finding that he did not have good cause connected with the work and said he quit "not for any good reason inherent in the work, but because he had a chronic back ailment that prevented him from continuing his work."

And in *Teel* v. *Daniels,* 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980), the claimant quit work primarily because the employer failed to provide drinking water and toilet facilities and, on the morning claimant quit, directed him to perform work without handrails on an "iced over" roof. The board had found that the claimant quit without good cause connected with the work and, in holding that decision not supported by substantial evidence, it is clear that the court was addressing the board's finding.

It is doubtful that other Arkansas cases contribute any more to the solution of our problem than these we have discussed. Nor have we found much help from cases of other jurisdictions. We think, however, that these cases furnish

some guidance as to what constitutes good cause "connected with the work."

In *Jackson* it seems to have something to do with "actions" and "fault" on the part of the employer. In *Teel* the conditions were either caused or could have been prevented by the employer. But in *McKnight* the employer had nothing to do with causing the claimant's problem.

Here, the appellant has multiple allergies, and the stress of the job and the chemicals in the newspaper's plant activated those allergies. This, however, is not the employer's fault and there is absolutely no evidence in the record that there is anything unusual, out of the ordinary, or wrong with the employer's plant or operation. On the other hand, there is a letter in the record from appellant's doctor which says his PRIST score on August 25, 1981, was 798 and that the normal PRIST score is 0 to 20. As the doctor says, "so you can see that Mr. Wilson is extremely allergic."

The board's decision that appellant did not quit his job for good cause connected with the work is supported by substantial evidence. He is entitled to benefits but, as the board held, those benefits must be reduced 25% because, under the facts of this case, Section 5 of Act 43 of 1981 requires it.

Affirmed.

COOPER and GLAZE, JJ., concur.

JAMES R. COOPER, Judge, concurring. I agree with the result reached by the majority in this case, for the reason that I believe that the Board's findings are supported by substantial evidence. The record indicates that appellant was highly allergic, much more so than the average person, and there is nothing in the record to indicate that his employment directly caused his condition.

However, I disagree with the reasoning used by the majority. I do not believe that any of the cases cited stand for the proposition that, in order for the employee to "quit for

good cause connected with the work", the employer must be at "fault" or that the employer must have taken some action which actually caused problems for the employee.

I am not ready to say that, where a physical ailment is directly caused by the work, even though the employee may have thought he could handle the job, and where the job was just as he expected it to be, the employee might not be able to "quit for good cause connected with the work".

Benny Jack BRAMLETT *v.* Sharon BRAMLETT

CA 81-246 636 S.W.2d 294

Court of Appeals of Arkansas
Opinion delivered June 23, 1982
[Rehearing denied August 18, 1982.]

Floyd Clardy of *Boswell & Smith, P.A.*, for appellant.

Hall, Tucker & Lovell, by: *John F. Lovell, Jr.*, for appellee.

JAMES R. COOPER, Judge. Appellant and appellee were divorced by the Saline County Chancery Court on August 14, 1981. The decree of divorce provided that appellee was to have the use of the parties' house until specific events occurred, and upon their occurrence the house was to be sold, the mortgage paid, and the balance divided equally. Appellant was ordered to make the mortgage payment on the house during the period of time in which appellee and the minor children occupy it. That payment is $197.00 per month. Appellant sought an order modifying the decree to provide that his equity in the house should be fixed as of the

date of the decree, and that he should receive credit for one-half of the mortgage payments made on the principal amount of the mortgage after the date of the divorce decree. The trial court declined to modify the decree. From that decision, comes this appeal.

Appellant argues that the equity in the parties' house should have been divided at the time of the divorce decree. Testimony was presented which indicated that the market value of the house was $28,500.00, and that the principal amount owed on the mortgage was $14,005.76. Appellant argued that his equity should have been set at $7,247.12. This argument is obviously without merit. Economic conditions might very well result in the house being sold in the future for more or less than its appraised value as of the date of the divorce decree. The date of the sale is uncertain and may be many years in the future. To fix appellant's share of the equity based on market value as of 1981 could very likely result in a highly unequal distribution of the net proceeds of the sale of the house, whenever it is sold.

Appellant further argued that, under the terms of the divorce decree, appellant will be making payments in the future which will serve to increase appellee's interest in the real property. His theory is that this is not an equal division of the marital property held as tenants by the entirety as required by *Warren* v. *Warren,* 273 Ark. 528, 623 S.W.2d 813 (1981).

In the *Warren* case, the Arkansas Supreme Court discussed the division of marital property in divorce cases. General marital property is divided pursuant to Ark. Stat. Ann. § 34-1214 (Supp. 1981), and the court can take into consideration eight variables in dividing the general marital property. Act 705 of 1979, codified as Ark. Stat. Ann. § 34-1214 (Supp. 1981), is not applicable to property owned as tenants by the entirety. The division of such property is controlled by Ark. Stat. Ann. § 34-1215 (Supp. 1981). *Warren, supra.*

Under Ark. Stat. Ann. § 34-1215 (Supp. 1981), the tenancy by the entirety was properly divided equally be-

tween appellant and appellee as tenants in common. The divorce decree provides that on sale of the house, the remaining mortgage will be paid from the proceeds and the balance divided equally. The only question is whether the appellant should receive credit for one-half of the mortgage payments made after the date of the divorce decree.

The chancellor stated that he had taken into consideration the fact that the husband would be making the entire mortgage payment, when the child support figure was set. The chancellor had the obligation to look at all the circumstances of the parties and to determine an amount which the appellant could pay and which would allow for reasonable support of the minor children. We cannot say that the court abused his discretion in requiring payment of the mortgage payment by the appellant, and in considering that factor when he set child support.

We note that the chancellor did not make specific findings as to the amount that he would have set for child support, but for the requirement that appellant make the mortgage payment. Detailed findings as to how the chancellor arrived at the child support figure, and the relationship between that figure and the requirement that one party pay the mortgage payment would be preferable in cases such as this. The chancellor obviously considered the arrangement concerning the mortgage payment when he set child support, and there is no appeal concerning the amount of child support.

Affirmed.

Elsie LEMAY *v.* V. L. BALDRIDGE

CA 81-425 635 S.W.2d 4

Court of Appeals of Arkansas
Opinion delivered June 23, 1982

Wilson, Grider & Castleman, by: *Murrey L. Grider,* for appellant.

No brief for appellee.

LAWSON CLONINGER, Judge. Appellant, Elsie Lemay, sought damages for one-half the value of timber cut by appellee, V. L. Baldridge, on a 200-acre tract of land owned by appellant as tenant by the entirety. Appellee had entered into a written contract with appellant's husband to cut the timber, but the contract was not signed by appellant. Appellant also sought triple damages under the provisions of Ark. Stat. Ann. § 50-105 (Repl. 1971). The jury found in favor of appellee, and appellant's only point for reversal charges that the trial court erred in failing to direct a verdict for her.

The action of the trial court is affirmed.

On April 12, 1978, appellee entered into the contract with appellant's husband. The contract provided that appellee was to have the right to cut all trees above twelve inches in diameter on the 200-acre tract, and Mr. Lemay was to receive one-fourth of the proceeds of the timber cut and sold. Cutting was sporadic because of a divorce action between the Lemays.

Evidence adduced by appellee was to the effect that he cut timber over a period of two years and paid Mr. Lemay $3,250 as his share; that the Lemays were living together as husband and wife when the contract was made and the cutting began; that appellant received one check as her proportionate share of the proceeds of sales made following the divorce; that the Lemays had talked about selling the timber at great length and that Mr. Lemay sold the timber with appellant's approval; that Mr. Lemay supported appellant during the marriage; and that appellee ceased cutting operations when a dispute arose.

Appellant sharply controverted the testimony presented by appellee, charging that appellant objected to the cutting of the timber when she first discovered it. Appellant testified that she never consented to the agreement and that appellee continued to cut timber after appellant registered an objection.

On appeal from the denial of a directed verdict this court must examine the evidence in the light most favorable to the party opposing the motion. *Missouri Pacific Railroad Company* v. *Purdy,* 263 Ark. 654, 567 S.W.2d 92 (1978). When the evidence is viewed in that light, it becomes apparent that there were issues of fact to be presented to the jury.

Appellant cites only two cases: *Foshee* v. *Murphy,* 267 Ark. 1047, 593 S.W.2d 486 (Ark. App. 1980) is cited for the rule that either spouse owning property by the entirety may transfer his or her interest, although it cannot thus affect the interest of the other; and *Gardner* v. *Bullard,* 241 Ark. 75, 406 S.W.2d 368 (1966) is cited to support the proposition that each party in a tenancy by the entirety is entitled to one-half

of the rents and profits during coverture. The jury was properly presented the issues relating to appellant's consent to the contract, acceptance of benefits under the contract, and ratification of the agreement made by her husband.

The judgment is affirmed.

Thelma FLETCHER et al *v.* P. D. DUKE
and MISSOURI PACIFIC RAILROAD COMPANY

CA 81-396 635 S.W.2d 2

Court of Appeals of Arkansas
Opinion delivered June 23, 1982

Joe Cambiano and *H. G. Foster,* for appellants.

Friday, Eldredge & Clark, by: *John Dewey Watson,* for appellees.

DONALD L. CORBIN, Judge. Appellants Thelma Fletcher, Richard Fletcher, and Joyce Wardlow brought this wrongful death action for damages arising out of a railway grade crossing accident in Conway, Arkansas, on November 25, 1979. The four cases were consolidated for trial at pretrial conference on March 16, 1981. On May 14, 1981, the jury was selected and seated. The trial court announced in chambers that the case would be bifurcated and the issue of liability would be tried first. Appellants objected, alleging surprise and prejudice to the appellants' case. The jury found in favor of the appellees, P. D. Duke and Missouri Pacific Railway Co. Appellants appeal, alleging that the trial court erred in refusing a new trial and trying the cases in a bifurcated manner. We affirm.

Bifurcation of a trial was an issue of first impression in Arkansas in the case of *Hunter* v. *McDaniel Brothers Construction Co.,* 274 Ark. 178, 623 S.W.2d 196 (1981), which concerned a collision between a pickup truck and a mobile home being pulled by a tractor. In *Hunter,* the Arkansas Supreme Court approved the bifurcation of the trial on the issues of liability and damages pursuant to ARCP 42 (b) which provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

In construing this section the court stated:

> The separation of the issue of liability from that relating to damages is an obvious use of Rule 42 (b). Logically, liability must be resolved by the factfinder before damages are considered.

In *Hunter,* the Supreme Court further recognized that a bifurcation should be used on a case by case basis, based upon the informed discretion of the court. Absent an abuse

of discretion, the decision of the trial judge will not be disturbed on appeal.

The justification seems to be that bifurcation of a trial on the issues of liability and damages results in judicial economy and shortened proceedings. In the case at bar, testimony as to damages would have consumed a great deal of time in view of the number of parties involved and was unnecessary until the issue of liability had been resolved.

A motion for a new trial is addressed to the sound discretion of the trial court and its refusal to grant the motion should not be reversed on appeal unless an abuse of discretion is shown. *Black* v. *Johnson,* 252 Ark. 889, 481 S.W.2d 701 (1972). We find no abuse of discretion. The record does not indicate that Thelma Fletcher or Joyce Wardlow were denied the right to testify, nor was there a proffer of their testimony, which is essential to preserve these points on appeal. In fact, in response to the trial court's question: "You were able to put on all your negligence testimony, were you not?", appellant responded: "Yes sir, and that testimony would not have changed."

The Arkansas Supreme Court in *Goodin* v. *Farmers Tractor & Equipment Co.*, 249 Ark. 30, 458 S.W.2d 419 (1970), held:

> If other evidence was actually excluded, there was no offer to show what the testimony would have been, and consequently we cannot say that prejudicial error occurred.

We affirm.

GLAZE, J., dissents.

Earl Edmond WALKER and Wilma Rose WALKER, His Wife *v.* WESTERN GAS COMPANY, SEECO, INC., and Arthur CURTIS, His Heirs and Assigns, and Mrs. Arthur CURTIS, His Wife

CA 81-408 635 S.W.2d 1

Court of Appeals of Arkansas
Opinion delivered June 23, 1982

Jack M. Lewis, for appellants.

Kathleen D. Burke and *Benny E. Swindell,* for appellees.

TOM GLAZE, Judge. In 1923, Arthur Curtis, the common source of title, conveyed by warranty deed the surface interest in the lands in question to H. D. Strickland and reserved all "coal and minerals." By subsequent conveyances, title to the surface estate vested in appellants. Arthur

Curtis never conveyed the mineral estate, and the appellees are the heirs-at-law of Arthur Curtis and their lessees.

The constructively severed mineral estate was never assessed in the name of Arthur Curtis as required by statute, nor was the mineral interest ever subjoined to the surface rights in the tax books of Johnson County, Arkansas. The mineral interest became delinquent for nonpayment of taxes for the year 1929 and was sold to John Rinke, owner of the surface interest, in 1930. The minerals were assessed in the name of John Rinke from 1930 through 1952, when they again became delinquent and were sold to Cecelia Vardaman. Vardaman received a clerk's tax deed in 1956 and conveyed the mineral interest to Rinke in 1957. By mesne conveyances from Rinke, appellants became the owners of the lands by regular warranty deed.

Appellants sued Western Gas Company and SEECO, Inc., lessees of the Arthur Curtis heirs, for an accounting of gas taken from lands of which appellants allege that they are the owners of the mineral interest by virtue of the tax deed. Appellants also sued the heirs of Arthur Curtis, in whose name the mineral interest was reserved and severed, alleging that they were barred from asserting any claims to the mineral interest because of the statute of limitations. Ark. Stat. Ann. § 34-1419 (Repl. 1962).

Appellees, heirs of Arthur Curtis, counterclaimed for confirmation of title to the mineral interest, alleging the original tax sale was void because the mineral interest was not subjoined with the surface interest on the tax books at the time of the tax sale.

The court dismissed appellants' petition for an accounting for lack of equity and held the two year statute of limitations on filing suit to set aside tax deeds did not apply because neither the appellants nor the appellees, heirs of Arthur Curtis, had been in actual possession of the minerals.

Appellants argue on appeal that the two year statute of limitations contained in Ark. Stat. Ann. § 34-1419 runs against a void sale as well as voidable sales or regular sales.

Their reliance on *Honeycutt* v. *Sherrill,* 207 Ark. 206, 179 S.W.2d 693 (1944), is misplaced since that case did not involve severed mineral rights whatsoever. In *Honeycutt,* the appellant obtained a donation certificate for the entire estate and immediately went into possession and occupied the lands adversely for more than two years. Under those facts, the court held title became vested in appellant.

In the instant case, we are dealing with a constructively severed mineral estate and no one has been in actual possession of the minerals. In fact, appellants stipulated that they are not and never were in possession of the minerals. To be in possession of constructively severed minerals, actual production is required. *Skelly Oil Company* v. *Johnson,* 209 Ark. 1107, 194 S.W.2d 425 (1946). The only way the statute of limitations will run against the owner of the mineral rights is for the owner of the surface rights or some other person to take actual possession of the minerals by opening mines and operating same. *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S.W.2d 390 (1929); *Adams* v. *Bruder,* 275 Ark. 16, 627 S.W.2d 12 (1982). Appellants clearly have not demonstrated the facts required to vest title in themselves under § 34-1419.

