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Melissa HALL *v.* STATE of Arkansas

CACR 94-1156 906 S.W.2d 692

Court of Appeals of Arkansas
Division II
Opinion delivered October 4, 1995

Randy Rainwater, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Melissa Hall, asks this court to reverse the trial court's denial of her motion to withdraw her previously entered pleas of guilt. We decline that invitation, and affirm.

On March 25, 1994, appellant was charged by information with one count of breaking or entering, two counts of felony theft of property, possession of drug paraphernalia and possession of a controlled substance, marijuana. For each offense, it was alleged that she acted alone or as an accomplice to her husband, John D. Hall. On April 6, 1994, appellant appeared before the court with counsel and entered pleas of guilt to all counts in exchange for the State's agreement not to pursue eight other charges pending against appellant. At the hearing, the trial court accepted the pleas of guilt after determining that there was a factual basis to support them and that appellant had knowingly, voluntarily and intelligently entered them. The trial court also accepted the recommended sentence of concurrent terms totalling ten years in prison.

On April 13, 1994, appellant again appeared with counsel and asked the court to allow the withdrawal of her guilty pleas on the ground that the pleas were not entered voluntarily. Appellant told the court that she had been confused, and had pled guilty only because her husband had made her do so. She explained that her husband had an "anger problem," that he was the one who committed the criminal acts and that her participation in the criminal activity was the result of his intimidation. James Roy Carmack, Sheriff of Montgomery County, testified that appellant and her husband had been jailed in separate facilities and that the only contact they had had during their incarceration consisted of two phone calls and several letters. Sheriff Carmack said that he had read one of the letters written by Mr. Hall, and he related that Hall had advised appellant in this letter not to plead guilty as he thought that she could get a better deal later on. Carmack further testified that the two had sat together for a short time in the courtroom on the day their pleas were entered. After hearing this testimony, the court first took the issue under advisement, but later entered an order denying appellant's motion to withdraw.

Rule 26.1 of the Arkansas Rules of Criminal Procedure addresses plea withdrawal, and states in pertinent part that the trial

court shall allow a defendant to withdraw her plea of guilt upon proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice. The rule further provides that withdrawal shall be deemed necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that the plea was, among other things, involuntary. Also according to the rule, the court in its discretion may allow the defendant to withdraw her plea if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.

Where a factual basis exists for the plea and the defendant initially admits that the plea is voluntary, the defendant faces an "uphill climb" to overcome the consequences of the plea. *Stone* v. *State*, 254 Ark. 566, 494 S.W.2d 715 (1973). As was said in *Stone* v. *State, supra*, "[p]leas of guilty — especially negotiated ones — are designed to avoid the necessity of trial, with advantages both to the State and to the defendant. It is essential that such pleas have some measure of stability." In sum, a plea of guilty is not to be lightly disclaimed days later, as appellant has attempted to do. Furthermore, the trial judge was not required to accept appellant's repudiation of her earlier statements regarding the voluntariness of her pleas. *See Pettigrew* v. *State*, 262 Ark. 359, 556 S.W.2d 880 (1977). From our review, we find no abuse of discretion in the trial judge's decision that the withdrawal of appellant's pleas was not necessary to correct a manifest injustice.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Robert KINKEAD and Virginia Kinkead
v. UNION NATIONAL BANK

CA 94-534 907 S.W.2d 154

Court of Appeals of Arkansas
Division II
Opinion delivered October 4, 1995

[redacted]

[redacted]

Joyce Kinkead, for appellants.

Allen Law Firm, by: *J. William Allen* and *Sandra Jackson*, for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal is from a judgment entered by the Pulaski County Chancery Court that awarded appellee judgment on its complaint for foreclosure and also granted it judgment on all counts of the appellants' counterclaim. Appellants assert eleven points on appeal. We find these points to be without merit and affirm.

In 1991, appellant Robert Kinkead owned an insurance agency known as the Kinkead Agency. Appellee, Union National Bank, made available financing to Kinkead's insurance customers

for their insurance premiums. Under this arrangement, Kinkead submitted premium finance notes signed by the insured and guaranteed by the Kinkead Agency to Union. Union then disbursed the loan proceeds to the Kinkead Agency to be used to pay the insurance companies writing the policies.

In July 1991, Union officials contacted Mr. Kinkead and set a meeting date after it discovered that some of the premium finance notes from the Kinkead agency were fraudulent. Neither Kinkead nor his wife, appellant Virginia Kinkead, attended the meeting or any of the subsequent meetings with the Union officials relating to this matter. Instead, attorney Webster Hubbell appeared on behalf of Kinkead but stated that he was there as a friend and not as an attorney. After the first meeting, it was decided that Kinkead would be given some time to arrange financing to pay off the notes owed to Union.

Kinkead was unable to procure outside financing, and at Hubbell's request, Union agreed to refinance the money it was owed secured by certain collateral. Union then sent Hubbell loan documents for appellants' execution which included a promissory note in the amount of $96,324.00; a mortgage on real property owned by appellants; and a collateral assignment of a contract for sale between Mr. Kinkead and Stevens-Dell & Associates, Inc. Before appellants executed the loan documents and mortgage, Union filed a criminal referral form regarding Kinkead's fraud as required by 12 C.F.R. § 21.11. Neither Kinkead nor Hubbell was notified that the criminal referral would be filed. The note and mortgages were signed by both appellants on November 21, 1991. On July 15, 1992, Kinkead pled guilty to bank fraud, and at the pre-sentencing hearing, Kinkead's attorney represented to the court that Kinkead had made restitution to Union by virtue of the November 21, 1991, note.

On October 15, 1992, Union filed its foreclosure action, contending that appellants failed to make the March 21, 1992, payment due on their note or any other payments required by the note thereafter. Appellants responded and counterclaimed. The central thrust of their counterclaim was that Union induced them to execute the promissory note and mortgages by representing that no criminal action would be taken against Robert Kinkead if the notes were paid by refinancing. They alleged misrepre-

sentation, breach of fiduciary duty, failure to make disclosures required by the Truth-in-Lending Act, and malice, and requested that the note, mortgages, and collateral agreement be rescinded; that all payments made on such note be returned to them; and that they be awarded punitive damages in the amount of $3,000,000.00. Union denied appellants' allegations, and it affirmatively pled that the Truth-in-Lending Act did not apply to Union's transaction with appellants; that the counterclaim failed to state facts upon which relief could be granted; and that the Kinkeads were barred from seeking relief under the doctrine of unclean hands. The matter proceeded to trial, at the conclusion of which the court granted appellee judgment on its complaint and all counts of appellants' counterclaim and awarded attorney's fees of $47,995.95. Appellants petitioned the court to amend its judgment, but that motion was deemed denied after thirty days. Appellants then filed their notice of appeal.

Appellants first contend that, because they sought punitive damages from appellee in their counterclaim, the chancellor erred in refusing to sever their counterclaim from appellee's foreclosure action and transfer it to circuit court. In support of their argument, they rely on Rule 18(b) of the Arkansas Rules of Civil Procedure, which provides that "[t]he trial court may make appropriate orders affecting severance of claims and may transfer claims between courts of law and equity on appropriate jurisdictional grounds." Appellants also rely on *Toney* v. *Haskins*, 7 Ark. App. 98, 109, 644 S.W.2d 622, 628 (1983), where this court stated: "Equity will not ordinarily enforce penalties and it has been held that one who appeals to a court of equity for relief waives the award of punitive damages as a matter of right."

Although we agree that the chancellor has the power to sever and transfer a claim in an appropriate situation, we find no error in his failure to do so in this case. Regardless of whether a party is entitled to bring an action at law, the mere existence of that right does not deprive the equity court of jurisdiction, unless the legal remedy is clear, adequate, and complete. *Weathersbee* v. *Wallace*, 14 Ark. App. 174, 686 S.W.2d 447 (1985). Here, appellants' counterclaim sought rescission of the promissory note, mortgages, and collateral agreement based on their allegation of fraud and violation of the Truth-in-Lending Act. An action to rescind under the Truth-in-Lending Act is an equi-

table proceeding. *See Bank of Evening Shade* v. *Lindsey*, 278 Ark. 132, 644 S.W.2d 920 (1983). Once a chancery court acquires jurisdiction for one purpose, it may decide all other issues. *Pryor* v. *Hot Spring County Chancery Court*, 303 Ark. 630, 799 S.W.2d 524 (1990); *see Bright* v. *Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992).

Appellants' second point concerns the chancellor's refusal to compel Union Bank officials and its former attorney, David Duke, to testify regarding conversations that they held concerning the filing of the criminal referral. During depositions and at trial, appellee asserted that the attorney-client privilege protected these communications from disclosure to appellants. Appellants first contend that appellee did not meet its burden of showing the privilege applied. We disagree.

Rule 502(b) of the Arkansas Rules of Evidence generally provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential . . . communications made for the purpose of facilitating the rendition of professional legal services to the client . . . between himself or his representative and his lawyer or his lawyer's representative. . . ." An attorney is incompetent to testify concerning any communication made to him by his clients, or his advice thereon, without his client's consent, and the rule as to privileged communications between attorney and client extends to statements of each to the other. *See Norton* v. *Norton*, 227 Ark. 799, 302 S.W.2d 78 (1957). The burden of showing that a privilege applies is upon the party asserting it. *Shankle* v. *State*, 309 Ark. 40, 827 S.W.2d 642 (1992).

At trial, Union's former attorney, Mr. Duke, acknowledged that the criminal referral form was discussed at meetings he held with Union officials and provided appellants with the dates of those meetings. Duke also testified that he was involved as a lawyer for Union and that he met with Union officials concerning the Kinkead matter. We find that this testimony was sufficient for appellee to meet its burden of showing that the privilege applied.

In regard to these same communications, appellants next argue that the communications were excepted from the attorney-client privilege because Arkansas Rule of Evidence 502(d)(1)

provides an exception to the attorney-client privilege if the communication is in furtherance of the crime of fraud. Appellants contend that Duke and the Union officials conspired to commit a fraud by delaying the filing of the criminal referral form from late July 1991 until October 14, 1991. Under 12 C.F.R. 21.11 (1995), a national bank is required to "file an OCC Criminal Referral Form . . . for any known or suspected criminal violation no later than thirty days after detection of the loss or known or suspected criminal violation." Appellants argue that appellee's delay in filing a criminal referral form was a violation of 18 U.S.C. § 371 and 18 U.S.C. § 1005.

We need not discuss these code sections because appellants have not provided this court with any citation to authority or convincing argument explaining how these code sections are applicable to this case. An assignment of error unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that the assignment of error is well taken. *Smith* v. *Smith*, 41 Ark. App. 29, 848 S.W.2d 428 (1993); *General Elec. Supply Co.* v. *Downtown Church of Christ*, 24 Ark. App. 1, 746 S.W.2d 386 (1988).

Appellants' final argument concerning the attorney-client privilege is that appellee waived its right to assert its attorney-client privilege when it filed the criminal referral form, discussed the matter with the FBI, and produced a copy of the form for appellants in response to their motion for production of documents. We disagree. It is not the information or the opinion that is privileged, but rather the communication of them to the attorney in whatever form, and neither the requirement that the information also be provided to some other forum nor its divulgence in response will subvert the privilege. *Courteau* v. *St. Paul Fire & Marine Ins. Co.*, 307 Ark. 513, 821 S.W.2d 45 (1991).

For their third point, appellants contend that the trial court erred in striking their second amended counterclaim, which added a claim based on the Equal Credit Opportunity Act and sought $10,000.00 in actual damages and punitive damages of $4,335,000.00. Rule 15(a) of the Arkansas Rules of Civil Procedure provides that amendments to pleadings shall be allowed in nearly all instances without special permission from the court *except where, on motion of an opposing party, the court deter-*

mines either that prejudice would result or that disposition of the cause would be unduly delayed, in which case the court may strike such amended pleading. See Odaware v. Robertson Arial-AG, Inc., 13 Ark. App. 285, 683 S.W.2d 624 (1985). The trial court is vested with broad discretion in allowing or denying amendments. *See Cawood* v. *Smith*, 310 Ark. 619, 839 S.W.2d 208 (1992). Here, the pleading was not filed until the day before the trial on the merits of this case began. Appellee argued that the inclusion of this claim at such a late date would require substantial additional research and discovery and would unduly delay the trial, which already had been twice rescheduled. We cannot find that the chancellor erred in holding that appellants' pleading was untimely and would result in prejudice to appellee.

Appellants' fourth point concerns the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* This Act requires a lender to give written notice to the borrower that he has three days following any transaction that results in a mortgage on real property to notify the creditor that he elects to cancel, and, if the notice is not given, the right to cancel continues. *See Bank of Evening Shade* v. *Lindsey*, 278 Ark. 132, 644 S.W.2d 920 (1983). In this case, the disclosures under the Act were dated November 21, 1991, but they were not sent for appellants' signature until November 27, 1991, one day after the three-day expiration period. Appellants therefore argue that the note, mortgage, and collateral agreement should be rescinded because Union did not timely send disclosures as required by the Truth-in-Lending Act.

The chancellor held that the Truth-in-Lending Act was not applicable after finding that all the transactions that led to the lawsuit were of a business nature and not a consumer or personal loan. Business loans are exempted from the Truth-in-Lending Act. *See id.* Appellants contend the chancellor's finding that the subject transactions were of a business nature is in error because the undisputed evidence showed Kinkead used the money he obtained from the fraudulent notes for personal expenses.

It is the use of the money, property, or services that is the subject of any underlying credit transaction, and not the nature of the property given as security nor the subjective motivation of the mortgagor, that determines whether the credit transaction is exempt from the requirements of the federal Truth-in-

Lending Laws. *See Sims* v. *First Nat'l Bank*, 267 Ark. 253, 590 S.W.2d 270 (1979). Where the evidence establishes that the proceeds of a loan were applied primarily to retire a business debt and purchase inventory, the loan is exempt from the Truth-in-Lending Act, and the fact that some checks may have been drawn on the account for personal purposes does not change the nature of the loan at the time it was made. *See Winkle* v. *Grand Nat'l Bank*, 267 Ark. 123, 601 S.W.2d 559 (1980), *cert. denied*, 449 U.S. 880 (1980).

Here, Leslie Wilfong, a Union official, testified that the $96,000.00 promissory note was made to appellants for the purpose of refinancing loans made to the Kinkead's insurance agency. Even though Kinkead testified that he used funds from the fraudulent notes for his personal use, he represented to the bank that the loans were to be used to finance insurance premiums, and the proceeds from these loans were sent to The Kinkead Agency. "A lender should be able to rely on the sworn statement of a borrower as to his intended use of the loan proceeds. . . ." *Briggs* v. *Capital Sav. & Loan Ass'n*, 268 Ark. 527, 531, 597 S.W.2d 600, 603 (1980). An appellate court attaches substantial weight to the chancellor's findings, and while the appellate court considers the evidence on a chancery appeal *de novo*, it will not reverse the chancellor unless it is shown that the lower court decision is clearly contrary to a preponderance of the evidence. *Id.* We cannot say that the chancellor's finding that the transactions in question were of a business nature is clearly against the preponderance of the evidence.