This case is controlled by the holding in *Adams* v. *Bruder, supra.* In *Adams,* the court held that the original tax sale of the mineral rights was void where the mineral rights were improperly listed, *i.e.,* they were not subjoined to the land taxes, and they were listed at random in a different section of the land tax record book. The procedure followed for assessment in the instant case appears to be almost identical to that described in *Adams.* The county assessor testified that mineral interests were listed separately from surface interests. Some of the minerals were listed by section, township and range, and others were not. He testified that he knew two years ago that this was an improper listing of mineral interests, but that only three counties in the state were listing mineral interests according to the statutes.

The law in Arkansas has long been established that for a valid mineral assessment the mineral estate listing must be subjoined to the surface estate. *Adams* v. *Bruder, supra; Sorkin* v. *Myers,* 216 Ark. 908, 227 S.W.2d 958 (1950). Here,

the mineral rights were improperly listed and the original tax sale was void.

There was no error in the trial court and we affirm.

Affirmed.

GEURIN CONTRACTORS, INC. *v.* BITUMINOUS CASUALTY CORPORATION

CA 81-382 636 S.W.2d 638

Court of Appeals of Arkansas
Opinion delivered June 23, 1982
[Supplemental Opinion on Denial of Rehearing August 25, 1982.*]

*636 S.W.2d 645.

Highsmith, Gregg, Hart & Farris, by: *John C. Gregg,* for appellant.

Bailey, Trimble, Pence & Sellars, by: *Rick Sellars,* for appellee.

LAWSON CLONINGER, Judge. On February 22, 1978, John Reaves filed suit against Geurin Contractors for the alleged negligent performance of a contract between Geurin and the Arkansas State Highway Department for the paving of Highway No. 67 in Jackson County. Mr. Reaves alleged that because the road was closed in front of his store, he was damaged in the amount of $22,227.00 in lost profits. Geurin Contractors notified its insurance carrier, Bituminous Casualty Corporation, of the litigation and demanded a defense to the civil action. Bituminous notified Geurin that it would provide a defense to the cause of action under a reservation of rights and advised appellant to employ its own attorney at its own expense in the defense of the lawsuit. Bituminous, after trial but before entry of the judgment, advised Geurin that no coverage was available to it under the policy and that Bituminous would take no further action or provide any further legal defense. Judgment was entered against Geurin for $22,227.00. Geurin appealed the decision and the verdict was affirmed on October 15, 1980.

On April 7, 1980, Geurin sued on the policy of insurance seeking reimbursement from Bituminous for the amount spent in satisfaction of the judgment, payment of costs, and attorneys' fees, plus penalty and costs. On May 7, 1981, the trial court dismissed Geurin's complaint with prejudice. Geurin now brings this appeal.

This case is primarily one of interpretation of an insurance policy. Appellant's sole point for reversal is that the circuit court erred in dismissing the complaint of Geurin because it misconstrued the insurance policy.

The construction and legal effect of written contracts are matters to be determined by the court, not by the jury, except when the meaning of the language depends upon disputed extrinsic evidence. *Southall* v. *Farm Bureau Mutual Insurance Co.,* 276 Ark. 58, 632 S.W.2d 420 (1982). It

is a question of law and not one of fact. *Arkansas Rock and Gravel Co.* v. *Chris-T-Emulsion Co.,* 259 Ark. 807, 536 S.W.2d 724 (1976). Under Arkansas law insurance contract language is to be given its common and ordinary meaning under the situation and words of limitation are to be construed strictly against the insurer. *Courson* v. *Maryland Casualty Co.,* 475 F.2d 1030 (8th Cir. 1973). Courts are required to strictly interpret exclusions to insurance coverage and to resolve all reasonable doubt in favor of an insured who had no part in the preparation of the contract. *State Farm Mutual Automobile Insurance Co.* v. *Trailer,* 263 Ark. 92, 562 S.W.2d 595 (1978). Insurance policies should always be construed most favorably to the insured and against the insurer. *Ritchie Grocery Co.* v. *Aetna Casualty Insurance Co.,* 425 F.2d 499 (8th Cir. 1970).

Appellant first contends that the situation which resulted in the claim by John Reaves constituted an "occurrence" within the meaning of the policy of insurance. Under the insurance policy, "occurrence" is defined as:

> An accident, including continuous repeated exposure to conditions, which results in bodily injury or property damage, neither expected nor intended from the standpoint of insured.

In *Ohio Casualty Insurance Co.* v. *Terrace Enterprises, Inc.,* 260 N.W.2d 450 (Minn. 1977), the Supreme Court of Minnesota held that the settling of an apartment building caused by Terrace Enterprises' failure to backfill adequately and to adequately protect the soil and concrete from the cold was an "occurrence" within the meaning of the policy. The insurance policy provided by Ohio Casualty Co. contained essentially the same definition for "occurrence" as is provided for in the policy by Bituminous Casualty Corporation. Similarly, in *Grand River Lime Co.* v. *Ohio Casualty Insurance Co.,* 289 N.E.2d 360 (Ohio 1972) the Court of Appeals of Ohio held that alleged nuisance and trespass by damage-causing emission of industrial wastes into the air in the course of insured's manufacturing operation could

constitute an "occurrence" within the meaning of the policy, but knowing and intentional malfeasance in such emission of wastes could not. The court reversed a summary judgment in favor of the insurer, Ohio Casualty Insurance Company. The court went on to say that the word "occurrence" is much broader than the term "accident". Furthermore, the court held that the word "occurrence" should not be interpreted in a sudden or momentary sense, but permit such term to encompass a period of time.

In another case, *Elco Industries, Inc.* v. *Liberty Mutual Insurance Co.*, 414 N.E.2d 41 (Ill. 1980), the Appellate Court of Illinois held that the installation of defective governor-regulating pins installed into engines by the insured, necessitating their removal and replacement, was an "occurrence" under the terms of the policy. The Court of Appeals of Washington held in *Gruol Construction Co.* v. *Insurance Co. of North America,* 524 P.2d 427 (Wash. 1974) that substantial evidence supported the trial court's finding that damage to a building caused by dry rot which resulted from the insured's action of piling dirt against boxsills of the apartment building by backfilling during construction came within the definition of "occurrence" as used in the policy.

There is one Arkansas case which construes the meaning of "occurrence", *Continental Insurance Co.* v. *Hodges,* 259 Ark. 541, 534 S.W.2d 764 (1976). In that case the sole issue on appeal was whether Continental Insurance Company was obligated to defend the Hodgeses in an action brought against them for allegedly casting surface water upon their neighbor's property. The word "occurrence" was defined in the policy as:

> An accident . . . which results . . . in property damage neither expected nor intended from the standpoint of the insured.

The trial court held in favor of the Hodgeses. On appeal, the Arkansas Supreme Court reversed the trial

judge's decision. The court held that the damages alleged could not have taken place without foresight or expectation and did not involve any negligence on the part of appellees. Nor could it be said that the damages alleged proceeded from an unknown cause or were an unusual effect of a known cause within the meaning of "accident." Rather, the court recognized that the complaint stated that appellees, after pumping the water onto their lands for use of irrigating the rice crops, drained it into a ditch crossing their land and cast it upon the lands of their neighbor. It followed that the trial court erred in holding that appellees' conduct constituted "an accident" within any reasonable definition of the word.

In applying the above stated rules to the facts of this case, we hold that the damage which resulted in the John Reaves claim was an "occurrence" within the meaning of the policy. The key issue in determining whether an "occurrence" is within the coverage of an insurance policy such as this is whether the occurrence was expected or intended by the insured. See *Continental Insurance Co., supra.* In the instant case, Geurin Contractors began to work on the portion of Highway 384 in front of John Reaves' store on July 13, 1977. Geurin specifically chose to do the work during the summer months to avoid potential wet weather problems. They first began grading operations on the road. They encountered soil cement during the grading operations and the highway department made the decision that the soil cement had to be removed. Geurin began removing the soil cement at the direction of the highway department. When the soil cement was removed it was discovered that the underlying soil was unstable and not suitable for a road bed. The highway department then made the decision that the unstable soil would have to be removed and refilled with stable material. This is called undercutting and consists of a contractor digging out the unstable soil and moving it, then refilling the area with the dry soil sufficient to stabilize the road area. During these operations, the road was kept open by closing one-half of the road and leaving the other half open.

The undercut area of Highway 384 was partially backfilled by Friday evening, July 15. On Friday night a

heavy rain occurred which filled the undercut area with water. The road was closed the following day with the approval of the highway department. It rained every day thereafter through Thursday, July 21. The road was closed through July 22. During this period, there was evidence to show that attempts were made to provide access to Reaves' store by Geurin and the highway department.

Based upon the above evidence, we hold that the occurrence which brought about the damage to Reaves' store was not expected nor intended by the insured and comes within the purview of an occurrence within the meaning of the policy.

Appellant next argues that the court erred in holding that even if there was coverage, these damages were specifically excluded from coverage under the policy of insurance. The policy provides in pertinent part:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . the property damage to which this insurance applies, caused by an occurrence.

Property damage in the policy is defined as:

> (1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

In *Elco Industries, Inc.* v. *Liberty Mutual, supra,* the court held that sums which the insured paid in settlement of a buyer's action after the buyer was forced to recall engines and remove defective regulating pins were the result of

property damage caused by an occurrence as defined by the policy, and, therefore, the damage was covered by the policy. The court recognized that a majority position holds that "property damage" includes tangible property which has been diminished in value or made useless irrespective of any actual physical injury to the tangible property. Furthermore, in *Elco,* the policy defined "property damage" as injury or destruction of tangible property.

In the instant case, there is a much broader definition of "property damage" than there was in *Elco.* The policy defines "property damage" as physical injury to or destruction of tangible property, *including* loss of use of the property. Furthermore, it defines "property damage" as loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence. As was stated earlier, the damage which is the subject of this lawsuit comes within the definition of "occurrence" within the meaning of the policy. Therefore, we find that it also comes within the meaning of "property damage" as defined in the policy.

The final exclusion relied upon by Bituminous is exclusion (m) which states in pertinent part:

> This insurance does not apply:
> (m) To loss of use of tangible property which has not been physically injured or destroyed resulting from (1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, ...

Appellee argues that Geurin delayed in performing its highway contract which caused customers to be unable to reach Reaves' store. Furthermore, appellee argues that there is ample evidence in the record to show that Geurin was performing its contract negligently and that this evidence alone is sufficient to raise the applicability of exclusion (m). We find nothing in exclusion (m) to show that negligent performance of the contract makes the exclusion operative. The exclusion only becomes operative if there has been a

delay in or lack of performance by the insured. Appellee makes the bare statement that Geurin delayed in performing its contract with the highway department. There was no evidence in the record to support such an assertion. In fact, all of the evidence indicates that Geurin was doing everything it possibly could to meet its obligations under the contract with the highway department. In fact, most of Geurin's work during the period in question was done at the express direction of the highway department, including the closing of Highway 384 in front of Reaves' store. Therefore, we hold that the exclusion is inapplicable to the facts of this case. Insurance policies should always be construed most favorably to the insured and against the insurer. *Ritchie Grocery Co., supra.* Courts are required to strictly interpret exclusions to insurance coverage and to resolve all reasonable doubt in favor of the insured. *State Farm Mutual Automobile Insurance Co., supra.* There was never any allegation of delay of performance on the part of Geurin in the John Reaves claim. In fact, the claim was tried on a pure negligence theory to the jury and there was no evidence as to any breach of contract or delay of performance in that proceeding. In this proceeding, there was also no evidence presented to show that Geurin delayed in its performance of its contract with the highway department. We hold that the exclusion is inapplicable.

This case is reversed and remanded to the trial court with directions to set a reasonable attorney's fee for Geurin's attorneys for the defense of the John Reaves claim and to enter judgment for Geurin.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I respectfully dissent from the majority's decision and I will discuss each point in the same order as the majority considered it.

I.

THE JOHN REAVES CLAIM AND RESULTING LITIGATION IN JACKSON COUNTY CIRCUIT

COURT CONSTITUTED AN OCCURRENCE WITHIN THE MEANING OF THE POLICY OF INSURANCE.

The majority held that the damage suffered by John Reaves was an "occurrence" within the meaning of the policy because it was neither expected nor intended by the insured, Geurin Contractors. The insurance policy defined "occurrence" as follows:

> "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The key word in the definition above is "accident." Although the insurance policy does not define that word, the Court in *Continental Insurance Company* v. *Hodges,* 259 Ark. 541, 534 S.W.2d 764 (1976), defined it as follows:

> The definition that has usually been adopted by the courts is that *an accident is an event that takes place without one's foresight or expectation — an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.* [Citing 44 Am. Jur. 2d *Insurance,* § 1219 (1969)]. [Emphasis supplied.]

Consideration of the meaning of "occurrence" is incomplete without a concurrent consideration of the meaning of "accident." Whether an event constitutes an "accident" is determined more by the effect or result of the event, not by the intent of the insured. Thus, although Geurin did not intend to damage Mr. Reaves' business, the precise damage which he suffered, *viz.* loss of business, was foreseeable in view of the relative location of the store to the highway construction.

The majority outlined the following so-called "unexpected" and "unintended" events which it opines consti-

tuted an "occurrence" and resulted in the store's becoming inaccessible to Reaves' customers: (1) finding soil cement during the grading operations; (2) finding the underlying soil to be unstable and not suitable for a road bed; (3) getting rain during the course of the construction.

Geurin's contract with the state highway department required him to remove the old highway surface and to replace it with a new surface. The contract also required the company to provide and maintain temporary access to businesses and parking lots along the construction route. The problems which Geurin encountered delayed completion of the job. Mr. Reaves was damaged by Geurin's failure to provide adequate access to the grocery store. Geurin maintains that he neither intended nor expected the resulting damage and is therefore within the terms of the policy. Intention, however, is not the controlling factor in applying the policy provision. If the occurrence were an *accident* which resulted in property damage that was either expected or intended by the insured, the provision applies and there is no coverage. The real question here is whether the delays and resulting loss to Mr. Reaves were caused by events which were normal, foreseeable and to be anticipated by a construction company. Rain is not so unlikely an event that it is unexpected by a highway contractor. Although Geurin may not, in fact, have expected rain, it is reasonably foreseeable in Arkansas that at some time during a construction project rain will occur. Within the definition of "accident" provided by this Court, rain which could delay a construction project is neither an event that proceeds from an unknown cause nor an unusual effect of a known cause, and therefore unexpected.

No evidence was presented to indicate that finding a spongy subsurface was unusual or unexpected. In fact, the testimony of Mr. W. A. Bigham, former Superintendent for Public Works for the City of Newport, was to the contrary. Mr. Bigham testified that he was not surprised that the subsurface was "wet and mucky" because he was familiar with it. He explained that it is in a low lying, easily flooded

area, and "in fact, the City of Newport is kind of in a duck nest, easy to flood anywhere."

Given the wording of the contract provision which defines "occurrence" and the testimony below, the evidence is overwhelmingly in support of the appellee's position. The facts indicate that the circumstances which led to Mr. Reaves' lost profits were foreseeable and were not unusual for one in Geurin's position.

The majority cites cases from other jurisdictions which have absolutely no application to or bearing upon the case at bar. For example, in *Ohio Casualty Insurance Company* v. *Terrace Enterprises, Inc.*, 260 N.W.2d 450 (Minn. 1977), the Court determined that faulty construction of an apartment building was an "occurrence" under the terms of the policy. The damage which resulted when the building settled was the direct result of the work the contractor performed in constructing the apartments. The case at bar would only be comparable if the damage had been to the highway which the contractor built rather than the lost profits Mr. Reaves suffered in his business.