Appellants' points 5, 7, and 8 all concern the chancellor's holding that appellee did not have a duty to disclose to appellants that it was required to file a criminal referral form and that a criminal referral form was in fact filed. Appellants argue that appellee's failure to advise them that it was required to file the criminal referral form clearly demonstrates bad faith, breach of trust, and breach of fiduciary duty, and that appellee protected its own interests to the detriment of appellants.

In support of their argument, appellants cite *Union National Bank of Little Rock* v. *Farmers Bank*, 786 F.2d 881, 887 (8th Cir. 1986), where the court stated:

> Under Arkansas law, a party may have an obligation to

> speak rather than remain silent, when a failure to speak is the equivalent of fraudulent concealment. Such a duty of disclosure arises only where special circumstances exist. The duty arises "where one person is in position to have and to exercise influence over another who reposes confidence in him whether a fiduciary relationship in the strict sense of the term exists between them or not." Absent such special circumstance, or affirmative fraud, a party must seek out the information it desires; it may not omit inquiry and examination and then complain that the other did not volunteer information.

Id. at 887 (quoting *Hanson Motor Co.* v. *Young*, 223 Ark. 191, 196, 265 S.W.2d 501, 504 (1954)) (citations omitted).

Although appellants argue that special circumstances existed here that created a duty of disclosure, they do not describe what those circumstances were. This court held in *Marsh* v. *National Bank of Commerce*, 37 Ark. App. 41, 822 S.W.2d 404 (1992), that generally the relationship between a bank and the customer is merely that of debtor and creditor and that the party claiming the existence of a confidential relationship has the burden of proving it.

Appellants also argue that Union's delay in filing the criminal referral form and its foreclosure action demonstrate a breach of trust, breach of fiduciary duty, and bad faith. Specifically, appellants point out that, although Union filed the criminal referral form more than a month before appellants executed their note, mortgage, and collateral agreement to Union, Union made sure "it was 'fully collateralized' before any law enforcement agency had time to act" and that Union waited until after appellant was sentenced for his fraud conviction before it filed its foreclosure action.

Appellee admittedly did seek to protect its own interests through its actions. Nevertheless, appellants have not shown that those actions breached any duty owed to appellants or constituted bad faith. Appellants were represented by Webster Hubbell, who testified that he thought Kinkead had committed a crime, that he had contacted a criminal attorney, and that he never questioned Union officials regarding any criminal consequences. He also testified he had no reason to believe that Union had not

dealt with appellees in good faith. The chancellor found that the parties dealt at arm's length and that appellee did not owe them any fiduciary duty. From our review of the evidence, we cannot say these findings are clearly erroneous.

Also in connection with the criminal referral form, appellants contend that the chancellor erroneously determined that there was no evidence to support their allegations that David Duke and Union officials conspired to withhold information from appellants in order to coerce appellants to execute the note, mortgage, and other collateral in favor of appellee. We find no merit to this argument, as we have affirmed the chancellor's holding that appellee did not have a duty to disclose to appellants that it was required to file the criminal referral form.

For their sixth point, appellants argue that the chancellor erred in finding that there was no evidence presented to show that Union acted with malice or reckless disregard as they alleged in count four. Count four involved appellants' allegation that Union intentionally overstated the amount that was included in appellants' promissory note and that it included sums from notes that were not in default nor "improper," including appraisal costs, attorney's fees, and title fees. Appellants also contend that Union did not advise them what made up the amounts included in the note until approximately one month after they signed the note and that Union returned payments it received from Kinkead's insureds on the notes that were not obtained by fraud to the insureds rather than crediting them to the Kinkeads' note. We agree that no evidence was presented to the trial court to support their complaint.

The undisputed evidence demonstrates that Union was following the directions given it by Hubbell, appellants' agent, in preparing the note and other collateral. Leslie Wilfong testified that Hubbell decided what the amount of the monthly payment on the note would be, the seventeen-year amortization, and the collateral that would secure the note. Another Union official, Robert Whisnant, testified that, with regard to the amount of the note, Hubbell told him to include all of the notes and late charges in the note balance regardless of whether they were procured by fraud. This testimony was not disputed by Hubbell. There was also evidence that a breakdown of the note was provided to appel-

lants in December 1991, that they then made several payments on the note after the breakdown was provided, and that it was not until July 1992 that appellants first questioned the amount of the note with appellee. Silence or acquiescence in the contract for any considerable length of time amounts to ratification. *Sims* v. *First Nat'l Bank*, 267 Ark. 253, 590 S.W.2d 270 (1979).

Appellants also allege that Union made false representations that induced them to enter into the note and mortgage. Specifically, appellants assert that Hubbell told Kinkead on numerous occasions that he did not think a criminal charge would be filed against Kinkead if he repaid the fraudulent notes. There is no evidence, however, that any such representations were made to Hubbell or appellants by Union officials or its attorneys. In fact, Hubbell admitted in his deposition that no such representations were made to him and that he never discussed any criminal charges with the Union officials or its attorney although he thought Kinkead had committed a crime. Appellants admitted that they never had any discussions with Union officials and relied entirely on Hubbell to represent them.

There is also no merit to appellants' claim that Union forced them to pledge their house as collateral. The undisputed evidence at trial was that Hubbell, appellants' agent, offered the mortgage on their house to Union in order to obtain financing to repay the fraudulent loans.

Appellant Virginia Kinkead also argues that the note and mortgage should be set aside as to her because she was not liable on the fraudulent notes to the bank. The supreme court addressed a similar argument in *Sims* v. *First National Bank, supra*: "A mortgage by a married woman to secure her husband's debts, whether they be existing debts or debts to accrue, is valid and enforceable. Consideration for the mortgage need not pass to the wife as consideration to the husband is sufficient. . . ." 267 Ark. at 263, 590 S.W.2d at 276 (citations omitted).

We do not address appellants' contention that the chancellor erred in holding that over-collateralization is not a defense to the note because appellants have not cited any authority or made a convincing argument in support of this contention. *See Smith* v. *Smith*, 41 Ark. App. 29, 848 S.W.2d 428 (1993); *General Elec. Supply Co.* v. *Downtown Church of Christ*, 24 Ark.

App. 1, 3, 746 S.W.2d 386 (1988). Furthermore, the evidence reflected that the amount of collateral Union received on its note was the amount offered by Hubbell on behalf of appellants. Therefore, appellants are not in a position to challenge the amount of collateral appellee obtained from them.

Appellants' ninth point concerns the chancellor's award of $47,995.95 in attorney's fees to appellee. At the conclusion of the trial, appellee's witness Wilfong testified that this amount had been paid by appellee to its attorneys through October 19, 1993. Appellant objected to the court's consideration of attorney's fees and requested a separate hearing. The chancellor denied appellants' request but stated a motion for reconsideration could be filed and ordered appellee to supply appellants with a copy of its billing statements. Appellants then filed a motion to amend the judgment, which was deemed denied after thirty days.

Appellants contend that, even if Union was entitled to receive a reasonable attorney's fee on its foreclosure action, it was not entitled to receive a fee for defending appellants' counterclaim because their claims dealt primarily with federal statutes and tort. The supreme court held in *Stein* v. *Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992), that the Arkansas fee statute for civil actions does not embrace tort actions such as deceit. Relying on that case, appellants here argue that it was error to award appellee a fee for defending their claims.

We find that *Stein* v. *Lukas, supra*, is not controlling in this fact situation. In that case, the appellant's complaint was brought on theories of deceit and breach of warranty. Here, although appellants made unsubstantiated allegations of tort in their counterclaim, the trial was basically an action for foreclosure. In *Loewer* v. *National Bank of Arkansas*, 311 Ark. 354, 844 S.W.2d 329 (1992), the supreme court affirmed an attorney's fee award of $50,000.00 on a $130,851.00 judgment, where the appellee had sued on two promissory notes and the appellants counterclaimed for set-off of his debt because of the appellee's conversion of his equipment. In that case, the appellants had also questioned the amount of attorney's fees. The supreme court held:

> Loewer also argues recoveries of attorney's fees on promissory notes are limited to 10% of the principal and

> interest, relying on Ark. Code Ann. § 4-56-101 (Repl. 1991). This section simply recognizes that a provision in a promissory note for the payment of a reasonable attorney's fee, not to exceed 10% of the amount of principal plus interest, may be enforceable as a contract of indemnity. We cannot interpret the Statute to limit the amount of attorney's fees which can be awarded in an action to recover on a promissory note. Arkansas Code Ann. § 16-22-308 (Supp. 1991) clearly authorizes attorney's fees to be awarded in an action such as this one.

Id. at 361, 844 S.W.2d at 334.

In determining a reasonable attorney's fee, the court considers the character of the services, the time and trouble involved, the skill and experience required, the professional character, judgment, and responsibility of the attorney, the result achieved, the attorney's own estimation of the value of his services, and an estimate of other attorneys who are familiar with relevant facts. *See State Farm Fire and Casualty Co.* v. *Stockton*, 295 Ark. 560, 750 S.W.2d 945 (1988). Considerable weight is given to the opinion of the judge before whom the proceedings have been conducted, *Crockett & Brown, P.A.* v. *Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993), and an award of an attorney's fee will not be reversed absent an abuse of the trial court's discretion. *See Garner* v. *Limbocker*, 28 Ark. App. 68, 770 S.W.2d 673 (1989).

Here, appellee furnished appellants and the court with a detailed summary of its billing statement. One counterclaim and two amended counterclaims were filed by appellants, and appellee had to defend against nine causes of action. Numerous depositions were also taken, and the chancellor sat through hearings and one trial. Based on the evidence before him, we cannot say that appellants have shown any abuse in the award of attorney's fees.

Appellants contend in their tenth point that the chancellor erred in holding that the security that they offered was not adequate to stay execution of appellee's entire judgment pending appeal. Inasmuch as we have affirmed the judgment in favor of appellee, the question raised by appellants is now moot, and we decline to address it. *Aldridge* v. *Aldridge*, 28 Ark. App. 175,

773 S.W.2d 103 (1989); *see Logan* v. *State*, 299 Ark. 550, 776 S.W.2d 327 (1989).

We also do not address appellants' final point, that the chancellor erred in compelling them to file a schedule under Ark. Code Ann. § 16-66-221, because the schedule was in fact filed by appellants on May 12, 1994.

Affirmed.

ROBBINS and ROGERS, JJ., agree.

Dale SMITH *v.* Kim SMITH

CA 94-1042 907 S.W.2d 755

Court of Appeals of Arkansas
Division II
Opinion delivered October 11, 1995
[Petition for rehearing denied November 15, 1995.]

Mooney Law Firm, by: *Tom A. Bennett*, for appellant.

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

JAMES R. COOPER, Judge. The parties in this chancery case were married in 1983 and separated on November 8, 1991. The appellant filed a complaint for divorce and the appellee answered and filed a counterclaim for divorce. After a hearing, the chancellor entered a decree of divorce and partial division of property on April 5, 1993. In the decree, the chancellor ordered an accounting for the parties' farm and trucking operations for 1991 and 1992. After a hearing, the court in an order filed February 18, 1994, found the net income from those operations for 1991 and 1992 to be marital property totalling $72,628.52; awarded appellee

judgment in the amount of $36,785.63; and found that the appellant was the successful purchaser of the real property. In a subsequent order entered on April 26, 1994, the chancellor found that the appellee's judgment of $14,499.52 from the original divorce decree would bear interest from April 2, 1993 at 8% per annum. From those decisions, comes this appeal.

For reversal, the appellant and cross-appellant raise several issues relating to the order of February 18, 1994. We are unable to address those issues, however, because the record on appeal was filed outside the seven-month maximum period allowed for that purpose by Ark. R. App. P. 5(b).

Rule 5(b) provides, in pertinent part, that:

> In no event shall the time [for filing the record] be extended more than seven (7) months from the date of the entry of the judgment, decree or order, or from the date on which a timely postjudgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c), whichever is later. An appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment, decree and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from.

The order of February 18, 1994, dealt with all of the outstanding issues between the parties by concluding their rights to income on the farm and trucking operations for 1991 and 1992, by detailing credits to be given and allocations to be made by the Commissioner concerning the real property previously sold, and by its final paragraph concerning the distribution of "all remaining funds." The order of February 18, 1994, was thus a final, appealable judgment. *See Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); Ark. R. App. P. 2(a)(1).

In contrast, the April 26, 1994, order concerning interest payments was a collateral matter, a ministerial detail in furtherance of the court's decision. Details of such matters need not be final in order for the order granting all the relief prayed for in the complaint to be final. *Pledger* v. *Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991). Furthermore, the April 26, 1994, order did not arise out of a motion for judgment notwithstanding the

verdict under Rule 50(b), out of a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), or out of a motion for a new trial under Rule 59(b). Consequently, the order of April 26, 1994, was not "an order disposing of a postjudgment motion under Rule 4," and it did not bring up for review the order of February 18, 1994. Therefore, the filing of the record on appeal on September 26, 1994, was outside the seven-month maximum period allowed for that purpose by Ark. R. App. P. 5(b) with respect to the order of February 18, 1994, and the appeal and cross-appeal from that order must be dismissed. *In re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992).

There remains a single issue arising out of the trial court's order of April 26, 1994. The appellant contends that the trial court erred in ordering him to pay interest on the appellee's judgment for $14,499.52 and on the unpaid purchase price of the real property. However, we find that this issue is moot. The record indicates that these amounts have been paid by the appellant, and voluntary payment of a judgment amount is inconsistent with a subsequent appeal so as to render any subsequent appeal moot. *Shepherd* v. *State Auto Property and Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993). In the absence of any attempt to post a supersedeas bond, we regard the payment to be voluntary. *Id.*

Dismissed in part, affirmed in part.

MAYFIELD and ROGERS, JJ., agree.

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

CA 94-1022 907 S.W.2d 745

Court of Appeals of Arkansas
En Banc
Opinion delivered October 11, 1995
[Petition for rehearing denied November 22, 1995.]

The Perroni Law Firm, by: *Samuel A. Perroni* and *Mona J. McNutt*, for appellant.

Helen Rice Grinder, for appellee.

JOHN B. ROBBINS, Judge. On November 13, 1990, appellant Christine M. Jones and appellee Dr. Jerry A. Jones were divorced. The divorce decree incorporated a property settlement agreement which gave custody of their infant child, Cameron, to Ms. Jones and provided that Dr. Jones was to pay $2,000 per month in child support. On Sunday, December 13, 1992, the chancery court issued an emergency *ex parte* order which provided that Dr. Jones was not required to return Cameron to Ms. Jones following Dr. Jones' weekend visitation and that an emergency custody hearing would be scheduled. The emergency hearing was scheduled for December 16, 1992, and on December 18, 1992, the chancery court issued a temporary order changing custody of Cameron from Ms. Jones to Dr. Jones pending a final hearing. A trial was held in February 1994 for the purpose of hearing Dr. Jones' petition for a permanent change of custody. After the trial, the chancery court determined that there had been a material change in circumstances which warranted a change in custody from Ms. Jones to Dr. Jones. In its order, the court allowed Ms. Jones liberal visitation rights and abated Dr. Jones' child support obligation. Specifically, the chancery court relied on its finding that Ms. Jones was unable to provide for Cameron's emotional needs; that Dr. Jones lived in Conway, which is a much safer environment than Little Rock, where Ms. Jones had recently relocated; and that Dr. Jones had recently remarried and could provide a more stable home than Ms. Jones, who remained single.

For reversal, Ms. Jones raises numerous arguments pertaining to each of the three custody proceedings. She first argues that the trial court exceeded its authority in conducting a child custody hearing on Sunday, December 13, 1992, and abused its discretion in changing custody based upon ex parte communications. As to the December 16, 1992, emergency hearing, Ms. Jones contends that she was not given adequate notice of the hearing as is required by the due process clause of the Fourteenth Amendment, and that the manner in which the hearing was conducted deprived her of due process of law. Ms. Jones also argues that the trial court erred in awarding an emergency change of custody after the hearing because there was insufficient evidence that Cameron was in danger or that it was detrimental for Cameron to be in the custody of Ms. Jones. In addition, Ms. Jones chal-

lenges the sufficiency of the evidence with regard to the permanent change of custody to Dr. Jones. She asserts that the trial court's finding that "it question[ed] [Ms. Jones'] ability to adequately provide an emotionally stable and wholesome home for the child" indicated a clearly erroneous standard, and that the trial court abused its discretion in finding that her move from Conway to Little Rock was a substantial change in circumstances supporting a change in custody. Ms. Jones further asserts that the trial court abused its discretion in concluding that the remarriage of Dr. Jones, the subsequent birth of a child, and the presence of a stepson was a significant change of circumstances justifying a change of custody. Finally, Ms. Jones argues that the chancellor abused his discretion in refusing to recuse.

We first note that all of Ms. Jones' arguments which pertain to the temporary custody orders are now moot and need not be addressed by this court. It is well settled that a temporary order is terminated upon entry of a subsequent permanent order. *Vairo* v. *Vairo*, 27 Ark. App. 231, 769 S.W.2d 423 (1989). The rights of the parties in the present litigation have been settled by the final award of custody, and a decision on the merits of the temporary awards would have no practical effect on the rights of the parties. *See id.* However, because error by a chancellor in granting or denying ex parte emergency relief incident to an action seeking a change of custody is virtually always moot and evades review, we will use this occasion to briefly address appellant's contention that the ex parte order here should not have been entered. *See Wright* v. *Keller*, 319 Ark. 201, 203, 890 S.W.2d 271, 272 (1995).

We acknowledge that the matter of emergency ex parte applications in child custody proceedings must be one of the most difficult areas of a chancellor's jurisdiction. This is so because ex parte decision-making is contrary to the basic premise of our justice system that an adversarial presentation of a controversy will result in a better reasoned, and hopefully correct, decision. However, because of the harm which can so quickly be suffered by a helpless child, emergency measures without an adversarial presentation are sometimes necessary to terminate or avoid a perceived harmful situation. While divining the truth can be difficult in adversarial proceedings, it is even more difficult when a chancellor has an ex parte petition and affidavits sud-

denly thrust upon him. The risk and consequence of erring in rendering ex parte protection to a child can appear to be of lesser gravity than the harm which might result if relief is denied.

The procedural method employed by Dr. Jones in seeking emergency custody of the minor child without notice to Ms. Jones, as the custodial parent, is found only under Rule 65 of the Arkansas Rules of Civil Procedure. This rule provides for injunctive relief where irreparable harm or damage will or might result if such relief is not granted. Section (a)(1) of the rule requires the court to decide the merits of an ex parte request for relief on the basis of assertions of fact contained in supporting affidavits or a verified complaint. Here, Dr. Jones' request for emergency ex parte relief was supported by four documents: Dr. Jones' verified petition and affidavit, a letter from Dr. Gayle Harrison, and a letter from Dr. Justin Ternes. Because the letters from Dr. Harrison and Dr. Ternes were not under oath they could not constitute affidavits. Ark. Code Ann.§ 16-40-103(b). The fact that these letters were attached as exhibits to Dr. Jones' verified petition for relief does not bootstrap them into affidavits, and they should not have been considered by the chancellor. This leaves only Dr. Jones' verified petition and affidavit. When the hearsay statements of Dr. Harrison and Dr. Ternes are disregarded, the only remaining allegations of fact addressing the need for relief could only support, if proven, a change of custody after notice and a hearing on the merits, but fall short of establishing such an emergency that irreparable harm would or might result if immediate ex parte relief was not granted. We believe that the chancellor erred by granting ex parte relief under these circumstances.

Although Rule 65 provides for relief without written or oral notice to the adverse party *or his attorney* where the requisite proof of emergency is shown, we believe the better practice is to give oral notice to the adverse party's attorney, if known and available to receive such notice, prior to submission of the ex parte request. Many times the adverse party may not have retained an attorney at this stage of the proceeding. However, if the ex parte request is incident to a change of custody following an earlier custody award, the attorney who represented the adverse party in the earlier proceeding should be notified unless the earlier proceeding occurred in the distant past. Dr. Jones' petition

for ex parte relief was submitted to the chancellor on December 13, 1992. The record reflects that the parties' divorce was granted by decree filed November 13, 1990, some twenty-five months earlier, at which time Ms. Jones was represented by an attorney, Thomas S. Stone. Notice was not given Mr. Stone of the ex parte proceeding.

Ms. Jones also argues on appeal that the chancellor erred by considering the petition for ex parte relief and signing the resulting order on a Sunday, citing Ark. Code Ann.§ 16-10-114 and *Chester* v. *Arkansas Board of Chiropractic Examiners*, 245 Ark. 846, 435 S.W.2d 100 (1968). Dr. Jones responds to this by denying the applicability of § 16-10-114 to emergency ex parte proceedings, but arguing that even if it is applicable then it is unconstitutional. Because we have found on other grounds that the ex parte order should not have been granted, we will not reach this constitutional issue. *See Board of Equalization* v. *Evelyn Hills Shopping Ctr.*, 251 Ark. 1055, 476 S.W.2d 211 (1972).

For the same reason we addressed the appellant's argument about the propriety of the ex parte order, we will briefly consider appellant's contention that the chancellor also erred in granting the temporary change of custody order. A hearing was held on December 16, three days after issuance of the ex parte order. While appellant argues that notice was received less than forty-eight hours prior to the hearing, and that she was not given sufficient time to arrange for several other witnesses to testify on her behalf, appellant neither moved to reset the hearing nor to continue the hearing at the conclusion of her proof.

Appellant contends that the evidence before the chancellor was insufficient to support a temporary change of custody. Appellee testified and called Dr. Gayle Harrison, a psychologist, and Dr. Justin Ternes, a child psychiatrist, as witnesses. Appellant testified and called her sister, Dr. Cathleen Burgess, an anesthesiologist, and her pastor, Dr. Arnold Murray. On rebuttal, appellee called Tina Verser, a nurse employed by appellee. The facts were in sharp dispute. However, appellee's expert, Dr. Harrison, expressed her opinion that the child had an adjustment disorder with disturbances of emotion and conduct, and had been traumatized while in the mother's custody. While there was evidence to the contrary, in child custody cases we defer to the supe-

rior position of the chancellor in assessing credibility of the witnesses. *Bennett* v. *Howell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990). While we may have made a contrary decision, we cannot conclude that the chancellor's determination to place custody of the child with appellee on an interlocutory basis was clearly erroneous.

We are primarily concerned with Ms. Jones' three arguments pertaining to the final custody determination, as well as her argument that the chancellor erroneously refused to recuse from this case. Ms. Jones takes issue with the final custody award, arguing that the trial court's decision to change custody was clearly against the preponderance of the evidence. Specifically, she attacks the trial court's reliance on each of three changes of circumstances upon which the court determined that a change of custody was warranted. This court has stated many times that a material change in circumstances must be shown before a court can modify an order regarding child custody, and the party seeking modification has the burden of showing a change in circumstances. *Snisky* v. *Whisenhunt*, 44 Ark. App. 13, 864 S.W.2d 875 (1993). The best interest of the child is the polestar for making judicial determinations concerning child custody matters. *Welch* v. *Welch*, 5 Ark. App. 289, 635 S.W.2d 303 (1982). On appeal from chancery court cases, this court considers the evidence de novo, but the chancellor's decision will not be reversed unless it is shown that his decision is clearly against a preponderance of the evidence. *Rogers* v. *Rogers*, 46 Ark. App. 136, 877 S.W.2d 936 (1994).

The first change of circumstances relied on by the chancellor related to his finding that "[w]hile [Ms. Jones] has proven that she is able to function adequately and competently in most areas of her social and work life, the Court questions [her] ability to adequately provide an emotional, stable and wholesome home for the child." Ms. Jones argues that this finding erroneously shifted the burden of proof away from Mr. Jones and in effect forced her to prove her case beyond question. Ms. Jones also argues that the finding that she is unable to adequately provide a stable home is clearly against the preponderance of the evidence.

We find that the burden of proof was not shifted

to Ms. Jones in this case. Rather, the chancellor was merely expressing his concern for the welfare of the child when he announced his uncertainty regarding Ms. Jones' ability to provide a stable home. The record, in fact, does contain evidence that Cameron was suffering emotionally while in Ms. Jones' custody and that Ms. Jones had a history of mental problems. Dr. Avam Jeffery Zolten, Directory of Psychology Services at the Family Guidance Center, examined Ms. Jones and testified that she exhibited paranoid behavior. Dr. Zolten also expressed concern as a result of Ms. Jones' statement that she could tell her son not to do something in a certain tone of voice and he would run to the corner and start crying. Drs. Gayle Harrison and Becky Porter both rendered psychological treatment to Cameron, and both expressed an opinion that Cameron had been traumatized by a female authority figure and that Christy Jones' home presented an unstable environment for Cameron. Dr. Jones testified and expressed concern because Ms. Jones had been discussing serpents, demons, and death with Cameron and that she would have the child participate in exorcism rituals of cleansing her home of these plagues; and that Ms. Jones told him in Cameron's presence that she "heard snakes under the house and they were turning" and "when the snakes are turning, that means evil is on its way, and you're evil."[1] Finally, Dr. William Siegal testified that he diagnosed Ms. Jones as having a borderline personality disorder approximately seven years before the final custody hearing and there was evidence that, prior to the birth of Cameron, Ms. Jones had attempted suicide on three occasions. Although these two factors predate the original custody award and do not constitute a change of circumstances, a judicial award of custody may be modified upon a showing of facts affecting the best interest of the child that were not presented to the chancellor or were not known by the chancellor at the time the original custody order was entered. *Stamps* v. *Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988). While it is true that there were medical opinions in this case that tended to show the fitness of Ms. Jones as a parent, this court defers to the superior position of the chancellor in determining credibility of witnesses, particularly in child custody cases. *See Bennett*

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[1]The record does not reflect that Ms. Jones disputed this testimony. In fact, the record does not reflect that Ms. Jones testified at all over the course of the four-day final hearing.

v. *Howell, supra.* The chancery court was entitled to give credence to the evidence indicating that Ms. Jones' custody of Cameron was detrimental to the child, and its reliance on this evidence in changing custody was not clearly against the preponderance of the evidence.

Ms. Jones next argues that the trial court abused its discretion in holding that her move from Conway to Little Rock and her husband's remarriage constituted substantial changes of circumstances supporting a change of custody. We cannot agree. There was evidence presented that Ms. Jones' home in Little Rock is in a higher crime area than Dr. Jones' home in Conway. This is a legitimate factor to be considered in determining what is in the best interest of the child. Remarriage of one of the parties is also a factor to be considered when deciding what is in a minor child's best interest. *See Roland* v. *Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993). In the case at bar, Dr. Jones remarried and has a stable family unit consisting of himself, his wife, Cameron's half brother, and Cameron's stepbrother. The chancery court did not abuse its discretion in taking this change of circumstances into account. Furthermore, in light of all of the material changes in circumstances, we find no error on the part of the court in its decision to change custody.

The remaining issue in this case is whether the chancery judge erroneously refused to recuse. Ms. Jones essentially contends that the chancery judge should have recused because his impartiality was put into question when he entered the emergency *ex parte* custody order. Ms. Jones also argues that the judge indicated bias when, prior to the emergency custody hearing held three days after the *ex parte* order, he refused to allow her to take Cameron to an independent psychiatrist for an examination without court approval.

Judges are presumed to be impartial and the party seeking disqualification bears a substantial burden proving otherwise. *Chancellor* v. *State*, 14 Ark. App. 64, 684 S.W.2d 831 (1985). Disqualification of a judge is discretionary with the judge himself, and his decision will not be reversed absent an abuse of that discretion. *Korolko* v. *Korolko*, 33 Ark. App. 194, 803 S.W.2d 948 (1991). Although we agree that the chancery judge in this case erroneously issued the emergency ex parte order, we do not

find that this or any other action taken by the judge rose to the level of putting his impartiality at issue. We find no abuse of discretion in the judge's refusal to recuse.

Affirmed.

PITTMAN, J., concurs.

ROGERS, J., dissents.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the result reached in this case. While I agree that the *ex parte* order was subsumed by the final order and is not itself vulnerable, I do wish to comment on the problems inherent with *ex parte* orders.

When there is imminent danger of harm to the child, there is a place in our jurisprudence for issuance, without notice, of emergency *ex parte* relief of short duration. Such emergencies would generally be the same as those constituting dependency, but for the availability of a fit parent to assume custody.[1] Courts should not change custody on an *ex parte* basis in the absence of a showing that, unless *ex parte* modification is ordered, the child is subject to immediate harm.

Application for an *ex parte* order should be accompanied by affidavits setting forth detailed facts supporting the need for such relief. When possible, affidavits from physicians or mental health professionals explaining the need for an immediate change should be obtained. It is very important for the attorney to allege specific facts warranting emergency jurisdiction. Moreover, "[u]nless imperative, the court should not rely on ex parte statements for proof of the existence of an emergency." *Wolfberg* v. *Noland*, 222 P.2d 426, 427 (Colo. 1950).

Ex parte communications deprive the absent party of the right to respond and be heard, suggest bias or partiality on the part of the judge, can be misleading, and, at the very least, expose

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[1]For example, a juvenile believed to be dependent-neglected may be removed from parental custody by issuance of an ex parte order for emergency custody. Ark. Code Ann. § 9-27-314(a) (Repl. 1993). A "dependent-neglected juvenile" means one "who as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness is at a substantial risk of serious harm." Ark. Code Ann. § 9-27-303(12) (Repl. 1993).

the judge to one-sided argumentation, which carries with it the attendant risk of an erroneous ruling. At worst, *ex parte* communications are an invitation to improper influence. Therefore, I also believe that such orders should not issue unless a showing is made that it is impractical to serve or otherwise notify, even informally, the opposing party or his or her attorney so that that party can participate.

JUDITH ROGERS, Judge, dissenting. I dissent. The chancellor's decision is clearly contrary to a preponderance of the evidence, and the affirmance of it promotes an injustice. It is rare that a custody decision is reversed on appeal and rightly so, given our standard of review and the deference afforded chancellors on such a sensitive and fact-intensive issue. However, we should not hesitate or lack the courage to do so in an appropriate case. This is such a case.

The parties to this action were divorced in November of 1990 and custody of their minor child was placed with Christie Jones. Dr. Jones remarried five months after the parties' divorce. In 1991, Christie Jones obtained a job as a registered nurse with Dr. James Billie in Little Rock. Consequently, she moved to Little Rock and purchased a home in the Hillcrest neighborhood.