In *Grand River Lime Company* v. *Ohio Casualty Insurance Company*, 289 N.E.2d 360 (Ohio Ct. App. 1972), a class action suit alleging damage and personal injury to some two hundred plaintiffs, the primary question was whether the insurer was obligated to defend the insured. The Court held the company not liable to defend against allegations of "knowledge and willful intent of the defendant" because the definition of "occurrence" in the policy applied only to accidents "neither expected nor intended by the insured." However, allegations of nuisance, trespass or negligence, according to the Court, fell within the policy provisions. Unlike the case of *Grand River Lime Company*, here appellee does not allege that Geurin willfully or intentionally caused damage to Mr. Reaves' property. Rather, appellee contended that the resultant damage was not beyond the foresight or expectation of Geurin. The policy provision in issue in *Grand River Lime Company*

simply is not the same as the one under consideration here. The Ohio case is so far off point on its facts that one must stretch his imagination to compare that Court's holding and facts to the instant case.

In *Elco Industries, Inc.* v. *Liberty Mutual Insurance Company,* 90 Ill. App. 3d 1106, 414 N.E.2d 41 (1980), cited by the majority, manufactured goods were recalled because of a defective component part made by the insured. The insured paid a settlement to the buyer because the insured's failure to manufacture the part according to the buyer's specifications resulted in the buyer's having to remove, repair and replace the parts. The insurance company maintained that the installation of defective parts was not an "occurrence" under the terms of the policy. The Court held that there *was* an "occurrence," pointing out "the word 'accident' should not be construed to exclude claims involving negligence or breach of warranty; otherwise the insured is afforded little or no protection." *Id.* at 44. Actually, the holding in *Elco Industries* is compatible with appellee's contentions here. Appellee does not contend that claims involving negligence which result in an "occurrence" ought to be excluded from coverage, but only that there was no "occurrence" under the terms of the policy in the instant case.

The majority also cites *Gruol Construction Company* v. *Insurance Company of North America,* 524 P.2d 427 (Wash. App. 1974), wherein the Court found that the damage caused by dry rot in an apartment building was not foreseeable. The Court indicated that the insurer would not have been liable were the damage "not unusual, unexpected or unforeseen and, therefore, not an 'accident.'" The facts in *Gruol* are easily distinguishable from the instant case. Here, the damage caused by the store's being inaccessible, *i.e.*, loss of business, was foreseeable.

Reviewing the cases from other states which the majority cites, I do not find them persuasive in holding that there was an "occurrence" under the terms of the policy. Although they do interpret the word "occurrence," the fact

situations are so different that the cases are inapposite to the facts and issues before us.

II.

THE JOHN REAVES CLAIM AND RESULTING LITIGATION IN JACKSON COUNTY CIRCUIT COURT WAS NOT SPECIFICALLY EXCLUDED FROM COVERAGE UNDER THE POLICY.

If there was no occurrence under the terms of the policy, then by the terms of the policy, the appellee is not obligated to pay. The policy provides coverage for property damage under Coverage B, which reads in pertinent part:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence.

Without an "occurrence" no property damage is covered by the insurance policy.

Even if there was an "occurrence" as the majority held, the damages which Mr. Reaves suffered are excluded by other policy provisions. The majority strained to find "property damage" under the terms of the policy, even though the damage was not physical damage to tangible property. Instead, the damages here involved lost profits due to the inaccessibility by customers to Mr. Reaves' store.

By definition, "property damage" under the policy in question is "[p]hysical injury to or destruction of *tangible* property . . . including the loss of use thereof at any time resulting therefrom." The only allegation of destruction of tangible property was the claim for meats and produce which spoiled because customers did not come to the store. Mr. Reaves' premises were not physically damaged.

"Property damage" is also defined in the policy as "loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence . . . . " No evidence exists that Mr. Reaves was unable to use his store during the period of construction or that he was forced to close as a result of an inability to use his property.

The only element of damages submitted to the jury when Mr. Reaves brought action against Geurin was for loss of profits, an intangible property right. Appellant cites *Hamilton Die Cast, Inc.* v. *United States Fidelity and Guaranty Company,* 508 F.2d 417 (7th Cir. 1975), to support the contention that "actual injury or damage . . . to tangible property resulting in loss of *intangibles*" is not excluded under the terms of the policy. Yet, in the case at bar, no physical injury or damage occurred to Mr. Reaves' store; the injury was to his pocketbook. In the *Hamilton Die Cast* case, the Court found that the losses which Midland claimed were intangible property rights, "loss of investment, loss of anticipated profits, and loss of goodwill," *id.* at 419, exactly the types of losses which Mr. Reaves claimed. Reaves maintained that he lost profits from his business while his customers could not easily get to his store and that he had to spend sums of money to retrieve his steady customers whom he had lost to his competition while the road construction was underway. On these facts, I fail to see how the majority could find that "property damage" occurred within the terms of the insurance policy.

The last exclusion which the majority held inapplicable to the case at bar is paragraph (m) of the insurance policy. It provides that the policy does not cover losses of tangible property not physically injured or destroyed resulting from a delay in or lack of performance by the insured. The exclusion is clear in its terms. Although insurance policies are to be construed most favorably to the insured and against the insurer, *Ritchie Grocer Company* v. *Aetna Casualty & Surety Company,* 426 F.2d 499 (8th Cir. 1970), and all reasonable doubts are to be resolved in

favor of an insured who had no part in preparing the contract, *State Farm Mutual Automobile Insurance Company* v. *Traylor,* 263 Ark. 92, 562 S.W.2d 595 (1978), when language is clear and unambiguous, the Court is bound to enforce the contract. In *Southern Farm Bureau Casualty Insurance Company* v. *Williams,* 260 Ark. 659, 543 S.W.2d 467 (1976), the Arkansas Supreme Court said:

> It is unnecessary to resort to rules of construction in order to ascertain the meaning of an insurance policy when no ambiguity exists. . . . The terms of an insurance contract are not to be rewritten under the rule of strict construction against the company issuing it so as to bind the insurer to a risk which is plainly excluded and for which it was not paid.

Id. at 664, 543 S.W.2d at 470.

The testimony at trial was to the effect that Mr. Reaves' losses were the result of the time involved in resurfacing the highway. The reasons for the delay in completing the job were finding an unstable subsurface and having rain for several days in a row, which prevented the workers from proceeding. The language in exclusion (m) does not require that a delay be intentional — only that a delay occur. It is not disputed that appellant's job performance was delayed, and therefore the insurance coverage was excludable on these facts.

The trial court's judgment should not be reversed.

Supplemental Opinion on Denial of Rehearing
delivered August 25, 1982

636 S.W.2d 645

LAWSON CLONINGER, Judge. Appellee, Bituminous Casualty Corporation, filed a petition for rehearing in this case requesting clarification of this court's decision to determine appellee's obligation to appellant. We remand the case to the trial court with directions to enter judgment for Geurin for $22,227.00, the amount of the Reaves judg-

ment, and directing the trial judge to (1) determine whether Geurin is entitled to an attorney's fee in the defense of the Reaves claim, and to fix the amount of the fee, if any, (2) fix a reasonable attorney's fee for Geurin in the appeal of the Reaves case, the trial of the instant case, and the appeal in the instant case, and (3) fix the amount of the costs, expenses, and interest due Geurin in both trials and both appeals.

GLAZE, J., dissents.

TOM GLAZE, Judge, dissenting. I dissent. Since I disagree that appellant is entitled to damages under the insurance policy, I necessarily disagree that it is entitled to attorneys' fees.

Joe THOMAS *v.* INTERNATIONAL HARVESTER CREDIT CORPORATION and CARCO INTERNATIONAL, INC.

CA 81-384 636 S.W.2d 296

Court of Appeals of Arkansas
Opinion delivered June 30, 1982
[Rehearing denied August 18, 1982.]

[redacted]

Hal W. Davis of *Walters, Davis & Cox,* for appellant.

James M. McHaney, Jr. of *Owens, McHaney & Calhoun,* for appellee International Harvester Credit Corp.

Rex M. Terry of *Hardin, Jesson & Dawson,* for appellee Carco International, Inc.

MELVIN MAYFIELD, Chief Judge. This case involves the Uniform Commercial Code's provision about a secured party's right to dispose of collateral after default.

In 1978 the appellant, Joe Thomas, bought four items of equipment from the appellee, Carco International, Inc., an International Harvester franchise dealer in Fort Smith. Three items, a bulldozer, a dump truck, and a backhoe-loader, were financed by security agreements which were assigned by Carco to the other appellee, International Harvester Credit Corporation. The security agreement on the fourth item, a three-axle trailer, was assigned to the First National Bank of Fort Smith who was never a party in this matter.

During the year 1980 Thomas became delinquent in his payments on all four items and on July 29, by agreement with a representative of International's credit company, the equipment was placed on Carco's lot to expose it to prospective purchasers in furtherance of the attempt Thomas was making to sell it. Two days later, Carco wrote Thomas that there would be a "public sale" of the equipment at Carco's place of business at 3:00 p.m. on August 15, 1980, and on August 4 a Fort Smith newspaper contained an ad to the same effect.

Thomas testified he went to Carco's to see about this and was told by Mr. Carl M. Corley that his son "jumped the

gun on this thing" and there would be no sale on the 15th. Within a few days, however, Thomas received a letter from Carco, signed by Carl M. Corley's son, saying that Carco had purchased the equipment "as of August 18, 1980."

The two different dates resulted from the fact that International's credit company sent Thomas notice, dated August 7, that unless the equipment "has been redeemed on or before 8/18/80 the same will be sold at private sale." Thomas testified this letter was not actually received by him until after August 18 but does not deny that it was mailed on the 7th. From the evidence at the trial we know that Carco paid off the amounts due by Thomas and took reassignments of the security agreements from the credit corporation and the bank. We also know that the dump truck was still at Carco's on January 28, 1981, and on that date Thomas filed a complaint in chancery court seeking to enjoin Carco from disposing of it and for damages for disposing of the other equipment. Apparently the injunction was not granted or not pressed and only the damage issues were eventually tried. The trial court found that the equipment was disposed of in a commercially reasonable manner; that there was nothing due Thomas because the equipment failed to sell for enough to pay what was owed on it; and the complaint against Carco and International's credit company was dismissed. We agree as to the credit company. We remand as to Carco.

Many issues are raised and this case, like the Commercial Code, is difficult to embrace. It has been said that although the Code places a positive duty on the secured party to act, with respect to every aspect of disposition, in a commercially reasonable manner, the specifics of this duty cannot be meaningfully described except in terms of particular fact situations. *Chittenden Trust Co.* v. *Maryanski,* 415 A.2d 206 (Vt. 1980). In *Farmers Equipment Co.* v. *Miller,* 252 Ark. 1092, 482 S.W.2d 805 (1972), our Supreme Court said: "We cannot say that there was not a jury question as to appellant's good faith and the commercial reasonableness of every aspect of the disposition of the collateral." Without belaboring the issue, we affirm the finding in the instant case that the equipment was disposed of in a commercially

reasonable manner because we think the question was one of fact and we cannot say that the chancellor's finding was clearly against the preponderance of the evidence. See Civil Procedure Rule 52 (a).

After there has been a commercially reasonable disposition of collateral, Ark. Stat. Ann. § 85-9-504 (Supp. 1981) provides that the proceeds of the disposition (as far as is involved here) shall be applied (1) to the reasonable expenses of retaking, holding, preparing for sale and sale; (2) to the satisfaction of the indebtedness secured by the security interest under which the disposition is made; and (3) any surplus to be returned to the debtor. The chancellor found there was no surplus to be returned in this case but we do not believe that finding was correct.

In an attempt to make the basis of our determination clear, we first point out that we do not think Carco purchased the equipment at any sale. Ark. Stat. Ann. § 85-9-504 (3) provides that the secured party may not buy at a private sale unless the collateral "is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations." *Norton* v. *National Bank of Commerce,* 240 Ark. 143, 398 S.W.2d 538 (1966), held that a used automobile did not come within the term "a type customarily sold on a recognized market" and in *Carter* v. *Ryburn Ford Sales,* 248 Ark. 236, 451 S.W.2d 199 (1970), the court said a NADA book was not a "widely distributed standard price quotation" since the proof showed it to be merely a guide to the price of a vehicle of that year, make and model in an average condition. There is nothing in the record in the instant case from which we can hold that the equipment involved here could have been legally purchased by Carco at a private sale.

With regard to the August 15 public sale, the trial court said:

> No bid was made by any prospective purchaser to purchase all four items of equipment, and the defendant, Carco International, Inc., therefore elected to purchase the equipment as a unit, *and the sale was*

> *completed on August 18, 1980,* for the full amount of the indebtedness on all four items of equipment which are the subject matter of this action. (Emphasis supplied.)

Carco's president, Mr. Corley, testified that because International's credit company gave notice for a private sale on or after August 18, 1980, the bidders at the public sale on August 15 were told "before they ever made their bids that it would not be consummated — or the bids would not be accepted until the 18th." Also, Mr. Corley wrote Mr. Thomas and said that Carco had purchased the equipment "as of August 18, 1980."

This evidence shows that while bids were taken on August 15, there was no sale until a bid was accepted on the 18th. So we find that Carco could not have legally purchased the equipment at the private sale on the 18th and did not purchase the equipment at a public sale on the 15th. If the finding of the chancellor is contrary, we hold it clearly against the preponderance of the evidence.

We say "if the finding of the chancellor is contrary" because we are not sure that it is. In determining that there was no surplus to be returned to Thomas, the chancellor made specific findings as to the amount of the indebtedness on each item of equipment and the amount of expenses allowed Carco for retaking, holding, preparing for sale and selling each item. Those amounts were then compared with the amounts for which Carco eventually sold each item. In other words, these findings by the chancellor would not be necessary if Carco purchased the equipment at a public sale on August 15.

In any event, we think the chancellor's finding on Carco's 15% "handling charge" was clearly erroneous. This was described by Carco's president as the "ordinary cost of doing business." His father said it includes storage and salesman's commission and expenses.

The appellant cites the case of *Cherner* v. *Lawson,* 162 A.2d 492 (D.C. 1960), where the court in refusing to approve

a 15% "cost of doing business" charge said that a defaulting purchaser was not "liable for expenses which are incurred incident to doing business and which would have been incurred by the vendor if no default in this particular sale had ever occurred."

We agree with that reasoning. In the instant case the backhoe was resold by Carco on August 20, 1980, the dozer on August 25, and the trailer on October 30. When we consider that Thomas put the equipment on Carco's lot at his own expense; the short period of time before these three items were resold; and the lack of any detailed information relating expenses of those items to the general 15% "handling charge"; we think the charge should not have been allowed. The situation as to the truck is different. It was not resold until April of 1981. We do not reverse the 15% handling charge as to that item and base our action on our finding that we cannot say that charge in this case is clearly against the preponderance of the evidence.

The handling charge allowed for the three items totalled $4,761.83. Each of these items sold, even with the handling charge included, for more than the indebtedness against them. There was, however, a loss on the truck. The total loss as computed by the chancellor was $359.78. We subtract that amount from $4,761.83 and hold that Thomas is entitled to judgment against Carco for the difference of $4,402.05 plus cost of this appeal and interest of 6% from trial and 10% from entry of judgment on remand.

We have not overlooked appellant's argument that each item of equipment should be considered separately and the loss on the truck should not be offset against the gain on the other items. We think it enough to say that we do not agree under all the facts and circumstances of this case.