This tragedy began to unfold in April of 1992, when Dr. Jones took the parties' two-year-old son to Dr. Justin A. Ternes, a friend and classmate, for a psychological evaluation. This action was seemingly prompted by Dr. Jones' concern that Christie Jones' was exerting some sort of detrimental influence on the child; however, Christie Jones was not made privy to this concern, nor was she advised that the child was being taken to a psychiatrist. Dr. Ternes recommended that Dr. Jones pursue further evaluation and possible treatment for the child. Christie Jones was similarly uninformed that Dr. Ternes had recommended any treatment for her son. Despite Dr. Ternes' advice, it was not until *three months later*, in July of 1992, that Dr. Jones began taking the child to the psychologist who had been recommended by Dr. Ternes, Dr. Gayle Harrison. Again, Christie Jones was not informed or even consulted. The child was seen by Dr. Harrison for five months before Christie Jones was finally notified of her son's alleged condition by means of an *ex parte* order removing the child from her custody.

The circumstances surrounding the issuance of the *ex parte* order reflect a clear abuse of the judicial system. According to Dr. Harrison, the child had been doing well over the five-month period of examination and evaluation. In her deposition, Dr. Harrison stated that she had not once observed the kind of behaviors reported by Dr. Jones (slapping, biting and hitting himself). I find it extremely interesting that Dr. Harrison's opinion changed so abruptly. The record clearly shows that Dr. Jones and his attorney, Helen Grinder, met with Dr. Harrison concerning a change in custody just one week before the doctor suggested, by way of letter to the court, that the child remain with Dr. Jones. Thus, suddenly, one week after Dr. Jones and his attorney visited with Dr. Harrison, Dr. Harrison observed that the child had regressed to the point that the child needed to remain with his father. Apparently, Dr. Harrison found this to be such a traumatic situation that she personally felt the need to contact the chancellor involved in the parties' divorce. However, the record indicates that it was not such an emergency as Dr. Harrison indicated in her letter. The record shows that Dr. Harrison visited with the child on Thursday. It was not until Friday afternoon, at approximately 4:30 p.m., that a letter was faxed to Judge McNeil from Dr. Harrison. It is also clear from the evidence that Judge McNeil closes his court at 4:30 p.m. Another interesting fact is that Dr. Ternes, who had not examined the child in over five months, also sent a letter to the chancellor proclaiming the need for an emergency change in custody. However, the letter was faxed to Ms. Grinder's office and not Judge McNeil's office. With this supposed ammunition in hand, Ms. Grinder located Judge McNeil on Sunday morning. Christie Jones was not served with notice until later that afternoon at 4:45 p.m.

When this evidence is viewed from beginning to end, it is apparent that the actions of Dr. Jones, with the aid of friendly experts and his attorney, were aimed at manipulating the court system by first manufacturing an emergency situation, when none really existed, and by presenting the matter at a time when Christie Jones would be without the opportunity to present her position. The effect of these machinations cannot be minimized or ignored as these acts set the tone for the entire proceedings and wrongfully gave Dr. Jones a tactical advantage by placing Christie Jones in a defensive posture, when it was Dr. Jones' burden to prove the necessity of a change in custody.

The majority glosses over these facts, but does ultimately hold that the chancellor erred in transferring custody on an *ex parte* basis. While I agree that the issue should not be considered moot, I find the majority's reliance on Rule 65 of the Rules of Civil Procedure wholly unsatisfactory, yet I cannot disagree with the result obtained. And, although I believe that appellant's argument concerning the issuance of an order on a Sunday in violation Ark. Code Ann. § 16-10-114 (1987) merits discussion, I am also not comfortable addressing that question as its resolution would require certification to the supreme court under Rule 1-2(a)(3) of the Rules of the Supreme Court and Court of Appeals. Perhaps this case should have been certified in any event, since the supreme court has decided a previous appeal involving these parties, *Jones* v. *Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995). Ark. R. Sup. Ct. 1-2(a)(11).

Turning now to the chancellor's award of custody to Dr. Jones on a permanent basis, the standard of review is well settled in child custody cases. Before an order awarding custody can be changed there must be proof of material facts which were unknown to the court at the time or that the conditions have so materially changed as to warrant modification and that the best interest of the children requires it. The burden of proving such change is on the party seeking the modification. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). The best interest of the child is the polestar for making judicial determinations concerning child custody matters. On appeal from chancery court cases, this court considers the evidence de novo, but the chancellor's decision will not be reversed unless it is shown that his decision is clearly against a preponderance of the evidence. *Larson* v. *Larson*, 50 Ark. App. 158, 902 S.W.2d 254 (1995).

Although we, as appellate judges, are obligated to follow our standard of review, we should not hide behind that standard when confronted with a case involving a crystalline effort on the part of the non-custodial parent to obtain custody of a child without legal or factual justification. The chancellor's decision in this matter is so clearly against any preponderance of the evidence that it should not be allowed to withstand appellate review. I would reverse the decision and reinstate custody of the child with Christie Jones.

Although the chancellor heard unrefuted evidence that Christie Jones was not unfit or unable to care for the child, reasons were found to change custody. The final order identified three circumstances: "plaintiff's move to the higher crime area of Little Rock, the inability of plaintiff to provide for the emotional needs of the child and the stability of the family situation of defendant, as compared to that of the plaintiff."

First, with regard to Christie Jones' residence, she moved to Little Rock after obtaining a job there, and she purchased a home in the Hillcrest neighborhood. At the hearing, Dr. Jones presented only a statistical comparison showing that Hillcrest had a higher crime rate than Conway. Without statistical data, common sense would indicate that the crime rate would be higher in an urban area as compared to a small town. That is not to say, however, that the Hillcrest area is particularly dangerous or that the child was in peril by living there. Dr. Jones' characterization of the neighborhood as a "war zone" is simply without evidentiary support. As such, this does not constitute a material change in circumstance. Moreover, such provincialism should not serve as the basis for a change in custody.

I also do not find Dr. Jones' remarriage a persuasive reason to change custody. Dr. Jones married his present wife five months after the divorce, and he admitted that their relationship antedated the parties' divorce. In fact, the record discloses that his wife was the labor nurse who attended the delivery of the parties' child. In short, Dr. Jones' remarriage does not impress me as being a material change in circumstance. I would not stigmatize the tough job of a single parent by giving preference to a new, unfamiliar family unit.

Lastly, there is no cogent evidence appearing in this record that Christie Jones was unable to provide for the emotional needs of the child. In affirming, the majority states that the record reflects that Christie Jones had a history of mental problems. "History" is the operative word which demonstrates the erroneous nature of this finding in that the problems she experienced occurred in the distant past, some seven years prior to the hearing. The record indicates that her emotional problems were associated with guilt she felt for aborting a child conceived by the parties during the marriage. With regard to this matter, Christie Jones

reported to Dr. Gallien, the court appointed psychiatrist, that Dr. Jones had forced her to have the abortion.

Be that as it may, there is no evidence in this record that she currently suffered from any mental difficulties. Although the majority refers to Dr. Zolten's testimony that she exhibited paranoid behavior, the majority ignores that Dr. Zolten also testified that he could understand why she would be paranoid since her attorneys had cautioned her with regard to the evaluation. I, too, can understand why she and her attorneys would be leery of these proceedings, given the way that the *ex parte* order was handled.

With respect to the child's emotional well-being, the majority refers to the opinions of Drs. Harrison and Porter that Cameron had been traumatized by a female authority figure and that his mother's home presented an unstable environment for him. However, neither of those individuals ever met with or examined Christie Jones. Also, the child's reaction to being verbally reprimanded does not establish that the child was suffering emotionally while in Christie Jones' custody. Moreover, the majority's reliance on the testimony of Dr. Jones is misplaced. His testimony is inherently suspect.

The testimony presented at the final hearing did not prove that Christie Jones was an unfit mother or that her depression years earlier had *any* effect on her ability to care for her child. There was no showing that Christie Jones had borderline personality disorder or severe depression at the time of her divorce, at the time of this hearing, or over the *past seven years*. The court appointed psychiatrist, Dr. Gallien, testified that the child should remain with his mother. She said that the child would suffer severe trauma if custody were changed because he would be taken from his mother who had raised him for two years. Dr. Gallien also criticized Dr. Harrison's *ex parte* communication with the chancellor. According to Dr. Gallien, this conduct both constituted and resulted in a "travesty of justice." I agree with that assessment and am troubled that the transparency of this entire matter is being disregarded by the majority.

It is clear that Christie Jones had provided for the emotional needs of her child from the time her son was born, through the divorce, and continuing to the time of the present hearing, a period of approximately three years. The chancellor awarded

Christie Jones extremely liberal visitation, and I think that fact alone shows that the chancellor was not persuaded that Christie Jones was an emotional threat to her son.

Christie Jones also argues, and I agree, that the chancellor shifted the burden of proof in this case. The chancellor sets out in his opinion that he could not find that Christie Jones had borderline personality disorder, as Dr. Jones had claimed. However, he noted in his final order that Christie Jones *had proven* that she was able to function in the work environment and socially, but he *still questioned* her ability to provide for her child. The majority finds that the chancellor was merely expressing his concern for the welfare of the child. I disagree. The chancellor was not merely expressing a concern; he was making a decision with regard to the custody of a child. An examination of the record shows that the chancellor shifted the burden of proof after the *ex parte* order and the temporary order transferring custody, and during the final hearing. It is clear from the record that the onus was placed on Christie Jones to prove her fitness as a parent in light of Dr. Jones allegations. In a footnote, the majority observes that Christie Jones did not testify and thus did not dispute Dr. Jones' testimony alleging bizarre behavior on her part. This demonstrates that the majority is working under the same mistaken impression as the trial court as to the burden of proof. The burden of proof was on Dr. Jones to show a material change in circumstance. Under this standard, Christie Jones had nothing to prove and was not required to testify. I note that she could just as easily have been called as a witness by Dr. Jones in his effort to meet his burden. I think it telling that he did not do so. The misplacement of the burden of proof, standing alone, requires that the case be reversed.

I cannot condone, and this court should not condone, the irregularities which occurred in this case. The chancellor, and now this court on appeal, have seized upon reasons to justify a change in custody which are, at best, specious, and do not constitute material changes in circumstance. According to a minister who served as the parties' counsellor, Dr. Jones said in 1992 that he would take the child away from Christie Jones if she did not accommodate his desire for increased visitation with the child. Also according to the minister, Dr. Jones intimated that he would be successful in this effort since he had more money

than she did. These are telling statements, and are, I fear, at the heart of this entire matter. No court should allow itself to be manipulated in the manner which was accomplished here, and no court should bend to the whims and desires of one parent. Custody decisions are simply not to be made on this basis. Regrettably, Dr. Jones has succeeded in his effort to gain custody, at the expense of the child. We ought to reverse.

Warren PINGEL *v.* TROY and NICHOLS, INC.

CA 94-983 907 S.W.2d 757

Court of Appeals of Arkansas
Division I
Opinion delivered October 11, 1995

Appellant, pro se.

Wilson & Associates, P.A., by: *Robert M. Wilson, Jr.*, for appellee.

JOHN B. ROBBINS, Judge. Warren Pingel has appealed, pro se, from an order of the Washington County Chancery Court rejecting his bid of one silver dollar in a commissioner's sale of property in foreclosure. We affirm the chancellor's decision.

Troy and Nichols, Inc., obtained a judgment against Robert Dale Forbes and Deborah J. Forbes for the balance due on a promissory note secured by real property. The chancellor ordered the property to be sold. The commissioner's report of the sale recited that Troy and Nichols had bid $47,367.61, Mr. Forbes had bid $47,400.00, and appellant had bid one silver dollar for the property. Because Troy and Nichols' bid was for less than the amount of its judgment against Mr. and Mrs. Forbes, it would be credited against the judgment.

At the hearing on the validity of the bids, Mr. Forbes withdrew his bid. Appellant argued that a bid (such as his) with a simultaneous tender of cash in gold or silver coin is the only kind of bid that can constitutionally be confirmed. The chancellor disagreed and found that it would be an abuse of discretion and it would shock the conscience of the court to accept appellant's grossly inadequate bid. The chancellor confirmed the report of sale and directed the commissioner to deliver a deed to Troy and Nichols.

Appellant has listed thirteen points on appeal. These "points" are largely unintelligible and can be distilled into appellant's claim that his bid was the only valid bid under article I, § 10, of the United States Constitution because checks and federal reserve notes are not lawful money of the United States.

In *Julliard* v. *Greenman*, styled "The Legal Tender Cases," 110 U.S. 421, 448 (1884), the United States Supreme Court rejected this argument, stating:

> Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metal-

> lic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency either in coin or in paper, and to make that currency, lawful money for all purposes, as regards the national government or private individuals.
>
> The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts.

This argument was also raised and rejected in *Daniels* v. *Arkansas Power & Light Co.*, 269 Ark. 390, 391, 601 S.W.2d 845 (1980). There, the issue was whether a check from Arkansas Power and Light Co. to the appellants, redeemable in federal reserve notes, was "money" as compensation required by law in an eminent domain case. The Arkansas Supreme Court stated:

> The appellants argue the United States Constitution, the Arkansas Constitution, and Arkansas law require payment in gold, silver or certificates redeemable in such medium of exchange. U.S. CONST. art. I, § 10, cl. 1, Ark. CONST. art. 12, § 9.
>
> Federal reserve notes are legal tender and, therefore, the appellants' argument has no merit. 31 U.S.C. § 392 (1976); *United States* v. *Wangrud*, 533 F.2d 495 (1976); *United States* v. *Rifen*, 577 F.2d 1111 (1978).

Many other courts have rejected appellant's argument. For example, in *Illinois, ex rel. Bosworth* v. *Robert L. Jungles Family Trust*, 126 Ill.App.3d 537, 467 N.E.2d 295, 296 (1984), the court stated that this argument, "while interesting and naturally somewhat appealing, is devoid of any merit." This argument was called "hopeless and frivolous" in *Foret* v. *Wilson*, 725 F.2d 254 (5th Cir. 1984). In *United States* v. *Wangrud*, 533 F.2d 495, 496 (9th Cir. 1976), *cert. denied*, 429 U.S. 818 (1976), the court stated:

> Mr. Wangrud appeals his conviction on two counts of wilful failure to make an income tax return. 26 U.S.C. § 7203. For the tax years in question the defendant received

> checks from the State Farm Insurance Company as compensation for his services. He now argues that he did not receive money, since the checks could be cashed only for federal reserve notes and that these are not redeemable in specie. We publish this opinion solely to make it clear that this argument has absolutely no merit. We affirm this conviction.
>
> By statute it is established that federal reserve notes, on an equal basis with other coins and currencies of the United States, shall be legal tender for all debts, public and private, including taxes. 31 U.S.C. § 392 (Supp. 1976). This statute is well within the constitutional authority of Congress. U.S. Const. art. I, § 8. It so completely disposes of appellant's argument that it is unnecessary for us to invoke other provisions of the Internal Revenue Code which would be equally dispositive. . . .

Appellant's argument was also rejected in the following cases: *Radue* v. *Zanaty*, 293 Ala. 585, 308 So.2d 242, 244-45 (1975); *Brand* v. *Texas*, 828 S.W.2d 824, 825-26 (Tex. Ct. App. 1992); *May* v. *Bailey*, 693 S.W.2d 246, 248-49 (Mo. Ct. App. 1985); and *Walton* v. *Keim*, 694 P.2d 1287, 1288-89 (Col. Ct. App. 1984).

■ Appellant also argues that the Constitution prohibits the states from declaring anything but gold and silver to be legal tender. As in *United States* v. *Rifen*, 577 F.2d 1111, 1113 (8th Cir. 1978), this argument misses the point. There, the court stated: "[A]rticle I, section 10 of the United States Constitution prohibits the states from declaring legal tender anything other than gold or silver, but does not limit Congress's power to declare what shall be legal tender for all debts." The Court also stressed that Congress, at 31 U.S.C. § 392 [now § 5103], has declared federal reserve notes legal tender. 577 F.2d at 1112.

■■ We also hold that the chancellor did not abuse his discretion in rejecting appellant's bid as being so low as to shock the conscience of the court. In *Looper* v. *Madison Guaranty Savings & Loan Association*, 292 Ark. 225, 227-28, 729 S.W.2d 156 (1987), the Arkansas Supreme Court set forth the relevant considerations:

The sale price was $1,900, and the market value was found to be $42,500; that is, the property sold for 4.4% of its value according to the chancellor's finding.

A price that "shocks the conscience" of a judge can never be reduced to a mathematical formula. It depends on a variety of circumstances: the value of the property, the circumstances surrounding the sale, the price, the rights of the parties participating in the sale, and the harm that may result if the sale is confirmed, to name a few. Nevertheless, the decision is one for the chancellor to make, using sound discretion. *Summars* v. *Wilson*, 205 Ark. 923, 171 S.W.2d 944 (1943). While no fixed formula exists or can exist for what is a shocking sale price, fixed rules do exist for us to review such a case. First, we are an appellate court; we do not retry cases. We cannot sit as jurors who determine facts in law cases, nor chancellors who do the same in chancery courts. *Merriman* v. *Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987); *Black & Black Oil Co.* v. *Guy R. Smith Drilling Co.*, 289 Ark. 487, 712 S.W.2d 901 (1986). Factual determinations of chancellors must be upheld unless clearly erroneous. ARCP Rule 52.

When we examine a discretionary decision made by a chancellor, the question is not what we would have done, but whether, as a matter of law, discretion was abused — was the judgment call arbitrary or groundless? *Keirs* v. *Mt. Comfort Enterprises et al.*, 266 Ark. 523, 587 S.W.2d 8 (1979); *Robbins* v. *Guy*, 244 Ark. 590, 426 S.W.2d 393 (1968).

Other principles also apply when we review a case, sometimes omitted from our opinions, but nonetheless applicable to all our decisions. The appellant, the party losing at the trial level, has the burden of demonstrating error. *Baldwin Co.* v. *Ceco Corp.*, 280 Ark. 519, 659 S.W.2d 941 (1983). The evidence on appeal and all reasonable inferences from that evidence, and the findings of fact by a judge must be reviewed in a light most favorable to the appellee, the party that won at the trial level. *Sipes* v. *Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985); *Wasp Oil, Inc.* v. *Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).

Accord Mulkey v. *White*, 219 Ark. 441, 442, 242 S.W.2d 836 (1951); *Kellett* v. *Pocahontas Fed. Sav. & Loan Ass'n,* 25 Ark. App. 243, 245-46, 756 S.W.2d 926 (1988); *Campbell* v. *Campbell*, 20 Ark. App. 170, 171-72, 725 S.W.2d 585 (1987). *See also Estate of Hodges* v. *Wilkie*, 14 Ark. App. 297, 300, 688 S.W.2d 307 (1985).

The property foreclosed upon in this action is worth approximately $48,000.00. If appellant's bid had been approved and confirmed, the debtors would have been liable for the deficiency of approximately $48,000.00. A bid of one silver dollar for property of this value would without question shock the conscience of the court.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Gina WOOD, et al. *v.* Vestal D. WOOD

CA 94-852 908 S.W.2d 96

Court of Appeals of Arkansas
Division I
Opinion delivered October 18, 1995
[Petition for rehearing denied November 29, 1995.]

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Herby Branscum, Jr., for appellants.

Philip A. Bagby, P.A., and *Michael J. Medlock*, for appellee.

JOHN E. JENNINGS, Chief Judge. Appellee Vestal Wood filed suit to quiet title to approximately ninety acres of land in Crawford County, Arkansas. Appellants Gina Wood, Roger Wood, Jerrie Wood Neal, and Doyle Wood answered, claiming an interest in the property. They appeal from the decree quieting title in Vestal Wood.

The parties are all grandchildren of George and Amanda Wood, who lived on and held title to the property in question. George and Amanda had nine children. George died in 1943. One of their children, Crawford Wood, cared for Amanda until she moved to Kansas City where she remained until her death in about 1953. Although it appears that no one lived on the property after some time in the 1950's, Crawford paid the taxes and looked after the place until his death in about 1963.

The taxes for 1963 went unpaid, and the land was sold at tax sale. It was purchased by another of the Wood children, Elsie, and her husband Hugh Hays, who received three clerk's deeds dated November 21, 1966.

Elsie and Hugh Hays never had any children. Sometime after Hugh's death, Elsie delivered a warranty deed to the property to her nephew, appellee Vestal Wood, whose deceased father Estel was another one of the nine children of George and Amanda. That warranty deed was dated June 29, 1981, and was promptly recorded. Vestal Wood has paid the taxes on the property ever since 1981. In August 1993 appellee filed his petition seeking to quiet title.

Gina Wood, Jerrie Wood Neal, and Roger Wood are children of Ray Wood, who was one of the nine children of George and Amanda. Doyle Wood is appellee's brother. None of the other descendants of George and Amanda named in the complaint filed an answer. Appellants claimed an interest in the property by inheritance and contended that any possession by appellee was with their permission and that the payment of taxes was for their

joint benefit. They argued that any interest conveyed by the tax deeds to an heir of George and Amanda was for the benefit of all the heirs and was held in trust as a redemption.

At trial, appellee testified that he acquired title to the property by the 1981 warranty deed from Elsie, had paid taxes on the property since then, and that he considered the land his. He had granted easements to Southwestern Bell and to a neighbor for a road. He testified that he lived four miles from the property and visited the land about once a week. He had done brushhogging and "dozer work," and allowed a neighbor to run some horses and cows on the land.

Appellee testified that some time in 1981 or 1982 Ray Wood asked appellee about having five acres of the property for Gina, and that appellee intended to see that Gina got five acres. Appellee then met Gina on the property, but testified that her request increased to ten, then fifteen, then twenty-two and a half acres. Appellee told her he would have to obtain a clear title before he could convey anything. Then appellee's brother Doyle asked for a place to build but appellee refused Doyle's request for forty acres. Appellee denied that he ever held the property "in trust" for any other family members. He testified that his Aunt Elsie was very precise in the handling of her affairs and would have put in writing any intentions regarding other family members. Elsie's will left all of her estate, except for a $1,000.00 gift to a neighbor, to appellee. He testified that from 1981 on he considered the property to be his.

Appellant Gina Wood testified that when the taxes on the property were delinquent, her father Ray went to the courthouse to pay them and discovered that Elsie and Hugh Hays had already paid them and taken the tax deeds. Gina testified that Elsie visited her father's home on many occasions and that she often heard them discuss the property. She testified that after Hugh Hays died, Elsie tried to turn the property over to her to take care of, but Gina felt that her aunt was upset over her husband's death and that they should talk about it later. Gina was aware that Elsie gave a deed to appellee in 1981, but testified that she believed appellee was going to take care of it and "give all of the Wood family their part of the land." Gina testified that right after Elsie died in January 1992 she and her sister Jerrie met appellee on the

land and he told her that "he was still going to give me Daddy's part of the land[.]" She testified that she and Jerrie and appellee all went to the attorney's office together, and she provided names of all the heirs she was aware of, in an effort to help clear up the title so appellee could give her her share. Her father Ray died in June 1992. She testified that she heard nothing else from appellee regarding the property until he filed suit in 1993.

After hearing the testimony and considering the evidence, the chancellor found that title should be vested in appellee, stating:

> The Court is satisfied that this property was not held in trust by him and that he has obtained title to this property by warranty deed and any challenge to his ownership of the property is barred by law at this time.

Appellants argue that as there was no finding of adverse possession, appellee's claim is based solely upon the 1981 deed to him from Aunt Elsie. They argue that when Aunt Elsie purchased the property by tax sale in 1966 she did so as a tenant in common with the other heirs of George and Amanda. Appellants argue that her purchase at tax sale was no more than a redemption for the benefit of all the cotenants; as such, she acquired no more by purchase at the tax sale than what she already had, i.e., her undivided interest as a tenant in common. Appellants argue that the chancellor erred in holding "that appellee acquired his title by conveyance from his aunt, Elsie Hays, in 1981[.]" Appellants argue:

> The only basis stated by the chancellor [in the decree quieting and confirming title in the appellee] is that appellee received a conveyance by warranty deed in 1981. This warranty deed was from an aunt who had purchased the property at a tax sale as a cotenant in 1966 and her purchase did not give her any title other than what she already owned.

A tenant in common is presumed to hold in recognition of the rights of his cotenants and this presumption continues until an actual ouster is shown. *Baxter* v. *Young*, 229 Ark. 1035, 320 S.W.2d 640 (1959). Since possession by a cotenant is not ordinarily adverse to other cotenants, each having an equal right to possession, a cotenant must give actual notice to other cotenants that his possession is adverse to their interest or com-

mit sufficient acts of hostility so that their knowledge of his adverse claim may be presumed. *Hirsch* v. *Patterson*, 269 Ark. 532, 601 S.W.2d 879 (1980). The statutory period of time for an adverse possession claim does not begin to run until such knowledge has been brought home to the other cotenants. *Gibbs* v. *Pace*, 207 Ark. 199, 179 S.W.2d 690 (1944). When there is a family relation between cotenants, stronger evidence of adverse possession is required. *Ueltzen* v. *Roe*, 242 Ark. 17, 411 S.W.2d 894 (1967).

When Elsie Hayes bought in the property at tax sale she acquired no additional rights as against her cotenants. *See William* v. *Anthony*, 182 Ark. 810, 32 S.W.2d 817 (1930). Such a purchase by a tenant in common amounts to a redemption and confers no right except to demand contribution from the cotenant. *Hollaway* v. *Berenzen*, 208 Ark. 849, 188 S.W.2d 298 (1945). Her possession would be construed as the common possession of all the tenants in common until she did some act of ouster or notified the others that her possession was exclusive. *Sanders* v. *Sanders*, 145 Ark. 188, 224 S.W. 732 (1920). Similarly, when the appellee, Vestal Wood, who was also a cotenant, obtained the warranty deed from Elsie Hayes in 1981, he acquired no title to the interest of his cotenants. A tenant in common cannot acquire title to the interest of his cotenants by purchasing the property from a third party who bought at the tax sale. *Johnson* v. *Johnson*, 250 Ark. 457, 465 S.W.2d 309 (1971). Had Vestal Wood been a stranger to the title, rather than a cotenant, Elsie's deed to him would have constituted color of title and his entry into possession would have commenced the running of the statutory period as against the other cotenants. *Marshall* v. *Gadberry*, 303 Ark. 534, 798 S.W.2d 99 (1990). Since Vestal Wood was a cotenant the deed to him from Elsie Hayes would not constitute notice of an adverse claim.

Mere lapse of time will not dissolve a cotenancy. *Hollaway* v. *Berenzen*, 208 Ark. 849, 188 S.W.2d 298 (1945). On the record in the case at bar we can find no acts on the appellee's part sufficient to constitute the ouster required to commence the running of the statute of limitations. We therefore reverse the decree that quieted title in the appellee, and remand

this case to the trial court for further proceedings in keeping with this opinion.

Reversed and remanded.

PITTMAN and ROBBINS, JJ., agree.

Pam LEPARD and Ann Lepard *v.*
WEST MEMPHIS MACHINE & WELDING
and Liberty Mutual Insurance Company

CA 94-1356 908 S.W.2d 666

Court of Appeals of Arkansas
Division II
Opinion delivered November 8, 1995

James, Yeatman & Carter, PLC, by: *Paul J. James*, and *Etoch Law Firm*, by *Louis A. Etoch*, for appellants.

Rieves & Mayton, by: *William J. Stanley*, for appellees.

JOHN B. ROBBINS, Judge. On July 17, 1992, a train collided with a vehicle being driven by West Memphis Machine and Welding employee Donald Ray Lepard, causing Mr. Lepard's death. Mr. Lepard's wife, Pamela Lepard, and former wife, Ann Lepard (on behalf of his minor child), brought a claim for workers' compensation benefits. The Workers' Compensation Commission denied benefits, ruling that compensability was precluded by the "going and coming" rule. Pamela Lepard and Ann Lepard now appeal, arguing that the Commission's finding that their claim was barred by the "going and coming" rule was not supported by substantial evidence. We affirm.

The "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment. *Woodard* v. *White Spot Cafe*, 30 Ark. App. 221, 785 S.W.2d 54 (1990). The rationale behind this rule is that an employee is not within the course of his employment while traveling to or from his job. *Brooks* v. *Wage*, 242 Ark. 486, 414 S.W.2d 100 (1967).

When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

The relevant facts in this case are not in dispute. Mr. Lepard had been an employee of West Memphis Machine and Welding for several months prior to the accident. Approximately two months before the accident, Mr. Lepard and his wife were having transportation problems because they owned only one vehicle. Because of this dilemma, Mr. Lepard asked his employer if he could borrow a company truck for the purpose of getting back

and forth to work. William Johnson, owner of West Memphis Machine and Welding, agreed to lend Mr. Lepard one of the company's trucks for this purpose. It was agreed that Mr. Lepard would purchase $25.00 of gas each week for the truck which was intended to equate the amount of gas used in his trips to and from work. Mr. Lepard also agreed to periodically clean and service the truck. On occasion, Mr. Lepard would run company errands while at work, and on those occasions Mr. Johnson would pay for the gas. Upon returning home from work, Mr. Lepard would park the truck and not drive it until time to go to work again.

On the day of the accident, Mr. Lepard telephoned Julie Smrt before driving the company truck home at the end of the work day. Ms. Smrt is Mr. Johnson's daughter and was a co-worker of Mr. Lepard. Mr. Lepard told Ms. Smrt that he was about to leave work and asked if she wanted him to come by her house with her paycheck. Ms. Smrt responded that this was unnecessary and informed Mr. Lepard that she would come to the office and get it herself. However, Mr. Lepard told Ms. Smrt that he did not mind going out of his way and bringing it to her. After this conversation Mr. Lepard drove the truck to Ms. Smrt's home, gave her the paycheck, visited for about fifteen minutes, and proceeded to drive toward his house. About three blocks from his house, Mr. Lepard collided with a train and suffered fatal injuries. The Commission denied appellants' claim for death benefits.