Remanded for judgment in keeping with this opinion. Affirmed as to International Harvester Credit Corporation.

COOPER, J., concurs.

Michael V. BRATCHER *v.* Gwendolyn F. BRATCHER

CA 81-407 635 S.W.2d 278

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

James P. Massie, for appellant.

J. R. Buzbee, for appellee.

MELVIN MAYFIELD, Chief Judge: This is an appeal by Michael Bratcher from a divorce decree. The trial court found the parties owned their home as an estate by the entirety and gave appellee and the parties' minor child possession of the house with appellee being responsible for the mortgage payments and for the taxes and insurance.

We understand that the appellant contends the trial court erred in failing to order a sale of the home, although we are not sure of the basis of that contention. His one-page argument says the home is "marital property" and under Ark. Stat. Ann. § 34-1214 (Supp. 1981) "it is mandated that this property be distributed at the time of the divorce." In support of this assertion the appellant cites *Warren* v. *Warren,* 273 Ark. 528, 623 S.W.2d 813 (1981) and *Bachman* v. *Bachman,* 274 Ark. 23, 621 S.W.2d 701 (1981). But *Warren* states, "We hold that Act 705 of 1979, § 34-1214 (Supp. 1979), is not applicable to property owned as tenants by the entirety." 273 Ark. at 534. And *Bachman* did not even involve an estate by the entirety.

In *Russell* v. *Russell,* 275 Ark. 193, 628 S.W.2d 315

(1982), the court said:

> Since the residence was owned by both parties as an estate by the entirety, it is not marital property which must be divided pursuant to Ark. Stat. Ann. § 34-1214. *Warren* v. *Warren,* 273 Ark. 528, 623 S.W.2d 813 (1981). The award of possession of the home to Mrs. Russell as provided in the decree is a reasonable application of a well recognized equitable remedy and is consistent with the Appellant's request at trial. *Schaefer* v. *Schaefer,* 235 Ark. 870, 362 S.W.2d 444 (1962); *Fitzgerald* v. *Fitzgerald,* 227 Ark. 1063, 303 S.W.2d 576 (1975); see also *Stevens* v. *Stevens,* 271 Ark. 248, 608 S.W.2d 17 (1980).

The appellant is mistaken in his contention that Ark. Stat. Ann. § 34-1214 required that the home owned as an estate by the entirety be sold at the time of the divorce. If he contends that the *evidence does not support* the chancellor's decision to award possession to the appellee and their minor child, we do not agree.

Affirmed.

Dr. Jerry PARK, Jerry ODOM, d/b/a CONWAY TRACTOR & EQUIPMENT, INC. *v.* William L. BURGE et ux

CA 81-439 635 S.W.2d 279

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Brazil, Roberts & Clawson, by: *Charles E. Clawson, Jr.,* for appellants.

Don Bruno, for appellees.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a jury verdict in favor of appellees. Appellants allege the trial court erred in failing to direct a verdict in their favor based upon the Statute of Frauds and that the jury's verdict is not supported by substantial evidence. We find no error and we affirm.

Appellees were the owners of the Conway Small Engine Company. In February of 1978, appellants purchased the business and changed its name. One of the larger suppliers of the business was the John Deere Company with whom appellants were desirous of but unable to secure credit. The appellees contend that appellees, appellants, and John Deere orally agreed that John Deere would continue to furnish equipment to appellants and that these purchases would be billed to appellees' existing account; appellants would then reimburse appellees for the amount expended. This agreement, according to appellees, was to continue in force until such time as appellants were able to secure credit in the name of the new business. Appellees' suit was to recover for amounts paid under the alleged agreement.

At trial, appellee Larry Burge and a representative of John Deere testified as to the existence of the alleged agreement. Burge explained the agreement as follows:

> They [Mr. Park and Mr. Odom] could have this equipment to go on and do the business and that when the bills came in, John Deere was looking directly to me for payment, because it was on my account, and the credit was established in my name in the entire deal, and that I would pay the bills, and when we got all — all this stuff that you have here, when this all came in and all the bills were paid, that these gentlemen, Mr. Park and Mr. Odom, would write me a check for whatever amount that they had actually got the benefit of.

At the close of appellees' evidence, appellants made a motion for a directed verdict based on the Statute of Frauds, Ark. Stat. Ann. § 38-101 (Repl. 1962), which states in relevant part:

> No action shall be brought . . . to charge any person, upon any special promise, to answer for the debt, default or miscarriage, of another . . . unless the agreement, promise, or contract, upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith . . . .

The judge denied the motion for directed verdict as well as all subsequent motions based upon the Statute of Frauds. The jury found for appellees for $6,923.17, the full amount sought.

We are of the opinion that the trial judge was correct in his ruling that the Statute of Frauds does not apply in this case. The language of the statute is that no action shall be brought to charge a person to answer for the debt of another unless the agreement is in writing. Here the appellees are suing the appellants for appellants' own debt, not for the debt of another.

In *Burgie* v. *Bailey*, 91 Ark. 383, 121 S.W. 266 (1909), the plaintiff brought suit in Justice of Peace Court against Jackson to collect for merchandise sold him. Jackson admitted the indebtedness and filed a cross complaint against Bailey alleging he had purchased Bailey's business but turned it back to him upon Bailey's agreement to return a portion of the purchase money and assume the indebtedness of the business.

The plaintiff was given judgment on his complaint and Jackson was given judgment on his cross complaint. Bailey appealed to circuit court and Jackson assigned his judgment to Burgie.

At trial in circuit court, the judge refused to allow the introduction of oral testimony to show Bailey's promise to assume the debts of the business and on appeal the Arkansas Supreme Court said:

> It was not a collateral undertaking on the part of Bailey to answer for the default of Jackson, but it was

> an original undertaking on his part for a valuable consideration to pay the debts Jackson incurred while running the business, and was not required to be in writing. The question of the truth or falsity of the testimony should have been submitted to the jury. *Gale* v. *Harp,* 64 Ark. 462.

Again, in *Nakdimen* v. *First National Bank,* 177 Ark. 303, 6 S.W.2d 505 (1928), the Arkansas Valley Bank at Fort Smith had asked the First National Bank, the Merchants' National Bank, and the City National Bank of Fort Smith to take over its assets and pay its debts and its depositors. First National and Merchants' National agreed. City National declined to enter into such an agreement. City National's president, however, agreed that he would personally pay First National and Merchants' National $5,000 if they would accept Arkansas Valley's proposition. Those banks did accept the proposition and, when City National's president refused to pay the $5,000, First National and Merchants' National brought suit. On appeal, in discussing the trial court's rulings, the Arkansas Supreme Court said:

> The court ruled correctly in refusing appellant's prayers for instructions on his plea of the Statute of Frauds, because the testimony did not justify the submission of such issue. The undisputed facts proved an original undertaking by appellant to pay appellees $5,000. It was not a collateral agreement on his part to pay the debts of another. 177 Ark. at 327.

On the appellants' contention that the jury's verdict is not supported by substantial evidence, we first point out that a representative of John Deere testified that the items charged to Mr. Burge's account during the time here involved were paid although he admitted he could not truthfully say from where the money came. But Mr. Burge testified that he paid the amounts to John Deere as they came due. He said, "I did pay every penny." (Tr. 85)

In the second place, the appellants concede in their brief that Mr. Burge testified that he paid John Deere by check but they submit that no such check was introduced into evi-

dence. That, we think, was a matter going to the weight of the evidence and was for the jury to pass upon.

In *Circle Realty Co.* v. *Gottlieb,* 267 Ark. 160, 589 S.W.2d 574 (1979), the court said:

> In testing the sufficiency of the evidence as being substantial on appellate review, we need consider only the testimony of the appellee and any other evidence favorable to him. . . . The jury is the sole judge of the credibility of the witnesses and if there is substantial evidence to support the verdict, we affirm.

Affirmed.

COOPER, J., not participating.

Annie Mae WILLIAMS *v.* CYPRESS CREEK DRAINAGE, Employer, FARM BUREAU INS. CO., Ins. Carrier

CA 82-58 635 S.W.2d 282

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Baim, Baim, Gunti, Mouser & Bryant, by: *Judith A. DeSimone,* for appellant.

Laser, Sharp & Huckabay, P.A., for appellees.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a decision of the Workers' Compensation Commission denying dependency benefits.

James Williams began working for Cypress Creek Drainage on June 13, 1980, and worked until he died in an accident on the job on August 6, 1980. At the time of his death, the decedent was 20 years old, unmarried, and left no surviving children. Annie Mae Williams, his mother, filed a workers' compensation claim for dependency benefits under Ark. Stat. Ann. § 81-1315 (Repl. 1976).

The administrative law judge held that appellant failed to prove that she was partially dependent on the decedent

but we are troubled by the law judge's opinion in which he took his definition of the word "dependent" from *Webster's Seventh New Collegiate Dictionary* instead of the Arkansas Workers' Compenstion Act and the appellate cases which have construed and interpreted that Act.

Since the commission specifically stated that it adopted the law judge's opinion as its own, we are forced to conclude that the decision appealed from was not based upon the law.

We, therefore, remand this matter for a determination based upon the law as we now review it.

In *Crossett Lumber Co.* v. *Johnson,* 208 Ark. 572, 187 S.W.2d 161 (1945), the court quoted with approval from a treatise on workers' compensation by Honnold as follows:

> Partial dependency, giving a right to compensation, may exist, though the contributions be at irregular intervals and of irregular amounts, and though the dependent have other means of support, and be not reduced to absolute want.

In *Smith* v. *Farm Service Cooperative,* 244 Ark. 119, 424 S.W.2d 147 (1968), the court said, "Dependency is a fact question. It is to be determined in the light of surrounding circumstances." And the court quoted with approval from Larson's treatise on workers' compensation. The full paragraph from Larson now reads:

> Partial dependency may be found when, although the claimant may have other substantial sources of support from his own work, from property, or from other persons on whom claimant is also dependent, the contributions made by the decedent were looked to by the claimant for the maintenance of his accustomed standard of living.

2 Larson's *Workmen's Compensation* § 63.12 (a) (Nov. 1981 Cum. Supp.).

A factor to be considered is the claimant's "reasonable

expectation of future support." *Roach Mfg. Co.* v. *Cole,* 265 Ark. 908, 582 S.W.2d 268 (1979); *Doyle's Concrete Finishers* v. *Moppin,* 268 Ark. 167, 594 S.W.2d 243 (1980). Obviously, the support being furnished at the time of the worker's injury is important but conditions prior to the injury should be considered, *Nolen* v. *Wortz Biscuit Co.,* 210 Ark. 446, 196 S.W.2d 899 (1946); a reasonable period of time should be used, *Smith* v. *Farm Service Cooperative;* dependency is not to be controlled by an unusual temporary situation, *Roach Mfg. Co.* v. *Cole.*

Also in the instant case, it would be appropriate to consider the amount of any contribution the decedent made to his mother's support in the light of the amount of any contribution she made to his support. *Pufahl* v. *Tamak Gas Products Co.,* 238 Ark. 895, 385 S.W.2d 640 (1965); *Sherwin-Williams Co.* v. *Yeager,* 219 Ark. 20, 239 S.W.2d 1019 (1951).

This matter is remanded for a decision based upon the law as set out above. We leave to the commission's discretion the question of whether another hearing should be had.

Remanded.

GLAZE, J., not participating.

J. G. MORROW *v.* MULBERRY LUMBER COMPANY and ST. PAUL INSURANCE COMPANY

CA 82-78 635 S.W.2d 283

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Sam T. Heuer, for appellant.

Laser, Sharp & Huckabay, P.A., for appellees.

GEORGE K. CRACRAFT, Judge. The appellant, J. G. Morrow, brings this appeal from an order of the Workers' Compensation Commission denying him benefits. He maintains that the finding of the Commission that his disability was not the result of a compensable injury is not supported by substantial evidence. He contended before the Commission, as he does here, that his disability was work related and resulted from an accidental injury which occurred or on about July 7, 1980. The appellee, Mulberry

Lumber Company, contended that any disability from which he now suffers was not work related but resulted from a diseased condition of long standing. The Administrative Law Judge reached the following conclusion which was affirmed and adopted in its entirety by the Full Commission:

> After having reviewed the evidence in its entirety in this case, even when viewing such in the light most favorable to the contentions of the claimant, as we are required to do, I believe the greater weight of credible evidence and the several inconsistencies as contained in this record simply do not form a basis upon which award of workers' compensation benefits can be made. This having been stated and full well realizing that the search for the truth is ofttimes a nebulous task I feel left with no reasonable alternative under the state of this record than to respectfully deny and dismiss the claim for benefits.

In claims before the Workers' Compensation Commission the burden is upon the claimant to prove entitlement to benefits by a preponderance of the evidence. In determining whether that burden has been met the Commission is not bound to accept the testimony of a claimant or any other witness in its entirety. The credibility and weight to be afforded the evidence is exclusively within its province. *Hammer* v. *Intermed Northwest,* 270 Ark. 262, 603 S.W.2d 913 (Ark. App. 1980). On appeal we review the record only to determine if their findings are supported by such substantial, relevant evidence as reasonable minds might accept as adequate to support their conclusion. The issue is not whether this court would have reached the same result as the Commission or whether the evidence would have supported a finding contrary to the one made. The question here is solely whether the finding made by the Commission is supported by substantial evidence. *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979). We find that it was.

The appellant contended that he was injured on or about July 7, 1980 while working in appellee's lumber yard. He testified that on that date the band on a stack of lumber

burst and he was required to restack it. As he was doing this he was twisting around and felt a tear "in his back." He stated that he rested for a while, finished up that day, and returned to work at least the next two days before leaving to see a doctor.

Although he did not file a claim for benefits until January 30, 1981, he testified that on leaving the job on July 10, 1980 he told his supervisor that he had hurt himself while working and was leaving to see a doctor. On July 10th he was seen by his regular physician, Dr. Calaway, who referred him to an orthopedic surgeon. He was admitted to the Veterans Hospital at Fayetteville on the following day for disability to his back. He was ultimately seen by Dr. Lockhart on March 30, 1981, shortly before the hearing for the purpose of evaluation. Dr. Lockhart, on the history given him by appellant at that time, rated his permanent partial disability to his body as a whole at 25%, "of which probably 10% preexisted the traumatic aggravation of his spine in July of 1980."

There was evidence from appellant, his wife and daughter that he had been previously admitted to the Veterans Hospital in 1963 for back pains but had manifested no discomfort or disability since that time. The evidence was confusing as to whether he told his wife or daughter that he had twisted his back on the job at the time he was first seen by Dr. Calaway on July 10th or at the time the daughter admitted him in the Veterans Hospital on July 11th. The wife testified, however, that she had communicated by telephone to the employer that he had "hurt himself down there." Both testified that he had had no difficulty with his back or disability resulting from it prior to July 10th when he was seen by Dr. Calaway.