For reversal, the appellants argue that the Commission erred in finding that their claim was barred by the "going and coming" rule. Although this rule ordinarily precludes compensation, the appellants correctly state that there are exceptions to the rule. These exceptions are outlined in *Jane Traylor, Inc.* v. *Cooksey*, 31 Ark. App. 245, 792 S.W.2d 351 (1990), as follows:

> (1) where an employee is injured while in close proximity to the employer's premises; (2) where the employer furnishes the transportation and to and from work; (3) where the employee is a traveling salesman; (4) where the employee is injured on a special mission or errand; and (5) when the employer compensates the employee for his time from the moment he leaves home until he returns home.

The appellants rely on the second and fourth exceptions for their argument. They contend that there was an exception to the "going and coming" rule because it was undisputed that Mr. Lepard's employer provided him transportation to and from work by furnishing him a truck for this purpose. Alternatively, the appellants argue that there was an exception to the rule in this case because Mr. Lepard was engaged in a "special mission or errand" at the time of his death.

In determining that an exception to the rule did not arise on the basis of the truck being owned by the employer, the Commission relied on the fact that there was no nexus between the travel and employment in this case. The appellants assert that this standard was erroneous as a matter of law. We disagree. In *Rankin* v. *Rankin Constr. Co.*, 12 Ark. App. 1, 669 S.W.2d 911 (1984), the claimant injured himself while driving home in a vehicle owned by his employer. That case is distinguishable because there the journey did not start from the employer's premises. Nevertheless, we stated that, in order to determine whether the claimant's injuries arose out of his employment, there must be a "connection, or nexus, between the travel and the employment." Similarly, we think that some nexus between the employment and travel must be present in order for a claimant to recover for injuries sustained on a trip from his employer's premises to his home.

One such nexus which could give rise to compensability would be if the employer provided the transportation as part of the employee's compensation, or if the employer benefitted from the furnishing of transportation because the employee was perpetually "on call." *See generally Arkansas Power and Light Co.* v. *Cox*, 229 Ark. 20, 313 S.W.2d 91 (1958). In the case at bar, the company truck was supplied by the employer as a pure gratuity, with no benefit accruing to the employer. The use of the truck was not part of Mr. Lepard's compensation and he was never "on call" during the two months that he was driving the truck. He was simply able to use the truck to get back and forth to work because he and his wife had only one vehicle and his employer chose to help him with his problem, without the expectation of anything in return.

Although this court has never specifically stated that

the "furnishing of transportation" exception to the "going and coming" rule does not apply when the transportation is furnished solely as a gratuity, we now take the opportunity to do so. In *Arkansas Power and Light Co.* v. *Cox, supra*, the supreme court quoted *Venho* v. *Ostrander Railway and Timber Co.*, 52 P.2d 1267 (Washington 1936), as follows:

> When a workman is so injured, while being transported in a vehicle furnished by his employer as an incident of the employment, he is within 'the course of his employment,' as contemplated by the act. In other words, when the vehicle is supplied by the employer for the mutual benefit of himself and the workman to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor. . . .
>
> This exception to the rule may arise either as the 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 the instant case, the vehicle was not lent to Mr. Lepard for the mutual benefit of him and his employer, since his employer received no benefit. In addition, the appellee employer did not have a custom of providing transportation for its employees, nor did part of the employment agreement include the furnishing of transportation. The truck was being used gratuitously, and as such the fact that it was owned by the employer does not give rise to an exception to the "going and coming" rule. This principle has been applied in other jurisdictions, and we now adopt it. *See Unity Auto Parts, Inc.* v. *Workman's Compensation Appeal Bd.*, 610 A.2d 1071 (Pa. Commw. 1991). In *Williams and Johnson* v. *National Youth Corps*, 269 Ark. 649, 600 S.W.2d 27 (1980), we stated that the mere fact that an accident occurs while an employee is riding in a vehicle owned by his employer is not sufficient to support a finding of compensability. The fact that Mr. Lepard was driving his employer's truck at the time of his accident does not, in itself, render the accident compensable.

The appellant's remaining argument is that the Commission erroneously failed to find an exception to the "going and coming" rule on the basis that Mr. Lepard was engaged in a busi-

ness errand in addition to the personal purpose of going home when he suffered the fatal accident. Specifically, Mr. Lepard contends that, when he delivered the paycheck to Ms. Smrt, he was engaging in business that benefitted his employer. We reject this argument because the evidence showed that Mr. Johnson did not instruct Mr. Lepard to deliver the check, nor was he even aware that Mr. Lepard was going to make the delivery. As far as Mr. Johnson was concerned, Mr. Lepard was off the clock when he left work on the day of the accident. Ms. Smrt testified that she did not ask Mr. Lepard to deliver the check, and that he did so as a friendly gesture. Clearly, West Memphis Machine and Welding did not benefit from the delivery of the check, particularly in light of the fact that Ms. Smrt had already planned to come in and personally pick up the check. In *Jane Traylor, Inc.* v. *Cooksey, supra,* we analyzed the issue of whether a "dual purpose" journey could give rise to compensation, and we stated:

> The decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to the perils. . . . We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause . . . and sufficient within itself to occasion the journey. (Quoting *Martin* v. *Lavender Radio and Supply, Inc.*, 228 Ark. 85, 305 S.W.2d 845 (1957).)

Jane Traylor, Inc. v. *Cooksey*, 31 Ark. App. at 252, 792 S.W.2d at 354. In the instant case, the trip undertaken by Mr. Lepard provided no service to his employer, thus his subsequent accident was not compensable.

We find that substantial evidence supports the Commission's ruling, and we affirm.

PITTMAN and MAYFIELD, JJ., agree.

Eric KNIGHT *v.* STATE of Arkansas

CACR 94-1385 908 S.W.2d 664

Court of Appeals of Arkansas
Division I
Opinion delivered November 8, 1995

William R. Simpson, Jr., Public Defender, by: *Llewellyn J. Marczuk*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Acting Deputy Att'y Gen., and *Savannah Dyer*, Law Student Admitted to Practice Pursuant to Rule XV(E)(1)(b) of the Rules Governing Admission to the Bar of the Arkansas Supreme Court, for appellee.

GEORGE K. CRACRAFT, Special Judge. The appellant was convicted in a bench trial of being a minor in possession of a handgun on school property in violation of Ark. Code Ann. § 5-73-119 (Repl. 1993). He was sentenced to three years in the Arkansas Department of Correction with credit for one day jail time. On appeal, he argues that the evidence is insufficient to support his conviction. We agree and reverse.

In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *Bailey* v. *State*, 307 Ark. 448, 821 S.W.2d 28 (1991). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Kendrick* v. *State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992). Circumstantial evidence may constitute substantial evidence; however, in order to be sufficient to sustain a conviction, the circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence. *Sheridan* v. *State*, 313 Ark. 23, 852 S.W.2d 772 (1993). This becomes a question for the fact finder to determine. *Id.*

At trial, Betty Rodden testified that she was a teacher and a coach at Sylvan Hills Junior High on December 4, 1992. On that day, she was in her seventh period study hall when Ms. Clark, the school principal, asked for the appellant. The appellant then left the classroom with Ms. Clark. Ms. Rodden testified that she subsequently saw the appellant return to the study hall. She further testified that as she was talking to another student, she observed the appellant at the front of the room standing beside a student by the name of B.J. Blake. They were standing next to

each other and there was a black book bag on a table beside them. They separated and the appellant started toward the door as she was about to speak to them. She testified that as the appellant was leaving the room, another student said something to him and he responded something about a nine millimeter and "nothing on me." Ms. Rodden informed Ms. Clark of the conversation she overheard. She also told Ms. Clark that she witnessed the appellant and B.J. Blake making a "big deal" about the book bag as though they were putting something in it or taking something out of it.

Ms. Clark, the principal for Sylvan Hills Junior High, testified that she had gone to study hall to escort the appellant to the school bus as a preventative measure because there had been some problems at school that day. They left the study hall together. The appellant subsequently told her that he had forgotten his books and asked if he could go get them. However, he did not return from study hall with any books or a book bag. Ms. Clark further testified that after speaking with Ms. Rodden, she retrieved the book bag from the study hall and opened it in her office with the appellant present. At that time, she observed a handgun in the book bag and contacted a police officer.

The appellant contends that the State failed to prove that he was in possession of the weapon. A showing of constructive possession, which is the control or right to control the contraband, is sufficient to prove a defendant is in possession of a firearm. *See Banks* v. *State*, 315 Ark. 666, 869 S.W.2d 700 (1994). Constructive possession can be implied where the contraband was found in a place immediately and exclusively accessible to the accused and subject to his control. *Crossley* v. *State*, 304 Ark. 378, 802 S.W.2d 459 (1991); *Sinks* v. *State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993). Constructive possession may be established by circumstantial evidence, but when such evidence alone is relied on for conviction, it must indicate guilt and exclude every other reasonable hypothesis. *Hodge* v. *State*, 303 Ark. 375, 797 S.W.2d 432 (1990). In *Ravellette* v. *State*, 264 Ark. 344, 571 S.W.2d 433 (1978), our Supreme Court stated:

> No one should be deprived of his liberty or property on mere suspicion or conjecture. Where inferences are relied upon, they should point to guilt so clearly that any other

> conclusion would be insufficient. This is regardless of how suspicious the circumstances are.

264 Ark. at 347, 571 S.W.2d at 435.

Here, the appellant did not have exclusive access to the book bag nor did he exercise any control over it. Neither Ms. Clark nor Ms. Rodden saw the appellant in possession of the book bag. The bag was not found on his person or with his personal effects. The appellant was out of his usual place in the classroom when he was standing next to B.J. Blake and the table on which the bag was placed. In fact, the appellant left the study hall twice while the black book bag remained in the classroom full of other students. In *Hodge* v. *State, supra*, our Supreme Court stated that where narcotics are found in an area entirely outside the control of the defendant and exposed to the public at large, the State must provide definite factors linking the defendant to the contraband. In the case at bar, the evidence fails to link the appellant to constructive possession of the handgun. Therefore, we find the evidence insufficient to support the appellant's conviction.

The appellant also argues that the evidence is insufficient because the State failed to show that the weapon met the definition of a handgun as defined in Ark. Code Ann. § 5-73-119(b) (Repl. 1993). However, given the disposition of the first issue, we do not address this argument.

Reversed and dismissed.

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

Leroy DICKERSON *v.* STATE of Arkansas

CACR 94-1432 909 S.W.2d 653

Court of Appeals of Arkansas
Division I
Opinion delivered November 15, 1995

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William R. Simpson, Jr., Public Defender, by: *Sally Collins*, Deputy Public Defender.

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

BRUCE T. BULLION, Special Judge. The appellant was convicted in a jury trial of possession of a controlled substance with intent to deliver and was sentenced as an habitual offender to thirty years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion to suppress. We affirm.

In reviewing a trial court's decision to deny an appellant's motion to suppress, this Court makes an independent determination based on the totality of the circumstances and will reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Roark* v. *State*, 46 Ark. App. 49, 876 S.W.2d 569 (1994). As the preponderance of the evidence turns heavily on the question of credibility, we defer to the superior position of the trial court in making the determination of which evidence is to be believed. *Folly* v. *State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

At the suppression hearing, Chris Oldham, an officer with the Little Rock Police Department, testified that on the evening of January 20, 1993, he and other officers were checking the area of 1811 Wolfe Street for reported drug activity. He testified that they had previously made numerous arrests and received nightly complaints of narcotics activity in that area. While on patrol,

Officer Oldham and Officer Dennis Ball pulled in behind a brown Buick stopped in the middle of the street. The vehicle was on the wrong side of the street facing in the wrong direction. A black male, later identified as Shannon Williams, was leaning against the vehicle. As the officers pulled up, Mr. Williams quickly walked away. Officer Oldham stopped Mr. Williams and questioned him. Mr. Williams told the officer that the appellant, who was the driver of the vehicle, attempted to sell him cocaine. Officer Oldham relayed this information to Officer Ball who approached the vehicle and tried to contact the appellant. The appellant initially rolled up the windows of the car and locked the door. However, the appellant subsequently opened the door and exited the vehicle.

Two other officers had to assist in restraining the appellant after he exited the vehicle. Officer Ball testified that the appellant made repeated attempts to put his hand in his left coat pocket. He testified that for his own protection, he conducted a pat down search of the appellant. He further testified that when he did so, he felt a large bulge in the appellant's pocket. The officer retrieved a plastic bag with fourteen rocks of cocaine from the appellant's pocket. Officer Ball testified that he believed a narcotics transaction was occurring. He based his belief on his experience and on his observations that Williams was leaning into the driver's side of the window and quickly left the vehicle after the officer's arrival, that the appellant's vehicle was stopped on the wrong side of the street facing in the wrong direction, that the area was known for drug activity, and that it was after dark.

The appellant argues that the trial court erred in failing to suppress the cocaine because the officers did not have probable cause to stop and search him. We disagree.

Arkansas Rule of Criminal Procedure 3.1 provides that a law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. "Reasonable suspicion" is defined as a

suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Ark. R. Crim. P. 2.1. The justification for the investigative stop depends on whether the police have a particularized, specific, and articulable reason indicating the person or vehicle may be involved in criminal activity. *Folly* v. *State, supra.* One factor that can be considered in determining whether reasonable suspicion exists is the apparent effort of a person to avoid identification or confrontation by the police. *Roark* v. *State, supra.*

Here, the officers found the appellant sitting in a car stopped in a suspicious manner. Mr. Williams was observed leaning into the window of the vehicle and was observed quickly leaving the vehicle after the officers arrived. Mr. Williams informed one of the officers that the appellant was selling cocaine. The appellant then refused to exit the vehicle or even open the door or window when approached by an officer. When he did finally exit the vehicle, he repeatedly attempted to reach for something in one of his pockets and had to be restrained by the officers. Considering the totality of the circumstances, we cannot say that the officers were not justified in reasonably suspecting that the appellant was involved in criminal activity.

Furthermore, Arkansas Rule of Criminal Procedure 3.4 provides that if a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. Given the appellant's behavior and the fact that he had to be restrained because he repeatedly attempted to reach for something in his coat pocket, we cannot say that the officer was not justified in conducting the pat down search for protection.

Moreover, we find no error in the officer's seizure of the cocaine. The United States Supreme Court held in *Minnesota* v. *Dickerson*, 113 S. Ct. 2130 (1993), that police officers may

seize nonthreatening contraband during a protective pat down search so long as the officer's search stays within the bounds marked by *Terry* v. *Ohio*, 392 U.S. 1 (1968). In *Dickerson*, the Court stated:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

113 S. Ct. at 2137.

Here, the officers were justified in stopping and frisking the appellant. Officer Ball testified that, based on his experience as a law enforcement officer, it was apparent to him that what he felt in the appellant's pocket was a bag of cocaine. Thus, the seizure did not invade the appellant's privacy beyond that already authorized by the officer's search for weapons. Therefore, we cannot say that the trial court's ruling is clearly against the preponderance of the evidence and we affirm the trial court's denial of the appellant's motion to suppress.

The appellant also argues that his statement to officers after his arrest should have been suppressed as "fruit of the poisonous tree." However, the appellant did not argue this to the trial court and hence it is not preserved for appeal. *Walker* v. *State*, 314 Ark. 628, 864 S.W.2d 230 (1993). We will not address an argument that was not presented to the trial court for consideration. *Id.*

Affirmed.