Dr. Calaway was the first doctor to see him in July of 1980. There is no report in the record of Dr. Calaway's findings, but in a letter he indicated that at the time he saw appellant in July he was "complaining of back trouble." There was no mention of a history of traumatic injury. Dr. Calaway referred him to Dr. Knight who saw him on July 10, 1980 and found him suffering from "*chronic* lumbar sacral

strain and acute exacerbations." Dr. Knight's report contained no mention of a history of industrial injury. Dr. Knight arranged for the appellant to be admitted to the Veterans Hospital at Fayetteville. Upon his admission in that hospital Dr. Taylor noted "this 59 year old veteran was admitted on 7/11/80 complaining of *chronic* lower back pain with radiation into the right hip and leg, *having noted progressive discomfort and disability since 1963.*" The appellant was again admitted to the Fayetteville Veterans Hospital on October 8, 1980, at which time Dr. Husain made a reference to "several prior admissions for *chronic* low back pain "diagnosed as disc degeneration" and referred him to the Veterans Hospital in Little Rock. Upon his admission to the Little Rock hospital Dr. Gocio diagnosed his problem as "low back pain, etiology unknown." He reported that the patient was transferred from the Federal Veterans Hospital "with a one year history of back and right leg pain." After he was released from that hospital he was seen by Dr. Sisco on December 10, 1980. Dr. Sisco reported "I saw Mr. Morrow, who stated he had difficulty with pain in his back since 1963." He diagnosed arthritis of the spine and deterioration of the backbone. He was seen by at least three other doctors before he went to Dr. Lockhart for evaluation. None of the medical reports made prior to his visit with Dr. Lockhart on March 30, 1981, made any reference to an accidental injury which occurred on July 7, 1980 or at any other time.

While the appellant testified that he had advised his immediate supervisor Earl Reeves of the occurrence of the injury immediately after it happened, Mr. Reeves unequivocally denied that the appellant or any member of his family had ever advised him that appellant had injured his back while working. To the contrary he testified he had no knowledge of any such incident until the claim was filed in January of 1981 and that for a long period prior to July 7th the appellant was taking off to see a doctor at least two times a month. He did not know why he was seeing a doctor and was never told. Mr. Reeves testified that after appellant was hospitalized in July of 1980 he asked appellant what the doctors had found, to which appellant answered "I don't know." Although the appellant, supported by his wife, testified that such an accident did occur on July 7th, in an

interview by representatives of the employer he had made no mention of that date, but reference was made to a feeling that he had "been going down since the first of the year."

When these and many other inconsistencies and conflicting facts and factors pointed out by the Commission in its opinion are considered, reasonable minds could easily conclude, as did the Commission, that appellant failed to prove by a preponderance of the evidence that his present disability resulted from an accidental injury arising out of his employment. We find the decision of the Workers' Compensation Commission to be supported by substantial evidence.

Affirmed.

GLAZE, J., not participating.

Eugene FRANKLIN *v.* ARKANSAS KRAFT, INC. & EMPLOYERS INSURANCE COMPANY OF WAUSAU

CA 82-138 635 S.W.2d 286

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Bethell, Callaway & Robertson, by: *Donald P. Callaway,* for appellant.

Harper, Young, Smith & Maurras, by: *Tom Harper,* for appellee.

JAMES R. COOPER, Judge. This is a workers' compensation case, in which the sole issue is whether, at the time of his injury, appellant was an employee of appellee Arkansas Kraft, Inc., or an independent contractor performing services for Arkansas Kraft. The appellant suffered an accidental injury while cutting pulpwood from a tract of timber which had been purchased by Arkansas Kraft.

The appellant and Arkansas Kraft had executed a written contract on May 26, 1978. The contract provided for the cutting and hauling of all pine timber (which had been previously marked) from certain lands located in Logan

County, Arkansas. The timber was to be cut into logs of a length and size specified in the contract, and appellant was to be paid the sum of $22.50 per cord. The contract was to be completed by July 2, 1978.

The contract further provided that no timber except that which had been marked was to be cut, and that the stumps were to be left no higher than four inches above the ground. The contract required that appellant provide his own tools, equipment and materials, and that he choose the means and methods of performing the contract without supervision by Arkansas Kraft. Arkansas Kraft retained the right to inspect the results of the work, and to require that the work conform to the requirements of the contract.

Under the contract, appellant had the right to employ other persons to assist him, and it provided that such persons were not to be considered agents, servants, or employees of Arkansas Kraft. The contract further provided that the appellant was to be considered an independent contractor, rather than a sub-contractor or employee of Arkansas Kraft. Arkansas Kraft did not retain the right to exercise any discretion or judgment regarding the appellant's working hours, but it did retain the right to require that the contract be completed by the date specified in the contract.

The contract also provided that Arkansas Kraft was not to be held liable for its failure to accept deliveries, if it had notified appellant that it could not accept deliveries because of strikes, acts of God, oversupply, or other specified reasons. There were various other provisions contained in the contract, but they are not relevant to this appeal.

Following the injury, appellees denied coverage, and a hearing before an administrative law judge, the Honorable Michael L. Ellig, was held. Appellant sought to prove that he was an employee of Arkansas Kraft, and the appellees contended that he was an independent contractor. The administrative law judge found that the appellant was an employee of Arkansas Kraft, and awarded benefits. On appeal, the full Commission reversed, finding that the appellant had failed to meet his burden of proving by a

preponderance of the evidence that he was an employee. The Commission made no findings of fact or conclusions of law, except as stated above, and therefore we are unable to determine what factors were considered by the Commission in deciding to reverse the administrative law judge. From the Commission's decision, comes this appeal.

The issue of whether an individual was functioning, at the time of an injury, as an employee or an independent contractor must depend on the particular facts of each case. *Moore* v. *Long Bell Lumber Co.,* 228 Ark. 345, 307 S.W.2d 533 (1957); *Hollingsworth & Frazier* v. *Barnett,* 226 Ark. 54, 287 S.W.2d 888 (1956); *Farrell-Cooper Lumber Co.* v. *Mason,* 216 Ark. 797, 227 S.W.2d 444 (1950); *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S.W.2d 620 (1945); *Irvan* v. *Bounds,* 205 Ark. 752, 170 S.W.2d 674 (1943).

The question of an injured person's status has been the subject of much litigation. There are numerous cases involving the timber industry alone, and the cases are not consistent. *Compare Dallas County Pulpwood Company* v. *Strange,* 257 Ark. 799, 520 S.W.2d 247 (1975), *with West* v. *Lake Lawrence Pulpwood Co.,* 233 Ark. 629, 346 S.W.2d 460 (1961).

In workers' compensation cases, our standard of review may compound the appearance of inconsistency. On appeal, we are required to review the evidence in the light most favorable to the Commission's decision and to uphold that decision if it is supported by substantial evidence. In order to reverse a decision of the Commission, the appellate court must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.,* 2 Ark. App. 185, 618 S.W.2d 573 (1981); *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1980). A reading of the cases involving the issue of employee versus independent contractor indicates that such cases are frequently very close. In many of those cases, a decision either way would have been supported by substantial evidence, and therefore, the appellate court would have been required to affirm, regardless of the result reached by

the Commission. *See Dallas County Pulpwood Company* v. *Strange,* 257 Ark. 799, 520 S.W.2d 247 (1975); *Wren* v. *D. F. Jones Const. Co.,* 210 Ark. 40, 194 S.W.2d 896 (1946).

Most of the cases have basically followed the common-law rule that the governing test is whether the asserted employer had the right to control the injured person in his work. *Clarksville Meat Co.* v. *Brooks,* 237 Ark. 717, 375 S.W.2d 671 (1964). Apparently, that is the test which was applied by the Commission, although the opinion of the Commission does not say so in so many words. In finding that the appellant was an employee, the administrative law judge considered factors other than just control, but the Commission seemed to indicate that it believed that the control test was the only test available under Arkansas law.

On appeal, the appellant argues that the "relative nature of the work" test enunciated by Professor Larson has been adopted by the Arkansas Supreme Court in *Sandy* v. *Salter,* 260 Ark. 486, 541 S.W.2d 929 (1976), and that that test should have been applied by the Commission in the case at bar.

In *Sandy, supra,* the Arkansas Supreme Court said:

> Larson reasons that in a case such as the one at bar, the law should consider, in determining whether an employer-employee status exists, *not only* the matter of control *but also* the relationship between the claimant's own occupation and the regular business of the asserted employer. Larson, §§ 43.50 and 43.51. With regard to the latter aspect of the problem, two considerations have weight: first, how much of a separate calling or profession is the claimant's occupation? How skilled is it? To what extent may it be expected to carry its own share of the workmen's compensation responsibility? Second, what relationship does the claimant's work bear to the regular business of the asserted employer? Is there a continuous connection or only an intermittent one, or is there no connection at all. See Larson, § 43.52. [Emphasis added].

While the Arkansas Supreme Court did discuss the "relative nature of the work" test in *Sandy, supra,* it is not clear whether the Court actually applied that test. After holding that the Commission's decision (which was based on the "control" test) was supported by substantial evidence, the Court proceeded to discuss Larson's test, and appeared to view it very favorably. In any event, the "relative nature of the work" test appears to be available under Arkansas law based on *Sandy, supra.*

In making the factual determination of whether the injured person is an employee or an independent contractor, it is the Commission's duty to follow a liberal approach and to resolve any doubts in favor of the person's status as an employee. *Liggett Construction Co.* v. *Griffin,* 4 Ark. App. 247, 629 S.W.2d 316 (1982); *Purdy* v. *Livingston,* 262 Ark. 575, 559 S.W.2d 24 (1977); *Feazell* v. *Summers,* 218 Ark. 136, 234 S.W.2d 765 (1950). In order to make a factual determination under the requirements stated above, it may not be enough, in a particular case, to consider only the question of control.

There are numerous factors which may be considered in determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation coverage. Obviously, the relative weight to be given the various factors must be determined by the Commission. Some of the factors which might be considered, depending on the facts of a given case, are:

(1) the right to control the means and the method by which the work is done;

(2) the right to terminate the employment without liability;

(3) the method of payment, whether by time, job, piece or other unit of measurement;

(4) the furnishing, or the obligation to furnish, the necessary tools, equipment and materials;

(5) whether the person employed is engaged in a distinct occupation or business;

(6) the skill required in a particular occupation;

(7) whether the employer is in business;

(8) whether the work is an integral part of the regular business of the employer; and

(9) the length of time for which the person is employed.

These are not all the factors which may conceivably be considered in a given case, and it may not be necessary in some cases for the Commission to consider all of these factors. Traditionally, the "right to control" test has been sufficient to decide most of the cases, although many variations of "control" have probably been squeezed into that test.

It may be that the Commission in the case at bar considered factors other than control. We are unable to determine what factors were considered by the Commission, since there are no findings of fact contained in the opinion. The case is reversed and remanded to the Commission for a reconsideration of the facts of this case in light of the foregoing opinion. Nothing in this opinion should be construed as a hint of the result we think the Commission should reach on remand. The Commission has the duty to weigh the facts and apply the law, and it is not our function to suggest a result.

Reversed and remanded.

GLAZE, J., concurs.

MAYFIELD, C.J., dissents.

TOM GLAZE, Judge, concurring. I believe the majority opinion fails to clearly hold whether we adopt the "relative nature of the work" test discussed in *Sandy* v. *Salter*, 260 Ark.

486, 541 S.W.2d 929 (1976). I concur for the sole reason that I would be more unequivocal in our adoption of the test announced in *Sandy*.

MELVIN MAYFIELD, Chief Judge, dissenting. I think the decision of the Commission is supported by substantial evidence and I would affirm.

Bill BRANNAN *v.* William F. EVERETT,
Director of Labor

E 81-206 636 S.W.2d 301

Court of Appeals of Arkansas
Opinion delivered June 30, 1982
[Rehearing denied August 18, 1982.]

Don K. Barnes and *Mary Ann Spencer* of *Central Arkansas Legal Services, Inc.*, for appellant.

Alinda Andrews, for appellee.

JAMES R. COOPER, Judge. This is the second appeal involving unemployment benefits paid to the appellant. In the first appeal, *Brannan* v. *Everett, et al,* No. E 81-144 (affirmed without opinion, December 16, 1981), this Court affirmed a decision of the Board of Review which found that appellant was ineligible to receive unemployment benefits. The appeal of the first case was lodged in this Court on May 20, 1981. On May 21, 1981, the agency mailed an overpayment determination to the appellant. The appellant appealed the Agency decision, and alleged that any decision regarding overpayment was premature, since the ultimate question of his eligibility had not been finally decided, and an appeal was pending on that question. The Appeal Tribunal proceeded to have a hearing, and determined that appellant had been overpaid benefits in the amount of $2,562.00, and that it would not be against equity and good conscience to require him to repay that amount. The Board of Review affirmed the Appeal Tribunal in a decision on July 16, 1981. The case at bar is an appeal from the final decision of the Board of Review concerning repayment of benefits.

Appellant does not contend that the Agency lacked the authority or that it was without jurisdiction to hold a hearing prior to a decision by this Court on the eligibility issue. The appellant alleges that the question of overpayment was *decided* prematurely. We agree with that contention made by the appellant.

Appellant's position seems to be that a continuance should have been granted until after this Court had decided his first case. The granting or denial of a continuance is generally left to the discretion of the presiding official. In *Johnson* v. *Coleman,* 4 Ark. App. 58, 627 S.W.2d 564 (1982), this Court stated:

> Whether a motion for continuance should be granted is addressed to the discretion of the trial judge, and his decision will not be overturned unless that discretion is manifestly abused. *Rawhide Farms, Inc.* v.

Darby, 267 Ark. 776, 589 S.W.2d 210 (Ark. App. 1979). Moreover, the Supreme Court has held that such a ruling will not be disturbed on appeal unless there is evidence that the trial judge acted arbitrarily or capriciously. *Bolden* v. *Carter,* 269 Ark. 391, 602 S.W.2d 640 (1980).

The power to grant or to refuse a continuance is an inherent power of an administrative agency and the denial of a requested continuance is grounds for reversal only where there is an abuse of discretion, considering chiefly whether the interests of justice have been furthered. *See All-Weld, Inc.* v. *Commonwealth of Pennsylvania, Department of Labor and Industry,* 34 Pa. Commw. Ct. 482, 383 A.2d 982 (1978).

We hold that, on these facts, the Agency should not have made a final decision regarding appellant's liability for repayment of benefits when the ultimate question of his eligibility had not yet been resolved. We do not mean to imply that the Agency was without authority or jurisdiction to hold a hearing on the question of repayment, but only that a final determination as to his repayment liability was premature. If the case were decided otherwise, it is easy to see how appellant could, theoretically, be required to repay benefits to the Agency based on a hearing such as this one, when ultimately it might be decided on appeal that he was, in fact, eligible for the benefits.

The second point urged for reversal is that the appellant should not be held to have to repay the benefits in question, since such a requirement would result in great hardship to him. This case is being reversed and remanded for a hearing consistent with this opinion, and therefore it is unnecessary and would be improper for us to make any decision regarding the equity and good conscience involved in requiring appellant to repay the benefits. The appellant did not offer any evidence to indicate his financial ability to repay the amounts in question, and on remand, he will be entitled to do so. The Board will then have facts before it upon which it can make a decision under the statute.

Reversed and remanded.

ARKANSAS STATE HIGHWAY COMMISSION
v. Jack ROBERSON et ux

CA 81-450 635 S.W.2d 299

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Thomas B. Keys and *Philip N. Gowen,* for appellant.

Lightle, Beebe, Raney & Bell, by: *A. Watson Bell,* for appellees.

LAWSON CLONINGER, Judge. Appellant, Arkansas State Highway Commission, brings this appeal from a jury verdict of $28,000 as compensation for the taking by eminent domain proceedings of a lot in the City of Searcy owned by appellee, Jack Roberson, and his wife. The only point for reversal urged by appellant is that the trial court erred in permitting testimony in behalf of the landowner which allegedly intermingled residential and commercial values.

We find no error and the judgment is affirmed.

The evidence establishes that appellee purchased the lot in question upon which a dwelling house and other improvements stood, for $25,000 ten months before the taking by appellant. Appellee Jack Roberson testified that he purchased the property for commercial purposes and although it was rented as a dwelling at the time of the taking, he had an agreement with the renter that appellee would eventually renovate the house for his real estate office. Appellee and his expert witness testified that the highest and best use of the property was for commercial purposes because it was a trend in the City of Searcy on that street to convert existing residential buildings into commercial enterprises. Appellee ascribed a value of $20,000 to the land and $14,550 to the improvements for commercial purposes, for a total amount of damages of $34,550. His witness placed a value of $18,000 on the land and a value of $10,000 on the improvements for commercial purposes.

The proper measure of damages in a condemnation case is the market value of the land with buildings upon it, but the owner receives nothing for the buildings unless they increase the market value of the land. *Arkansas State Highway Commission* v. *Richards,* 229 Ark. 783, 318 S.W.2d 605 (1958). In a commercial use evaluation, the value of the improvements, before and after the taking, should be based on commercial worth. *Arkansas State Highway Commission* v. *Toffelmire,* 247 Ark. 74, 444 S.W.2d 241 (1969). The rule in Arkansas is that a verdict rendered by a jury which is partially based on testimony relating to commercial value of the land and partially based on testimony relating to the land's value for residential purposes is improper. *Arkansas*

State Highway Commission v. *Griffin,* 241 Ark. 1033, 411 S.W.2d 495 (1967).

In *Arkansas State Highway Commission* v. *Pearrow,* 1 Ark. App. 289, 614 S.W.2d 695 (1981), this court reversed and remanded an eminent domain proceeding largely based on the testimony of an expert witness who assigned a value to Pearrow's dwelling of $31,040 before the taking. The witness testified that the highest and best use of the property was for commercial purposes. On cross examination the witness admitted that the dwelling did not contribute to the commercial use of Pearrow's property, but that the house was actually in the way for a commercial development. We held that the testimony of the witness was in conflict with the rule noted in *Griffin, supra.*

In this case, the landowner and the expert witness testified that the house actually increased the commercial value of the property, and that many residences on the same street had been renovated and used for commercial property. The witnesses did not intermingle residential and commercial values, but testified that the highest and best use for the property was commercial, and that the improvements on the property contributed to its value for commercial purposes.

In considering the evidence in the light most favorable to the appellee, as we must do on appeal, there is substantial evidence to support the jury's verdict.

Affirmed.

Jackie W. HORN *v.* IMPERIAL CASUALTY AND INDEMNITY COMPANY

CA 82-1 636 S.W.2d 302

Court of Appeals of Arkansas
Opinion delivered June 30, 1982
[Rehearing denied August 18, 1982.]

James A. Penix, Jr., P.A., for appellant.

John R. Eldridge, III of *Burke & Eldridge,* for appellee.

LAWSON CLONINGER, Judge. Walter L. Horn was insured under a policy issued by appellee, Imperial Casualty and Indemnity Company, which provided for coverage for loss of life while in a private passenger automobile. The insured died while a passenger in a ten-wheel 1964 Silver Eagle Scenicruiser bus, and appellee denied benefits to the beneficiary, appellant Jackie W. Horn, on the basis that the bus was not a private passenger automobile within the meaning of the policy.

The trial court granted appellee's motion for summary judgment, and appellant contends on appeal that the finding by the trial court that the bus was not a private passenger automobile within the definition of the policy is clearly erroneous. We affirm the action of the trial court.

The insurance policy defines "private passenger automobile" as:

> . . . a four-wheel vehicle of the private passenger, station wagon or jeep type. It also includes an automobile of the truck type with a load capacity of 1500 pounds or less, designed for use on public roads.

The policy also provides coverage if the insured is riding as a passenger in a common carrier, but that provision has no application in this case. It was agreed that the bus belonged to the insured's employer and was not being operated as a common carrier.

In construing the language in an insurance policy, if the language employed is ambiguous, then the court must construe the language strictly against the insurance company and all reasonable doubts decided in favor of the insured. *Southern Title Insurance* v. *Oller,* 268 Ark. 300, 595 S.W.2d 681 (1980). If, however, the language of the contract is unambiguous, it is unnecessary to resort to rules of construction in order to ascertain the meaning of the insurance policy. The clauses are to be interpreted by the court in the plain and ordinary meaning of the terms and cannot be construed to contain a different meaning. *Southern Farm Bureau Casualty Insurance Co.* v. *Williams,* 260

Ark. 659, 543 S.W.2d 467 (1976). If the language of the policy is clear and unambiguous, the court should decide as a matter of law the construction. *National Life and Accident Insurance Co.* v. *Abbott,* 248 Ark. 1115, 455 S.W.2d 120 (1970).

In *National Life and Accident Insurance Co.* v. *Abbott, supra,* the Arkansas Supreme Court was presented with the question of whether a half-ton pickup truck driven by the insured at the time of his death was within the meaning of a "private passenger type automobile" of the exclusively pleasure type. At trial, the court granted the beneficiary's motion for summary judgment. On appeal, the trial court's decision was reversed. The Supreme Court recognized that when policy language is clear and unambiguous, the court should decide, as a matter of law, the construction. The court found that the language in the policy was unambiguous and that coverage should have been denied. The beneficiary contended that there was ambiguity because the insured had used the pickup truck entirely for pleasure. The court stated that " . . . 'use' does not govern whether the vehicle involved here was included in the coverage; rather, liability is determined by the 'type' of vehicle involved."

The insurance company had the right to prescribe the kind of vehicle it desired to cover by its policy, and it chose to cover a "four-wheel vehicle of the private passenger, station wagon or jeep type." The vehicle in which the insured in this case was a passenger was a "ten-wheel Scenicruiser bus," and is clearly outside the description of vehicles covered. The language employed in the policy is not ambiguous and does not require interpretation.

Appellant relies upon the case of *Coleman* v. *M.F.A. Mutual Insurance Co.,* 3 Ark. App. 7, 621 S.W.2d 872 (1981), where the question was whether a vehicle was a private passenger automobile within the terms of an insurance policy. The appellant in this case had an accident while driving a twin cab, dual rear wheel pickup truck. The term "private passenger automobile" was not defined in the policy and appellant argued that there was an ambiguity which should be construed against the insurer. The appellee

argued that the vehicle was obviously a "car hauler" and not a private passenger vehicle. Appellee alleged that the vehicle was designed and used primarily for the hauling of cargo and was being used for that purpose at the time of the accident.

This court recognized in *Coleman* that cases which have dealt with situations similar to this case generally hold that the question of whether or not a vehicle is a "private passenger automobile" is a fact question which must be determined on the facts of each individual case. The term "private passenger automobile" was not further defined in the policy, and the court was unwilling to say that the finding by the trial court that the vehicle in question was not a private passenger automobile was clearly erroneous or against a preponderance of the evidence.

However, no fact question was presented in the instant case because the term "private passenger automobile" was defined in the insurance policy in clear and unambiguous terms. *National Life and Accident Insurance Co.* v. *Abbott, supra.*

Rule 52 (a) of the Arkansas Rules of Civil Procedure provides that on appeal the trial court's findings of fact will not be set aside unless they are clearly erroneous or clearly against the preponderance of the evidence. Appellant urges that the finding of the trial court was clearly erroneous or clearly against the preponderance of the evidence in this case. Rule 52 (a), however, has no application here, because we hold that the terms of the policy are unambiguous and thus not a question of fact but one of law.

Affirmed.

Alma MURPHY *v.* William F. EVERETT, Director of Labor, and QUIK MART #8

E 81-304 635 S.W.2d 301

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Legal Services of Northeast Arkansas, by: *Janet Pecquet,* for appellant.

Alinda Andrews, for appellees.

LAWSON CLONINGER, Judge. Claimant, Alma Murphy, was denied unemployment benefits by a decision of the Arkansas Board of Review. The Board found that claimant had voluntarily quit her last work without good cause connected with the work, which is a disqualification for benefits under the provisions of Ark. Stat. Ann. § 81-1106 (a) (Supp. 1981).

The pertinent portion of the Board of Review's findings of fact is as follows:

> . . . the evidence indicated that the claimant initiated her terminated (sic) when, upon hearing that the management had applied for a beer license, she refused

to sell beer and would quit. She stated, though, that she would continue to work until the beer was put on the shelves. The record also indicated that the claimant was not happy with the new management. She testified that since they were hiring new girls, she didn't see any reason to stay and learn new ways when she would be leaving in a few days. Consequently, the claimant called her employer and resigned on June 3, 1981, before the beer was put on the shelf and without any statement from the employer that she was being discharged.

The evidence before the Tribunal establishes that claimant was an employee of Quik Mart, a convenience store in McCrory. Some time before claimant's last day of employment the employer had made application for a permit to sell beer. Claimant advised the employer that she would not work in a store selling beer because of her religious principles. Shortly before claimant's termination the employer fired the store manager and hired a new one. The new manager brought in two new women to take the place of claimant and the one other woman who had been working there. At the request of the employer, claimant agreed to stay on a few days to train the new employees, but claimant knew she was being terminated. After the new store manager arrived, claimant was told by the district manager that the store had its license and would have the beer on the shelves within a week. When the new manager came in, she said, "I'm bringing in my girls and getting all my girls because I've already got them hired." The new manager hired two girls who had worked for her at another store, which was a full crew for the store where claimant worked. After the claimant had put in the time the store allowed to train new girls, she quit.

The findings of the Board of Review are conclusive on appeal if they are supported by the evidence. Ark. Stat. Ann. § 81-1107 (d) (7) (Supp. 1981). The definition of evidence in this context has been extended by the courts to mean substantial evidence, *Terry Dairy Products Co., Inc.* v. *Cash,* 224 Ark. 576, 275 S.W.2d 12 (1955) and whether the evidence

is substantial is a question of law. *Skorcz* v. *Howie,* 243 Ark. 640, 421 S.W.2d 874 (1967).

We find no substantial evidence to support the decision of the Board, and the findings of fact by the Board do not support its conclusions. The Board found that claimant initiated her termination when, upon hearing that beer was going to be sold in the store, she stated that she would quit. Claimant testified that she would not work in a store where beer was sold because of her religious principles, and she was entitled to so refuse. In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the United States Supreme Court held that unemployment compensation benefits may not be conditioned upon the sacrifice of a constitutionally protected right. That principle was affirmed recently in *Thomas* v. *Review Board of the Indiana Employment Security Division,* 101 S. Ct. 1425 (1981).

The only reasonable conclusion which can be drawn from all the evidence is that, aside from the religious issue, claimant was fully aware that she was going to be laid off within a matter of days. She had stayed on only because the employer asked her to train the new employees, and her willingness to cooperate cannot now be used to defeat her request for unemployment benefits.

The decision of the Board of Review is reversed, and the case is remanded with instructions to award benefits to claimant.

MAYFIELD, C.J., concurs.

Russell SWEAT and Richard "Bud" SWEAT
v. STATE of Arkansas

CA CR 81-164 635 S.W.2d 296

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Paul Johnson and *William H. Craig,* for appellants.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellants, Russell Sweat and Richard "Bud" Sweat, were charged by amended information with conspiracy to possess a controlled substance, marijuana, with intent to deliver in violation of Ark. Stat. Ann. § 41-707 (Repl. 1977). After trial, the jury returned a verdict of guilty and they were sentenced to five years imprisonment and a fine of $10,000 for each appellant. Appellants now bring this appeal.

Their first point for reversal is that the trial court erred in refusing to allow evidence of video tapes and audio recordings of conversations of Jimmy Snow with two officers to be presented to the jury. In the winter of 1979-80, Arkansas State Police Officers Earl Rife and John Chappell went to Blytheville to investigate illegal gambling activities. They established an undercover operation there and assumed false identities as barge operators. During the course of the investigation, the officers requested one Jimmy Snow to contact Russell and Bud Sweat for the purpose of selling marijuana. There were several conversations between Jimmy Snow and the officers at their apartment, and these conversations were recorded. At trial, the state introduced by way of exhibits numerous recorded telephone conversations and video tapes of meetings between the Sweats and Officer John Chappell. Counsel for appellants attempted to introduce evidence of various recorded telephone conversations and video tapes of the police officers and Mr. Snow on the defense of entrapment. The trial judge refused to admit the evidence proffered by the defense on the basis that the conversations were hearsay and therefore, inadmissible. Furthermore the trial judge, pursuant to Rule 611 of the Uniform Rules of Evidence, stated that the playing of the tapes would be a needless consumption of time and would serve to humiliate Mr. Jimmy Snow.

Uniform Rules of Evidence, Rule 801 (d) (2) states:

> A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Statements of a co-conspirator made during a transaction are admissible under this rule. See *Foxworth* v. *State,* 263 Ark. 549, 566 S.W.2d 151 (1978); *Bosnick* v. *State,* 248 Ark. 846, 454 S.W.2d 311 (1970). A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. See Black's Law Dictionary; see also Model Penal Code § 5.03.

In the instant case, all of the evidence indicates that Jimmy Snow had no knowledge that Rife and Chappell were police officers and that he willingly participated in the scheme to sell marijuana to the Sweats. He assisted in introducing the officers to the Sweats and in maintaining communications between them. We hold that Jimmy Snow comes within the definition of a co-conspirator, and therefore his statements are an exception to the hearsay rule. Rule 801 (d) (2); *Foxworth* v. *State, supra.*

The question remains whether the tapes of Snow's conversation with the officers are relevant to the issue of entrapment. Entrapment exists where the criminal designs originate not with the accused, but with the officers of the law, and the accused is lured into the commission of an unlawful act by persuasion, deceitful representation or inducement by the officers. See *Sorrells* v. *United States,* 287 U.S. 435 (1932); *Peters* v. *State,* 248 Ark. 134, 450 S.W.2d 276 (1970). Any evidence having any tendency to make the existence of entrapment more probable is admissible, and the accused should be allowed a reasonable latitude in presenting whatever facts and circumstances he claims constitute an entrapment, subject to ordinary rules of admissibility. Rule 401, Uniform Rules of Evidence [Ark. Stat. Ann. § 28-1001 (Repl. 1979)]; *Spears* v. *State,* 264 Ark. 83, 568 S.W.2d 492 (1978). In *Rhoades & Emmerling* v. *State,* 270 Ark. 962, 607 S.W.2d 76 (Ark. App. 1980) this court held that evidence did not support the defense of entrapment

where the initial inducement to commit the offense charged did not come from government authorities. In the instant case, there was evidence to suggest that the initial inducement to commit the offense charged did come from the police officers. Furthermore, conversations which the officers had with Jimmy Snow indicate that the officers used Mr. Snow as a "go-between" with the appellants. It is true that much of the material which is included in the tapes is irrelevant on the issue of entrapment. However, some of the statements made are material and as was stated earlier, any evidence having any tendency to make the existence of entrapment more probable is admissible. *Spears* v. *State, supra.* Therefore, we hold that it was error for the trial judge to refuse to allow the video tapes and the audio recordings into evidence.

Appellants' second point is that the trial court erred in refusing to permit into evidence certain material which appellants allege was relevant to the defense of entrapment. Specifically, appellants allege that the trial judge erred in refusing to allow into evidence the information, amended information, arrest warrants and memoranda from the police case file regarding a meeting in Little Rock of officers from various police agencies and the United States Attorney's Office. Appellants argue that these materials were essential to their defense of entrapment. Appellants allegedly sought to show that the crime itself was conceived by the officers. Appellants wanted to show that the information had been filed and warrants had been issued prior to the existence of any conspiracy. As was stated earlier, any evidence having any tendency to make the existence of entrapment more probable should be admitted into evidence. *Spears* v. *State, supra.* We hold that the information, amended information and arrest warrants were also relevant to the issue of entrapment and, therefore, it was an abuse of discretion for the trial judge to refuse to admit them. We have no basis of determining the admissibility or relevancy of the police memoranda, since these materials are not in the record.