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

ARGENIA, INC. *v.* Troy BLASINGAME

CA 94-1077 910 S.W.2d 225

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

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jeffrey A. Weber*, for appellant.

Hardin, Jesson, Dawson & Terry, by: *Rex M. Terry*, for appellee.

JOHN MAUZY PITTMAN, Judge. Argenia, Inc., an insurance brokerage firm, appeals from a judgment finding it responsible for losses caused by a September 1991 fire. We find no error and affirm.

This case began when Troy Blasingame, the appellee, contacted Johnny Gossage, an insurance agent, to secure insurance on a building in Ozark. Mr. Gossage then contacted appellant regarding coverage. Subsequently, the building burned and appellee sought to collect the insurance proceeds. Appellant denied that

coverage had been bound; however, Mr. Gossage's errors and omissions carrier, Lancer Claims Service, paid appellee $80,000.00 eight months after the fire as the amount of coverage on the policy. When appellee brought action against appellant, appellant filed a motion to substitute Lancer Claims Service as the party plaintiff, alleging that Lancer Claims Service was the real party in interest pursuant to its payment of the $80,000.00 and that appellee had no financial interest in the outcome of the lawsuit. Appellee responded that he had sufficient financial interest in the outcome as he was seeking interest and a penalty. Appellant's motion was denied. Appellant also filed a third-party complaint against Mr. Gossage. At trial, the parties stipulated that Mr. Blasingame was entitled to receive the $80,000.00 and proceeded to jury trial on the third-party complaint for a determination of which party should pay the claim. At trial, the court denied appellant's motion for a directed verdict, and the jury assessed damages against appellant. The court denied Mr. Blasingame's request for a penalty but awarded prejudgment and postjudgment interest.

On appeal, appellant first argues that the trial court erred in denying its motion to substitute Lancer Claims Service as the real party in interest. Rule 17(a) of the Arkansas Rules of Civil Procedure provides that "every action shall be prosecuted in the name of the real party in interest." Appellant contends that because appellee was paid the total amount of coverage, it was error to allow him to pursue the lawsuit. Appellant cites several cases for the rule that, in insurance cases, the real party in interest is the insurer when the insured has been paid in full. That rule indeed is supported by the cases cited by appellant. *See Bankston* v. *McKenzie*, 287 Ark. 350, 698 S.W.2d 799 (1985); *Ark-Homa Foods, Inc.* v. *Ward*, 251 Ark. 662, 473 S.W.2d 910 (1971).

In the present case, however, appellee claimed that he had not been fully reimbursed. It is also true that, when an insurance company has only partially reimbursed an insured for his loss, the insured is the real party in interest. The supreme court and this court have long held that when an insured has not been reimbursed for his deductible, the insured is the real party in interest. The supreme court stated:

> The general rule is that where an insurance company

> has only partially reimbursed an insured for his loss, the insured is the real party in interest and can maintain the action in his own name for the complete amount of his loss. *McGeorge Contracting Co.* v. *Mizell*, 216 Ark. 509, 226 S.W.2d 566 (1950). It is undisputed in the present case that Sammons was never reimbursed by Farm Bureau for the amount of his deductible. This court has held that where the insured has a deductible interest, he is the real party in interest and the action *must* be brought in his name for his own benefit. *Page* v. *Scott*, 263 Ark. 684, 686, 567 S.W.2d 101 (1978); *Washington Fire & Marine Ins. Co.* v. *Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964); *see also Thompson* v. *Brown*, 5 Ark. App. 111, 633 S.W.2d 382 (1982). The insured stands as trustee to the insurer as to any amount recovered; the insurer is not a necessary party. *Id.* Accordingly, the trial court committed reversible error in granting Case's motion to substitute Farm Bureau as the real party in interest.

Farm Bureau Ins. Co. v. *Case Corp.*, 317 Ark. 467, 469, 878 S.W.2d 741, 742 (1994).

Here, appellee was not reimbursed for his fire loss until approximately eight months after the fire. At trial, he sought both prejudgment and postjudgment interest. Appellee points out that prejudgment interest amounts to approximately $2,800.00. Prejudgment interest is awarded for the period of time in which the recovering party has been deprived of the use of money or property. During that period, the obligor has had the use of that which rightly belonged to the recovering party. *USAA Life Ins. Co.* v. *Boyce*, 294 Ark. 575, 745 S.W.2d 136 (1988). Likewise, postjudgment interest is awarded on the amount of prejudgment interest to compensate the recovering party for the loss of the use of money adjudged to be his. *Hopper* v. *Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983). The purpose of awarding interest would be frustrated if appellee were not compensated for the loss of use of all of his money, both before and after judgment. *Id.* The award of interest was necessary to fully compensate appellee, the injured party. *See Wooten* v. *McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981).

Deprived of the use of money adjudged to be his,

appellee suffered a loss for which he had not been fully reimbursed. We conclude that the trial court was correct in determining that appellee was the real party in interest and was entitled to bring the action in his own name. We believe that our decision is in accord with those cases determining that an insured who has not been reimbursed for his deductible is the real party in interest and furthers the stated goal of permitting an insured to maintain an action in his own name for the complete amount of his loss.

Appellant also argues that the trial court erred in denying its motion for a directed verdict. This court's standard of review in determining the sufficiency of the evidence is as follows:

> In reviewing the denial of a motion for a directed verdict, this court gives the proof its strongest probative force. *Lazelere* v. *Reed*, 35 Ark. App. 174, 180, 816 S.W.2d 614, 618 (1991). Substantial evidence is that evidence which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or another; it must force or induce the mind to pass beyond a suspicion or conjecture. *Bank of Malvern* v. *Dunklin*, 307 Ark. 127, 129, 817 S.W.2d 873, 874 (1991); *Newberry* v. *Johnson*, 294 Ark. 455, 458, 743 S.W.2d 811, 812 (1988). Consequently, a motion for directed verdict should be granted only if the evidence so viewed would be so insubstantial as to require a jury verdict for the party to be set aside. *Bice* v. *Hartford Accident & Indem. Co.*, 300 Ark. 122, 124, 777 S.W.2d 213, 214 (1989).

City of Fort Smith v. *Findlay*, 48 Ark. App. 197, 203-04, 893 S.W.2d 358, 362 (1995).

The evidence shows that in May 1991 Mr. Gossage contacted Mike Alexander, president of the appellant company, and obtained a quote for insurance on the building that appellee was purchasing. At trial, Mr. Gossage testified that after the quote was accepted by appellee, Mr. Alexander orally bound coverage on the building. He stated that he then mailed a signed insurance application and a check to appellant. Mr. Alexander denied that coverage was bound and stated that appellant's records showed that coverage was not bound and that no application or check was received.

Appellant argues that payment of a premium is ordinarily a condition precedent to the creation of insurance coverage and that it demonstrated at trial that appellee lacked sufficient funds to make the down payment on the premium. Appellee testified at trial that he had checking accounts at that time either with American State Bank, the Bank of Mulberry, the Bank of Ozark, or some other bank. He stated that he did not remember the amount of the check or on which bank it had been drawn and that all of his records of the transaction were destroyed in the fire. Appellant presented records to show that appellee did not have open accounts at the Bank of Mulberry or American State Bank in May 1991 on which to draw a check.

We agree that the general rule is that payment of the premium is ordinarily a condition necessary to the operation of a policy of insurance. *Leigh Winham, Inc.* v. *Reynolds Ins. Agency*, 279 Ark. 317, 631 S.W.2d 74 (1983). There are, however, exceptions to this general rule. One such exception is the giving of an effective oral binder of coverage prior to payment of the premium. *See Dixie Ins. Co.* v. *Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989); *Leigh Winham, Inc.* v. *Reynolds Ins. Agency, supra.*

Here, there was a sharp dispute in the evidence regarding whether the president of the appellant company gave an oral binder of coverage. Ultimately, the weight and value to be given the testimony of witnesses lies within the exclusive province of the jury. *Garrett* v. *Brown*, 319 Ark. 662, 893 S.W.2d 784 (1995); *Pineview Farms, Inc.* v. *A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989). Viewing the proof in the light most favorable to appellee, we cannot say that it does not represent substantial evidence of binding insurance. The trial court did not err in denying appellant's motion for a directed verdict.[1]

Affirmed.

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

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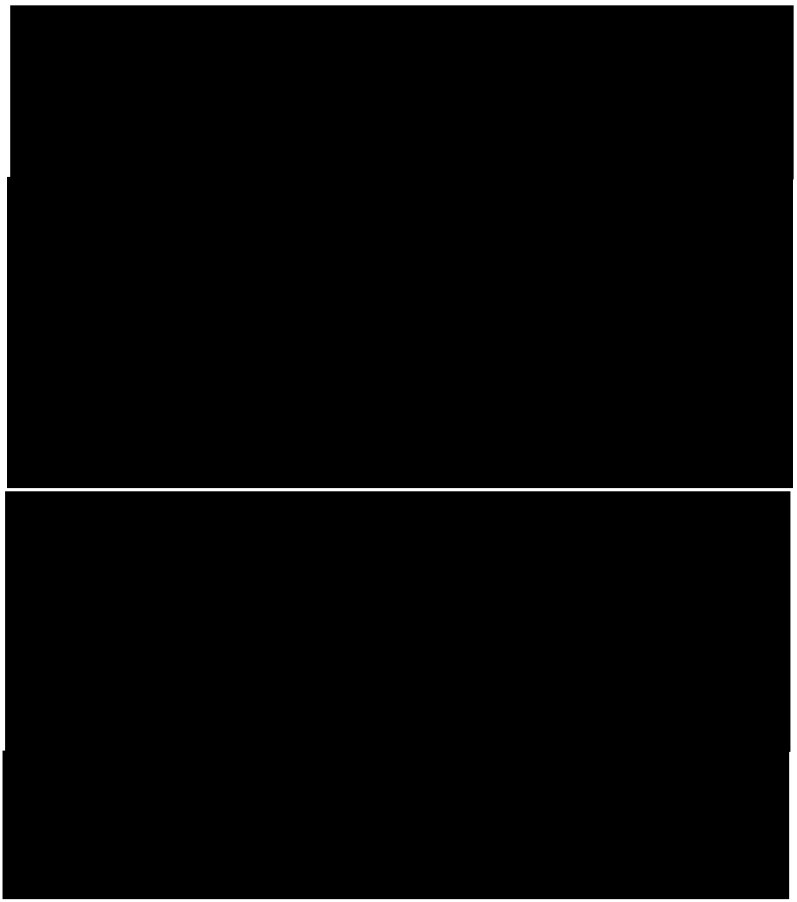
[1]We note that Ark. Code Ann. § 23-79-120(b) (Repl. 1992) provides that "[n]o binder is valid beyond the issuance of the policy or beyond ninety days from its effective date, whichever period is the shorter." However, appellant did not argue, either below or on appeal, that any binder that may have been given expired prior to appellee's loss, and we do not consider that issue.

DEPARTMENT OF FINANCE AND ADMINISTRATION,
Alcoholic Beverage Control Division, and
Conway Supper Club, Inc. *v.* John J. SAMUHEL;
Dwight Balch; Robert Dailey; Billy Hightower; and
Arkansas Free Will Baptist Church
dba Camp Beaver Fork, Inc.

CA 94-1058 909 S.W.2d 656

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



Milton Lueken, for appellant Alcoholic Beverage Control Division.

Charles R. Singleton, for appellant Conway Supper Club, Inc.

Morley Law Firm, by: *Stephen E. Morley*, for appellees.

BRUCE T. BULLION, Special Judge. The appellant in this ABC Board case, Conway Supper Club, Inc., filed an application for a private club alcoholic beverage permit. After a hearing on November 8, 1992, the Arkansas Alcoholic Beverage Control Division Board (ABC Board) granted the application. The appellees appealed to the circuit court which remanded to the Board for additional findings. Following remand, the circuit court reversed the decision of the Board and denied the permit. From that decision, comes this appeal.

For reversal, the appellants contend that the circuit court erred in remanding to the ABC Board to take additional evidence; in permitting issues relating to the legal validity of the nonprofit corporation and property ownership to be raised for the first time on appeal; in substituting its judgment for that of the ABC Board; and in finding that the Board's decision was not supported by substantial evidence. We reverse.

We first address the appellants' contention that the circuit court erred in remanding to the ABC Board for the taking of additional evidence. Arkansas Code Annotated § 25-15-212(f) (Repl. 1992) permits the circuit court to order that additional evidence be taken before the agency if the court finds that the evidence is material and that there were good reasons for failure to present it in the proceeding before the agency. The appellant asserts that, because the circuit court failed to make such findings, the order of remand was erroneous. We agree.

We have held that, when a party applies for leave to present additional evidence under Ark. Code Ann. § 25-15-212(f), the trial judge should first view the application for additional evidence to determine if the party was diligent; that the trial court may then in the exercise of its discretion conduct a hearing to determine if the additional evidence fits within the requirements of the statute; and that, if the trial court finds that under the requirements of the statute additional evidence should be taken, the trial court may then remand to the Board for it to hear the additional evidence. *Marshall* v. *Alcoholic Beverage Control Bd.*, 15 Ark. App. 255, 692 S.W.2d 258 (1985). However, the trial court in the case at bar failed to make the requisite findings of diligence and good reasons in its order, but instead remanded to

the Board for additional evidence to be taken concerning issues which had not been raised in the initial administrative hearing. In the absence of any finding that the statutory requisites had been satisfied, the trial court erred in remanding to the Board for additional evidence to be taken. *See Woolsey* v. *Arkansas Real Estate Comm'n*, 263 Ark. 348, 565 S.W.2d 22 (1978).

Given our resolution of the previous issue, the only question before us is whether the Board's initial decision granting the appellant's application is supported by substantial evidence. The rules governing judicial review of administrative decisions are the same for both the circuit and appellate courts and this review is limited in scope: administrative decisions will be upheld if supported by substantial evidence and not arbitrary, capricious, or characterized by an abuse of discretion. *Fouch* v. *Arkansas Alcoholic Beverage Control Div.*, 10 Ark. App. 139, 662 S.W.2d 181 (1983). In determining whether there is substantial evidence, we review the entire record rather than merely the evidence supporting the Board's decision. *Id.*

Arkansas Code Annotated § 3-9-222(f) (1987) provides that a private club permit may be issued upon a determination that the applicant is qualified and that the application is in the public interest. The qualifications required of an applicant are set out in Ark. Code Ann. § 3-9-202(10) (1987), which defines a "private club" as:

> [A] nonprofit organization organized and existing under the laws of this state, no part of the net revenues of which shall inure directly or indirectly to the benefit of any of its members or any other individual, except for the payment of bona fide expenses of the club's operations, conducted for some common recreational, social, patriotic, political, national, benevolent, athletic, or other nonprofit object or purpose other than the consumption of alcoholic beverages. The nonprofit corporation shall have been in existence for a period of not less than one (1) year before application for a permit, as hereinafter prescribed. At the time of application for the permit, the nonprofit corporation must have not less than one hundred (100) members regularly paying annual dues of not less than five dollars ($5.00) per member, and, at the time of application, must

> own or lease a building, property, or space therein for the reasonable comfort and accommodation of its members and their families and guests, and restrict the use of club facilities to such persons.