Appellants' third point for reversal is that the trial court erred in denying appellants' motion to suppress statements

elicited from them after the felony information was filed and the arrest warrants issued. Subsequent to the filing of the felony information and the issuance of the arrest warrants, but prior to the actual arrest of appellants, one of the officers elicited statements from each of the appellants at his apartment. First of all, appellants argue that Officer Chappell's conduct from the filing of the original felony information and the issuance of the arrest warrants constituted entrapment as a matter of law. However, we find that the evidence in the record merely provided a fact question as to whether entrapment was available as a defense and this is not sufficient to suppress statements made by appellants. See *Peters* v. *State, supra.*

Secondly, in support of this point, appellants argue that their constitutional rights were violated in that all statements were made without counsel present and without adequate warning of their rights, citing *Massiah* v. *United States,* 377 U.S. 201 (1964); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). First of all, we note that one is not entitled to notification of his rights when the person has not been arrested or deprived of his freedom in any significant way. *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Parker* v. *State,* 258 Ark. 880, 529 S.W.2d 860 (1975). Since no interrogation of appellants took place and they were not coerced or tricked into saying anything against their will, it was not error for the trial judge to refuse to suppress appellants' statements. See *Hoffa* v. *United States,* 385 U.S. 293 (1966).

Appellants' final point for reversal is that the evidence was insufficient to support the verdict. We have reversed and remanded this case for a new trial because certain evidence was excluded improperly by the trial judge. Improper exclusion of evidence is a trial error. See *Burks* v. *United States,* 437 U.S. 1 (1978). We will not review the sufficiency of the evidence question until all relevant evidence has been admitted. See *Vowell* v. *State,* 4 Ark. App. 175, 628 S.W.2d 599 (1982), *rev'd on other grounds, State* v. *Vowell,* 276 Ark. 258, 634 S.W.2d 118 (1982); see also *United States* v. *Harmon,* 632 F.2d 812 (9th Cir. 1980).

Reversed and remanded for a new trial.

Wanda S. WELCH *v.* William M. WELCH

CA 81-430 635 S.W.2d 303

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

William R. Wilson, Jr., P.A., for appellant.

Johnson & Tarvin, by: *William E. Johnson,* for appellee.

DONALD L. CORBIN, Judge. The present case was brought by the appellee, seeking a change in the custody of a nine-year-old child and the deletion of child support.

Appellant, the child's mother, counter-claimed for an increase in child support payments. The court continued the custody of the nine-year-old child in her mother and awarded the father visitation from June 5 through August 20 of each year. This appeal is taken only with respect to the portion of the order that denies the mother visitation rights during the summer months. We reverse and remand.

This is a case of first impression. Generally, where the court has granted a nine-month/three-month split custody, the non-custodial parent is awarded visitation rights by the trial court and this award is usually affirmed on appeal with little or no discussion about the visitation privileges. See *Stephenson* v. *Stephenson,* 237 Ark. 724, 375 S.W.2d 659 (1964). The issue on appeal has always been the split custody and not the denial of visitation. *Drewry* v. *Drewry,* 214 Ark. 540, 216 S.W.2d 888 (1949). Whether you call the nine/three split, "custody", "split custody", or "visitation", the effect on a minor child is the same no matter what label is used. In the instant case, this nine-year-old child may not see her mother or her sister for nearly three months out of each and every year. The most common custody arrangement is the placement of the child in the custody of one parent, with visitation granted to the non-custodial parent. In such cases, the general rule on visitation is that where custody is placed with one parent, the other is allowed reasonable visitation. Reasonable visitation is determined by the child's best interest. Some of the factors considered are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or the stability of the parties and the relationship with siblings and other relatives. In the instant case, there were no findings by the trial court concerning his denial of visitation to the mother during the period of extended summer visitation with the father. Although the appellee-father made much-to-do about the appellant-mother working and not being a "full-time mother", there was no evidence that she was anything but a devoted, loving mother who worked so that she could provide for her children.

Doctor Travis Tunnel, a qualified psychologist, who

examined appellant and her daughter prior to the hearing, testified that the child saw her mother as her "primary parent", the person the child looked to for security. When questioned about whether he felt granting custody to the father would be good for the child, Dr. Tunnel responded unconditionally in the negative. The reasons he gave for his opinion were that such a change would be taking the child away from her primary parent and also taking her away from a sister figure with whom the child "had formed a close love tie."

We believe that the trial court's order is manifestly against the best interest and welfare of the child. The courts of Arkansas have long recognized that the best interest of the child is the polestar for making judicial determinations concerning custody and visitation matters. We do not believe the evidence submitted to the trial court substantiates the court's order denying appellant and her daughter the opportunity to see each other for a three-month period. We reverse and remand for the trial court to enter such orders as he deems necessary to provide appellant reasonable visitation privileges during the three-month period the child spends with her father.

Reversed and remanded.

CRACRAFT, J., dissents.

GEORGE K. CRACRAFT, Judge, dissenting. As reluctant as I am to be the sole dissenter in an otherwise unanimous decision, I feel compelled to state in general my reasons for doing so. I do not view this as a case of first impression but merely one which requires the sound exercise of that broad discretion vested in the chancellor. In my judgment the majority is treading within that discretionary area which appellate courts ought not enter lightly. There is no type of case in which the personal observations of the chancellor mean more, nor are his observations from a superior position to judge, more vital. *Holt* v. *Taylor,* 242 Ark. 292, 413 S.W.2d 52 (1967). Cases involving custody and visitation are truly adversary proceedings in which only the child is not represented by an advocate. It has long been the duty of

the chancellor to see that his best interests are protected and to make such discretionary orders as will best foster those interests. Appellate courts should defer to the chancellor's superior position from which he is better able to separate wheat from chaff after hearing, seeing and observing all parties including the child.

In his closing comments the chancellor expressed a strong personal distaste for orders which temporarily isolate a child from one parent or the other, but on finding that the best interests of the child so required he reluctantly did so in this case. His remarks indicate that he had done so only after weighing and considering everything he had seen and heard. A motion to reconsider that order was filed with the court in which all of the arguments advanced here were made to the chancellor. After considering that motion for ten days the chancellor declined to grant it.

What the majority seems to be saying is that as the court gave no specific reason for the restriction on visitation he acted arbitrarily. He was neither asked nor required to record his reasons. It is only where the record demonstrates an abuse of discretion that we should interfere in these cases. My review of the record suggests a number of reasons why he might have reached this conclusion. Not the least of these was the mother's stated preference for a career as opposed to parenthood, her expressed attitude toward visitation of the father, her feeling that she should determine the extent of his visitation and that the father was "getting his money's worth" in visitation. A stronger reason might have been the child's expressed desire to spend more time with her father in the community in which most of her kinsmen resided and in which she had lived all of her life before her mother's recent move to an apartment in Little Rock.

Furthermore the record reflects that this chancellor's experience with these parties and their problems with visitation rights began with the initial divorce proceedings in 1974. In the intervening years the parties have been before him on several occasions seeking modification of decreed visitation rights. We would certainly be justified in assuming that the knowledge this chancellor gained from

seven years experience with these parties and their problems with visitation lend support to his conclusion that his actions were in the best interests of the child. *Holt* v. *Taylor, supra.* While the chancellor did not state in the record what facts and factors led him to that conclusion, I am unwilling to second guess his judgment from our insulated position merely on a printed record.

I respectfully dissent.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY *v.* Jeff MOBLEY

CA 81-451 636 S.W.2d 299

Court of Appeals of Arkansas
Opinion delivered June 30, 1982
[Rehearing denied August 18, 1982.]

Laser, Sharp & Huckabay, P.A., for appellant.

Mobley & Smith, by: *William F. Smith,* for appellee.

DONALD L. CORBIN, Judge. A Pope County Circuit Court jury returned a verdict in favor of the appellee in the

sum of $619.03 and judgment was entered on April 20, 1981. The appellee had sought a recovery for damages to his diamond ring in the amount of $4,754.00 plus penalties and attorney's fees. The appellant, State Farm Fire and Casualty Insurance Company, admitted that the ring was insured at the time of the loss; but contended its liability was limited to costs incurred by the appellee in having the stone recut.

On April 21, 1981, appellee filed a written motion to set aside the verdict and grant a new trial on the ground that the verdict was contrary to the law and the evidence. On July 21, 1981, the court, by order, took the motion for a new trial under advisement. On July 28, 1981, the trial court entered an order granting the motion for new trial based upon the trial judge's actions during the trial in allowing the jury to examine appellee's diamond ring during the course of the trial. It is from the action of the trial court in granting a new trial that appellant prosecutes this appeal. We reverse.

In *Jones* v. *Benton County Circuit Court,* 260 Ark. 893, 545 S.W.2d 621 (1977), the Supreme Court held that if the record did not affirmatively show the motion for a new trial was taken under advisement within 30 days from its filing, the trial court had no jurisdiction to grant the motion after the term of court expired. Rule 60 (b) of ARCP substitutes the 90-day limitation in place of the previously used limitation of "term of court". Ark. Stat. Ann. § 27-2106.4 provides:

> It shall be the duty of the party filing any motion provided for in the preceding section to present the same to the trial court within thirty [30] days from the date of filing and if the matter cannot be heard by the trial court within thirty [30] days, or for any good cause either party shall not be ready for final hearing within thirty [30] days, the moving party shall, within said period of thirty [30] days, request the trial court to set a definite date certain for hearing of such motion. Unless the motion shall have been presented to the trial court and taken under advisement within thirty [30] days from the date of its filing, or the trial court shall have set a date certain thereafter for hearing on the motion, it

> shall be deemed, for purposes of this act, that the motion has been finally disposed of at the expiration of thirty [30] days from its filing, and time for filing of notice of appeal shall commence to run at the expiration of thirty [30] days from the filing of such motion. If the said motion shall have been presented to the trial court and taken under advisement, or the trial court shall have fixed a date certain for hearing thereof within thirty [30] days from its filing, said motion shall not be deemed to have been disposed of until the trial court shall enter its order granting or denying the motion. The expiration or lapse of a term of court or commencement of a subsequent term shall not affect the power of the court to take any action herein provided, or the time for filing notice of appeal.

Appellee caused several letters to be reprinted in his brief that would indicate that the delay by the trial court in considering appellee's motion was caused by the appellant. These letters are not a part of the record and, therefore, cannot be considered by the court. Thus, Ark. Stat. Ann. § 27-2106.4 has not been complied with because the record does not show: (a) that the motion was presented to and taken under advisement by the trial court within the 30-day period or, (b) that the trial court set a date certain thereafter for a hearing on the motoin. The court therefore lost its jurisdiction to grant the relief sought after the expiration of 90 days from the entry of the judgment. We reverse.

MAYFIELD, C.J., and COOPER, J., concur.

GLAZE, J., not participating.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in the decision in this case because the motion for new trial was not granted for more than 90 days after the judgment was filed with the clerk and I assume that under Civil Procedure Rule 60 (b) the judgment had to be set aside within 90 days.

I think Ark. Stat. Ann. § 27-2106.4 (Repl. 1979) has been superseded by Rule 4 of our Rules of Appellate Procedure.

At least, Reporter's Note 2 under that rule indicates that § 27-2106.3 *et seq* has been superseded. Appellate Procedure Rule 4, however, makes the same general provisions as did Act 123 of 1963 which appears as Ark. Stat. Ann. §§ 27-2106.3 through 27-2106.6 (Repl. 1979).

If the 90 days had not run, then the court would have had the authority to set aside the judgment, in my opinion, regardless of whether the motion had been taken under advisement within 30 days. What is not clear is whether the judgment could be set aside after 90 days from its filing *even* if the motion *had* been taken under advisement within the 30 days.

Regardless, it is extremely important to realize that Rule 4 and § 27-2106.4 (if it has not been superseded) vitally affect the time element involved in appealing from the trial court.

The filing of a motion for new trial is fraught with great procedural danger — unnecessarily so — it seems to me.

ALUMINUM COMPANY OF AMERICA
v. Katie HIGGINS

CA 81-369 635 S.W.2d 290

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Carol S. Arnold of *Rose Law Firm,* for appellant.

Sam Ed Gibson, P.A., for appellee.

TOM GLAZE, Judge. Appellee instituted an action against appellant, as garnishee, to collect a judgment rendered against her former husband, Charlie Higgins, an employee of appellant, for child support arrearages. After the garnishment action was filed, appellee's ex-husband filed a voluntary petition in bankruptcy. In his Chapter 13 bankruptcy plan, he provided for payment of the $4,075 judgment, which was the subject of the garnishment action. Upon learning of the bankruptcy proceeding, Ms. Norma Gardner, appellant's employee responsible for answering garnishments, called the bankruptcy court clerk's office for advice. Ms. Gardner was informed that appellant was not required to answer appellee's garnishment action because the Chapter 13 plan had been filed. Relying on this advice,

Ms. Gardner did not cause an answer to be filed on behalf of appellant. Subsequently, the chancery court entered a judgment against appellant in the amount of $4,075 plus costs.

Appellant seeks reversal of the chancery court's judgment and argues: (1) The court lacked subject matter jurisdiction over the garnishment action; its judgment was entered in violation of the bankruptcy court's automatic stay order; and its judgment violated Section 1302 of the Bankruptcy Code in that the judgment disrupted the orderly payment of appellee's debt; and (2) In the alternative, appellant's failure to answer was due to excusable neglect.

The jurisdictional and relative issues raised by appellant, we believe, are controlled by our decision in *Van Balen* v. *Peoples Bank & Trust Company*, 3 Ark. App. 243, 626 S.W.2d 205 (1981), wherein we held that the automatic stay provisions of the Bankruptcy Code did not automatically stay a proceeding against a guarantor of the bankrupt debtor. In so holding, we concluded, in sum, that the filing of a voluntary petition in bankruptcy effects an automatic stay as to the commencement or continuance of any claim against the debtor or his estate, but the stay was not for the benefit of other parties.

Appellant argues that *Van Balen* is distinguishable on its facts since that case involved an action against a third party guarantor and was not directed against the debtor or his estate. Here, appellant argues further, we have a garnishment action which is directed at the property of the debtor held by the garnishee and the liability of the garnishee is limited to the amount of that property. See Ark. Stat. Ann. §§ 31-501, *et seq*.

The fallacy in appellant's argument is that under the facts and applicable law in this case, appellee's garnishment action did not impound the debtor's property or money in the possession of appellant at the time the writ was served. Rather, appellant, as garnishee, failed to file any responsive pleading to the action within the time fixed by Statute and, under Arkansas law, a judgment for the amount sought was

rendered against appellant, not the debtor. See *Karoley* v. *A. R. & T. Electronics, Inc.*, 235 Ark. 609, 363 S.W.2d 120 (1962). If appellant had properly filed an answer limiting its liability to the monies it may have held for and owed to the debtor-employee, we unquestionably would have reached a different conclusion. Since appellant failed to answer, we find the debtor's property or estate was not the subject matter of the pending garnishment proceeding. This being so, the exclusive jurisdiction of the bankruptcy court and its stay order did not serve to enjoin or otherwise affect further state court proceedings against the appellant.

We believe that Alcoa's failure to answer was due to excusable neglect. To hold otherwise would fetter and inhibit the power of courts to correct a wrong that arose from a mere inability to do right. The facts here are not unlike those found in *Lewis* v. *Firestone Tire & Rubber Company*, 241 Ark. 360, 407 S.W.2d 750 (1966). Ms. Gardner, Alcoa's employee responsible for answering garnishments, withheld Charlie Higgins' paycheck on the Friday after she received the writ of garnishment. Immediately after receipt of the writ, Ms. Gardner learned that Higgins had filed for bankruptcy. She at once called the federal bankruptcy office and was informed that she did not have to file an answer. Later, after appellee's attorney called inquiring about the writ, she again called a second time; once again, the federal bankruptcy clerk told her no answer was required. Alcoa was under a federal bankruptcy order to withhold Higgins' monies and pay them over to the Trustee in bankruptcy.

In view of the facts set forth above, and in view of the further facts that (1) there is no contention that Alcoa did not act in good faith, and (2) there is no contention that Alcoa actually owed Higgins $4,075, we find good cause to believe that Alcoa's failure to answer was due to excusable neglect. We reverse.

Reversed.

CLONINGER, J., dissents.

Ruby H. SCAFF *v.* Donald C. SCAFF

CA 81-441 635 S.W.2d 292

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Kenneth C. Coffelt, for appellant.

Paul Petty, for appellee.

TOM GLAZE, Judge. This appeal is from a chancery court order finding appellant delinquent in payments under the terms of a Note and Mortgage to the appellee. The court further directed appellant to bring the payments current within thirty days from the date of its order, or a foreclosure would be ordered.

On appeal appellant argues three points for reversal: (1) The mortgage and note sued on constituted an unconscionable agreement, which was without valid consideration; (2) the order of the court was unresponsive to the pleadings and proof at trial; and (3) the appellee had no equity in the property and his attempt to recover $4,000 from appellant under the terms of the note was a fraud per se practiced on

the appellant. We do not reach the merits of this case because the order of the trial court is not a final order.

The Arkansas Rules of Appellate Procedure, Rule 2, sets out the requirements an order must meet to be appealable. More specifically, a judgment, decree or order must be a final order or, in some way, determine or discontinue the action. The test of finality and appealability of an order is not whether the order settles the issue as a question of law, but to be final the order must also put the court's directive into execution, ending the litigation or a separable branch of it. *Festinger* v. *Kantor,* 264 Ark. 275, 571 S.W.2d 82 (1978).

In the instant case, the chancellor refused to cancel or reform the instruments executed by the parties, and to this degree, he determined the parties' interests and rights under their agreement. He concluded that appellant failed to prove an unconscionable contract and, therefore, he upheld the validity of the contract between the parties. At the conclusion of trial, the chancellor stated, in part:

> Just reading the instruments, relying on those and the proof before the Court with a strict interpretation of the documents for the Court that these parties entered into and executed, it would appear that the Plaintiff would be entitled to a foreclosure on the Defendant's interest in the property.... In any event, at this time, the Court doesn't feel that the Defendant has made its burden of proof to cause this Court to find it to be an unconscionable contract. The Court is not willing to allow a foreclosure in this matter. I would allow the Defendant an opportunity to become current on the contract without granting a foreclosure.

An exchange between the chancellor and the attorneys then occurred as follows:

> MR. PETTY: You are going to postpone foreclosure for thirty days for her to comply with the alleged contract, which she sued on?
>
> THE COURT: That is correct.

MR. PETTY: And if she doesn't comply, then you are going to make foreclosure final, is that my understanding?

THE COURT: Well, that is not exactly what the Court said.

MR. COFFELT: You can't have a conditional foreclosure, as I understand it.

THE COURT: Well, I didn't order a conditional foreclosure.

MR. COFFELT: But, if it isn't a final judgment — I can't appeal unless there is a final judgment of some kind.

THE COURT: All the Court said that we were going to allow — I did not find that she is in default. I am not going to allow a foreclosure at this time.

The Court entered an order that it would later order a foreclosure in the event the delinquent payments were not brought current by the appellant.

This appeal must be dismissed for the reason that an order which merely indicates the direction a court will rule in the future is not a final, appealable order. An appeal cannot be taken from an order of a chancery court which is not a final order. Thus, the Court determined the parties' rights and obligations in this foreclosure action but failed to provide for any execution of the Court's order. Rather, the court clearly directed that further judicial action would be necessary before foreclosure and its execution would be ordered. The appellant can suffer no injury by awaiting the termination of the litigation. *Davis* v. *Hale,* 114 Ark. 426, 170 S.W.2d 99 (1914).

This appeal is dismissed.

Dismissed.

Hope WELLS *v.* William F. EVERETT,
Director of Labor

E 81-322 635 S.W.2d 294

Court of Appeals of Arkansas
Opinion delivered June 30, 1982

Kirby Riffel, for appellant.

Thelma Lorenzo, for appellee.

TOM GLAZE, Judge. The appellant in this employment security case contends that it is unjust to require her to repay $1,152 to the Employment Security Agency. She began receiving benefits on August 23, 1980, in the amount of $136 per week. When she received her first check, she did not cash it but took it to the unemployment office. She told the Agency's representative that she did not believe she was entitled to that amount. The representative for the Agency checked appellant's file and assured appellant that the check was written for the correct amount.

Appellant continued to receive checks for this same amount per week until January 31, 1981. She was informed that a redetermination had been made, and appellant was entitled to $88 per week. The Agency determined that appellant was overpaid $1,152, and she was required to repay it.

At a hearing held July 31, 1981, appellant explained that she and her husband drew social security benefits, which were their only source of income. Appellant's social

security check was for $204 per month. She and her husband owned a home. Appellant testified that she was now 62 years old, suffered from arthritis and was unable to work.

The Board of Review affirmed and adopted the decision of the Appeal Tribunal, which found that it would not be against equity and good conscience to require appellant to repay the Fund. It is not contended that any act or representation on the part of the appellant caused the overpayment. The Board found specifically that the overpayment was not the result of appellant's fraud or willful misrepresentation of a material fact.

A recovery may be required so long as it does not violate the standard of equity and good conscience. As this Court said in *Vaughn* v. *Everett,* 5 Ark. App. 149, 633 S.W.2d 401 (1982):

> In applying the "equity and good conscience" standard, the factfinder may consider such matters as whether claimant received notice that he would be liable to repay any overpayments, whether the claimant received only normal unemployment benefits or some extra duplicative benefit, whether the claimant changed his position in reliance upon receipt of the benefit, the cause of the overpayment, and whether recovery of the overpayment would impose extraordinary hardship on the claimant.

There is nothing in the record which shows that the claimant received notice that she would be liable to repay any overpayments. That is the first factor in the "equity and good conscience" test which the Court relies on. The appellant apparently did not receive extra benefits, even though that too is unclear from the record. The cause of the overpayment lay either with the employer or the Agency. Appellant was blameless as to the cause of the overpayment.

The only evidence presented below supports appellant's contention that repayment would constitute an extraordinary hardship. The record fails to reveal any assets from which the Fund could be repaid. The record does not reveal

the value of appellant's equity in the home she owns, nor do we know if she has any savings accounts, stocks, bonds or other assets. Certainly, a jointly owned home and social security income of $204 per month alone do not support a finding that repayment would not be against equity and good conscience.

As for the reliance factor, appellant spent the money in the normal course of living. Appellant attempted to return the first check because she felt it was an incorrect amount. The Agency checked the records and assured appellant that the amount was a correct one. She relied upon the assurances of the Agency as she might well be expected to do.

The doctrine of estoppel is applicable when four essential elements are present: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Rainbolt* v. *Everett,* 3 Ark. App. 48, 621 S.W.2d 877 (1981). Here, the Agency had access to the correct information concerning appellant's employment; an Agency employee informed the appellant that the check sent to her was in the correct amount; the appellant had no way of knowing that the monetary determination was an incorrect amount; and appellant has used those benefits to meet her daily expenses.

On these facts, we hold that the Agency is estopped to recover the overpayment. To hold otherwise would be to thwart the benevolent purpose of this Act as set out in Ark. Stat. Ann. § 81-1101 (Repl. 1976), which is to provide unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. We reverse and remand for a decision not inconsistent with this opinion.

Reversed and remanded.

MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I agree

that under all the facts and circumstances shown in the record it would be against equity and good conscience to require appellant to repay the overpayments she has received.

I do not agree, however, that the doctrine of estoppel is applicable under the facts and circumstances of this case.

Pearline OLLER *v.* CHAMPION PARTS REBUILDERS, INC. and CONTINENTAL INSURANCE CO.

CA 81-438 635 S.W.2d 276

Court of Appeals of Arkansas
Opinion delivered June 9, 1982
Released for publication June 30, 1982

Dowd, Harrelson & Moore, by: *Gene Harrelson,* for appellant.

Chester Lowe, for appellee.

MELVIN MAYFIELD, Chief Judge. Pearline Oller appeals from a decision of the Workers' Compensation Commission which denied her claim for total and permanent disability. We affirm.

Appellant sustained a compensable injury to her back in June of 1978. In December of that year, after having received conservative treatment, she underwent surgery for the removal of two discs. At a hearing before an administrative law judge the employer admitted to a permanent partial disability of 15% to the body as a whole but the judge awarded appellant permanent and total disability. On appeal by the employer the commission reduced the award to 25% permanent partial disability to the body as a whole. In its opinion, the commission said:

> [A]fter carefully reviewing all the evidence of record herein, including the fact that the claimant has not made any attempt to return to gainful employment and has indicated that she is not interested in exploring vocational rehabilitation, and after according this claimant the benefit of liberal construction to which she is entitled, we find the claimant in this case has not sustained her burden of proof by a preponderance of the evidence that she is permanently and totally disabled.
>
> However, we cannot agree with respondents that the claimant has not sustained any wage loss impairment as a result of her admittedly compensable injury. From our review of the evidence we find that the award of permanent disability in this case should be reduced to twenty-five percent permanent partial disability to the body as a whole.

In her appeal to this court, Mrs. Oller cites her testimony that she is 54 years of age with an eighth grade education, has performed heavy manual labor all her life, must now wear a back brace, has continual pain, cannot stand for more than thirty minutes at a time, and cannot even do her own housework; and she contends these facts, coupled with the medical evidence, demonstrate that the commission's decision is not supported by substantial evidence.

The medical evidence consists mainly of reports from appellant's family doctor and reports and a deposition from

the neurosurgeon who performed her disc surgery. A report from her family doctor states that, in his opinion, appellant is totally and permanently disabled. Reports from the neurosurgeon say appellant is totally disabled from "going back to any type of stooping, lifting or bending on a continuous basis" and that, in his opinion, she is totally and permanently disabled. In his deposition, the neurosurgeon testified that appellant had a 15% permanent partial disability to the body as a whole and said it would be conjecture whether she could do sedentary type of work, adding "that's not for me to determine."

Appellant argues that the appellees offered no lay or medical evidence to rebut her evidence and that the commission's award should be set aside and the law judge's award should be reinstated.

In the first place, the Arkansas Supreme Court has said "we give the law judge's findings no weight whatever." *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979). Or, as we said in *Jones* v. *Scheduled Skyways, Inc.,* 1 Ark. App. 44, 612 S.W.2d 333 (1981):

> The duty of the Workers' Compensation Commission is to make a finding in accordance with the preponderance of the evidence and not on whether there is any substantial evidence to support the findings of the Administrative Law Judge.

And in the second place, we must view and interpret the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the commission and give the testimony its strongest probative force in favor of the action of the commission, whether it favored the claimant or the employer. *Clark* v. *Peabody Testing Service; Jones* v. *Scheduled Skyways, Inc.*

In determining whether the evidence supports the award of the commission we must keep in mind that disability, within the meaning of workers' compensation law, does not mean merely functional disability but includes, in varying degrees in each instance, loss of use of the

body to earn substantial wages. *Glass* v. *Edens,* 233 Ark. 786, 346 S.W.2d 685 (1961). That opinion also quotes from *Larson on Workmen's Compensation Law* that "the proper balancing of the medical and the wage loss factors is, then, the essence of the 'disability' problem in workmen's compensation." We have said that the balancing of those factors is a responsibility of the commission. *Chicago Mill & Lumber Co.* v. *Greer,* 269 Ark. 895, 902, 601 S.W.2d 583 (Ark. App. 1980), *rev'd on other grounds,* 270 Ark. 672 (1980). That statement is supported by a citation to *Mann* v. *Potlatch Forests,* 237 Ark. 8, 371 S.W.2d 9 (1963) where the court said it was the duty of the commission, not the doctor, to determine disability from a consideration of the medical evidence together with other elements such as the claimant's age, education, experience, and other matters affecting wage loss.

While doctors are experts on functional or anatomical loss, they are not deemed to be experts on wage loss disability or loss of earning power capacity unless such qualifications are shown. On the other hand, in *Rooney & Travelers Ins. Co.* v. *Charles,* 262 Ark. 695, 699, 560 S.W.2d 797 (1978), the court referred to a prior decision where it said:

> [A]lthough the commission's knowledge and experience is not evidence, once it has before it firm medical evidence of physical impairment and functional limitations, it has the advantage of its own superior knowledge of industrial demands, limitations and requirements and can apply its knowledge and experience in weighing the medical evidence of functional limitations together with other evidence of the manner in which the functional disability will affect the ability of an injured employee to obtain or hold a job and thereby arrive at a reasonably accurate conclusion as to the extent of permanent partial disability as related to the body as a whole.

In the instant case, Mrs. Oller testified that her husband owned four hundred and thirty acres of land on which they had operated a family-owned business of hog farms, fish farms, and "just everything," and that she had helped with

the office work by doing a "little filing" and "taking telephone messages and things." There is nothing in the record to show that the doctors who treated Mrs. Oller knew anything about the fact that she had done some type of office work for the family-owned business. It was proper for the commission to consider this situation in making its determination.

Also, there is the matter of the appellant's lack of interest in exploring vocational rehabilitation. This was referred to in the commission's opinion and while Ark. Stat. Ann. § 81-1310 (f) (Supp. 1981) provides an employee "shall not be required to enter any program of vocational rehabilitation against his consent," the Arkansas Supreme Court has said:

> Whether or not an injured employee can be retrained is a pertinent factor in determining the amount, if any, of wage earning loss. If no rehabilitation evaluation is made the commission has no way of knowing whether the employee could have been retrained.

Smelser v. *S.H.&J. Drilling Co.*, 267 Ark. 996, 593 S.W.2d 61 (1980).

In a recent case we upheld the commission's award of 35% permanent partial disability to a claimant who testified that while he could not follow his former occupation as a welder, he had made no real effort to either seek employment in other fields for which his education and experience might qualify him or to determine whether he was able to perform the duties of such other pursuits. In that case, the commission had found that these circumstances effectively blocked full assessment of all factors in determining ultimate disability. *Rapley* v. *Lindsey Const. Co.*, 5 Ark. App. 31, 631 S.W.2d 844 (1982).

If, in the instant case, appellant's lack of interest in exploring vocational rehabilitation was an impediment to the commission's full assessment of appellant's loss of earning capacity, she cannot be heard to complain of that now. The commission has found she has not sustained her

burden of proving, by a preponderance of the evidence, that she is permanently and totally disabled. We cannot say its finding of 25% permanent partial disability is not supported by substantial evidence.

Affirmed.

COOPER, J., dissents.

[redacted]