The Board found in its opinion of November 18, 1992, that the Conway Supper Club, Inc., was a legally incorporated nonprofit corporation qualified to hold a private club permit, and that it would be in the public interest to grant the application. The evidence before the Board at that hearing included testimony that the club was a nonprofit organization with approximately three hundred dues-paying members, and that a building with a small bar area and dining room would be constructed on the leased property. There was also testimony that the club proposed to operate a supper club therein for the benefit of its membership, with any excess revenues over cost being used for improvements, including a tennis court and swimming pool for the membership, and for donations to local charities. In addition, there was evidence that there were presently located in Faulkner County three organizations licensed to dispense alcohol by the drink, i.e., the Conway Country Club, the Cadron Valley Country Club, and the VFW Club, but that the appellant club's membership could not afford the cost of the first two organizations and, not having participated in a foreign war, were not qualified for membership in the third club. There was also testimony that Faulkner County was a "dry" county, a majority of its citizens having exercised their right to prohibit the sale of alcoholic beverages by the package in that county, and that the club membership was therefore required to drive either to Little Rock or to Morrilton to have dinner and mixed drinks. Finally, there was testimony that no serious law enforcement or traffic problems were to be expected if the application was granted for a private club permit at the proposed location. Although there was evidence to the contrary on this latter point, on our review of the record as a whole we cannot say that the Board erred in granting a private club permit to the appellant club. Consequently, we reverse the circuit court's decision and reinstate the Board's decision granting the permit.

Reversed.

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

Linda BONEBRAKE *v.* STATE of Arkansas

CACR 94-1100 911 S.W.2d 261

Court of Appeals of Arkansas
Division II
Opinion delivered December 6, 1995

Paul H. Lee, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Linda Bonebrake appeals from her conviction at a jury trial of possession of a controlled substance (cocaine) with intent to deliver. She was sentenced to twenty years in the Arkansas Department of Correction and fined $2,000.00. She argues that the trial court erred in denying her motion to suppress evidence obtained from a search that she contends was not incident to a lawful arrest. We affirm.

Officer Kurt Spears of the Dardanelle Police Department testified that he was called to assist appellant who had locked her keys in her car. When he arrived, appellant's nine-year-old daughter, Mindy, told him that her mother's keys were locked in her mother's car. Officer Spears testified that appellant was in the lobby of Wal-Mart, that he recognized her from a previous arrest, and that he was aware of her general background. After confirming ownership of the vehicle, appellant accompanied Officer Spears to the vehicle. An information check indicated that the license was registered to a different vehicle. A ACIC check revealed that there were outstanding arrest warrants issued against appellant for hot check violations. Officer Spears placed appellant under arrest, patted her down, searched her pockets, and placed her in the patrol car. While appellant was seated, her daughter brought appellant's purse to her. Appellant said, "No, get that away, get it out of here." Officer Spears testified that he stated to appellant's daughter, "No, just leave it here; she might need that." Appellant took the purse from her daughter. Officer Spears asked her if it contained a weapon. When he searched the purse to confirm her denial, he discovered self-closing plastic

baggies containing a white powdery substance, which later proved to be cocaine.

Appellant argues that seizure of her purse as part of a search incident to her arrest was improper because it was not in her possession at the time of her arrest. We find no error.

Arkansas Rule of Criminal Procedure 12.1 permits an officer making a lawful arrest to conduct a search, without a warrant, of a person or his property to protect the officer, to prevent the accused's escape, or to obtain evidence of the commission of an offense for which the accused is arrested or to seize contraband or fruits of the crime. Moreover, a search incident to an arrest may be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. *U.S.* v. *Chadwick*, 433 U.S. 1 (1977). A search incident to an arrest must be substantially contemporaneous with the arrest and not remote in time and place. *Jones* v. *State*, 246 Ark. 1057, 441 S.W.2d 458 (1969). Thus, a search may be made only of the area within the immediate control of the person arrested, which has been held to be the area from within which he might gain possession of a weapon or destructible evidence. *Crow* v. *State*, 306 Ark. 411, 814 S.W.2d 909 (1991) (citing *Chimel* v. *California*, 395 U.S. 752 (1969)).

Relying on *U.S.* v. *Rothman*, 492 F.2d 1260 (9th Cir. 1973), appellant argues that the police cannot arrest her and then bring her into contact with possessions which are unrelated to her arrest and not within her immediate possession. Appellant cites *U.S.* v. *Wright*, 577 F.2d 378 (6th Cir. 1978), where the court ruled as impermissible a search, incident to arrest, of the defendant's luggage, which was not present at the time of arrest and was in the custody of an airline. The court said the only reason the luggage was near the defendant was because the officer obtained the luggage and placed it there. Similarly, appellant relies on *U.S.* v. *Perea*, 986 F.2d 633 (2nd Cir. 1993), where the court struck down a search of the defendant's duffel bag in the car trunk because the officers could not justify the search as incident to arrest by bringing the item they wished to search near the arrestee. However, these cases are distinguishable from the case now before us. Here, Officer Spears did not bring appellant's purse to her or manipulate her to be in the vicinity of her

purse. Without the officer's initiation or instruction, appellant's daughter brought the purse to her, Officer Spears stated that she may need it, and appellant chose to take it. *See also U.S.* v. *Jeffers*, 524 F.2d 253 (7th Cir. 1975) (search incident to arrest upheld when arrestee sought to give purse to her mother and officer told her that she would need to keep it with her). This case is not one in which an officer arranged an incident-to-arrest exception by bringing an item into the area of an arrestee for the purpose of a search.

Appellant also argues that the evidence should have been suppressed because it was unrelated to the offense for which she was arrested (hot check violations). Arkansas Rule of Criminal Procedure 12.1(d) limits the scope of a search for evidence connected with the offense for which one is arrested, but does not limit the items that may be properly seized. *Van Daley* v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987). The rule allows the arresting officer to seize contraband, the fruits of crime, and any other things criminally possessed which are discovered during a proper search incident to arrest. Once such items are discovered, they may be seized and used as evidence without regard to whether they are connected with the offense for which the accused was initially arrested. *Id.*

In reviewing a trial court's decision to deny an appellant's motion to suppress evidence, this court makes an independent determination based on the totality of the circumstances and reverses the decision only if it is clearly against the preponderance of the evidence. *Myers* v. *State*, 46 Ark. App. 227, 878 S.W.2d 424 (1994). We cannot say that the court's denial of appellant's motion to suppress is clearly erroneous.

Affirmed.

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

J.M. PRODUCTS, INC. *v.*
ARKANSAS CAPITAL CORPORATION

CA 94-1039 910 S.W.2d 702

Court of Appeals of Arkansas
Division II
Opinion delivered December 6, 1995

[redacted]

Mays & Crutcher, P.A., by: *Richard L. Mays* and *Michael A. LeBoeuf*, for appellant.

Rose Law Firm, by: *Stephen N. Joiner*, for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal is from a summary

judgment that granted appellee a mandatory injunction requiring appellant, J.M. Products, Inc., to issue a stock certificate for 250 of its shares to appellee. In contending that the trial court erred in awarding summary judgment, appellant asserts that a number of questions of fact remained for the trial court's determination. We find no merit to any of its arguments and affirm.

In March 1990, defendant Anthony Riney pledged a stock certificate for 250 shares of stock in J.M. Products, Inc., to appellee as collateral for a $100,000.00 loan. Appellee made the loan to defendant R.J. Productions, Inc., a corporation solely owned by Riney, and the loan was personally guaranteed by Riney and his wife, Helen Riney. After R.J. Productions, Inc., and the Rineys defaulted on their payments under the note, appellee requested appellant to reissue the stock certificate in appellee's name. Appellant, however, refused, claiming that the Pulaski County Circuit Court, in *Riney* v. *J.M. Products, Inc.*, No. 90-5273 (Sept. 5, 1991), had found that Riney improperly obtained the stock certificate. Appellee was not a party to that lawsuit.

Appellee then filed suit against R.J. Productions, Inc., the Rineys, and appellant, seeking judgment jointly and severally in the amount of $102,501.00 together with attorney's fees. It also requested the court to declare it to have a first lien against the collateral described in the complaint, to grant it possession of such collateral, and to order appellant by mandatory injunction to issue a stock certificate in the name of appellee representing ownership of 250 shares of stock of J.M. Products, Inc. Appellee attached to its complaint the loan agreement between appellee and appellant, the promissory note for $100,000.00, the guaranty agreement signed by the Rineys individually, the stock pledge and security agreement, the stock power transferring the stock certificate to appellee's name, and a copy of the stock certificate representing 250 shares of common stock made out in favor of Anthony Riney, dated April 16, 1982, and bearing the signatures of Ernest P. Joshua as president of appellant and Thelma L. Joshua as secretary thereof.

In the pleadings and depositions filed with the court, appellant admitted the validity of the signatures on the stock certificate. Appellant also admitted that it received a letter dated March 20, 1990, from appellee's attorney, requesting that the

corporate stock records of appellant be amended to reflect the Stock Pledge, Security Agreement, and Stock Power executed by Tony Riney and Helene Charlot Riney to appellee. On April 19, 1990, appellant responded, advising appellee that appellant had the first right to purchase the common stock of Mr. Tony Riney should R.J. Productions, Inc., or Mr. Riney default on any of the terms or provisions of their loan agreement with appellee and that it be given immediate notification if such default occurs. Appellant's response made no mention of its claim that Riney had wrongfully obtained the stock certificate. Appellant also admitted that it had no communication of any kind with appellee concerning the status of the stock certificate prior to March 6, 1990; that its president, Ernest P. Joshua, testified in Pulaski County Circuit Court Case No. 90-5273, *Riney* v. *J.M. Products, Inc.*; that he "told the Board that [Riney] owned Twenty Five Percent of [appellant] in 1990"; and that appellant had not filed suit against Riney until October 17, 1990.

Based on these pleadings and appellant's admissions, appellee moved for summary judgment. Attached to its motion were the affidavits of Sam Walls and George Eagen, executive vice presidents of appellee. Walls' affidavit stated:

> Based on a diligent review of ACC's books and records, Defendants, R.J. Productions, Inc., as primary obligor and Anthony Riney and Helene Charlot Riney as guarantors, are currently indebted to ACC, as of July 26, 1993, in the amount of $105,129.27, with interest accruing per diem at the rate of $30.21. A true and correct copy of the loan payment record is attached hereto as Exhibit "1".

Eagen's affidavit stated:

> 2. At no time during the loan evaluation process and prior to closing was I made aware of any deficiency in the validity of the stock in J.M. Products, Inc. that was pledged by Anthony Riney as partial collateral for the loan from ACC to R.J. Productions, Inc.
>
> 3. Mr. Riney represented himself as an officer of J.M. Products. Mr. Riney had copies of audited financial statements of J.M. Products, a closely held corporation, supporting the contention that he was in fact a shareholder.

Appellee was granted summary judgment against separate defendant R.J. Productions, Inc., in the amount of $124,913.64. Appellee was later awarded summary judgment against appellant, J.M. Products., Inc. In that judgment, the chancellor found that the affidavit of George H. Eagen of appellee made a prima facie showing that appellee was a subsequent purchaser for value of the Stock Certificate, that appellee had no knowledge of any defect with respect to the Stock Certificate at the time that it was pledged by Riney, and that the affidavit of Ernest P. Joshua of J.M. Products did not contain any factual assertions negating appellee's prima facie showing of appellee's status as a purchaser for value of the Stock Certificate or appellee's prima facie showing that it had no knowledge of any defect with respect to the Stock Certificate at the time the Stock Certificate was pledged to appellee. The chancellor concluded that, under Ark. Code Ann. § 4-8-202(2) (Repl. 1991), appellee is entitled to and is the lawful owner of 250 shares of the common stock of appellant, and that appellee is entitled to a stock certificate evidencing such ownership and all the attendant rights of being a stockholder of appellant. The judgment ordered appellant to issue a stock certificate in appellee's name on or before June 10, 1994.

Motions for summary judgment are governed by Rule 56 of the Arkansas Rules of Civil Procedure, which provides that a judgment may be entered if the pleadings, depositions, answers, interrogatories, and admissions on file, in addition to affidavits, if any, show that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy which should be allowed only when it is clear that there is no genuine issue of fact and the moving party is entitled to a judgment as a matter of law. Although affidavits and documents in support of motions for summary judgment are construed against the moving party, once a prima facie showing of entitlement to summary judgment is made, the responding party must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *Mathews* v. *Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988).

For its appeal, appellant argues that summary judgment was in error because questions of fact existed for the trial court's determination. Appellant first argues that the trial court should

not have considered the affidavit of George Eagen in awarding appellee summary judgment because the trial court did not have the opportunity to assess Eagen's credibility. Appellant, however, has not cited any authority for this argument, nor do we know of any.

Appellant next claims that the trial court erred in finding that appellee was a bona fide purchaser without notice of appellant's claim. Arkansas Code Annotated § 4-8-302(1) (Repl. 1991) states that "[a] 'bona fide purchaser' is a purchaser for value in good faith and without notice of any adverse claim . . . ." The burden was on appellee to prove that it was a bona fide purchaser. *See Gwatney* v. *Allied Companies, Inc. of Arkansas*, 238 Ark. 962, 385 S.W.2d 940 (1965).

The evidence attached to appellee's motion demonstrated that Riney had possession of the stock certificate when it was given to appellee, that there was nothing on the face of the certificate to give appellee notice that it was invalid, that the signatures on the certificate were valid, and that Riney had copies of the audited financial statements of appellant supporting his claim that he was a shareholder. Based on this evidence, the trial court found that appellee made a prima facie case that it was a bona fide purchaser for value in good faith and without notice of appellant's claim. It also found that appellant failed to rebut appellee's case with any evidence.

Appellant refutes this finding and contends that appellee had constructive notice of appellant's defense to the stock certificate and, therefore, whether appellee was without notice of appellant's adverse claim was a question of fact. The evidence on which appellant relies for its argument is the affidavit of its president, Ernest Joshua, which states: "[Appellee] had knowledge of the litigation between J.M. and Riney concerning Riney's ownership of J.M. stock but did not intervene in the litigation." Assuming that Joshua's statement is true, appellant still has not presented any evidence of appellee's knowledge at the time it accepted the stock certificate as collateral. The litigation to which Joshua refers in his affidavit did not occur until seven months after appellee accepted the certificate as collateral.

Appellant also argues that appellee failed to make any effort to establish the validity of the stock certificate prior to accept-

ing it as collateral and, therefore, appellee's failure to make such an effort operated as knowledge of appellant's defense as defined by Ark. Code Ann. § 4-1-201(25)(c) and (27) (Supp. 1993), which provides:

> (25) A person has notice of a fact when:
>
> (c) From all the facts and circumstances known to him at the time in question he has reason to know that it exists.
>
> . . . .
>
> (27) Notice, knowledge, or a notice of notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

In support of its argument that appellee had a duty to ascertain the validity of the stock certificate prior to accepting it as collateral, appellant cites *First National Bank of Cicero* v. *Lewco Securities Corp.*, 860 F.2d 1407 (7th Cir. 1988); *Hollywood National Bank* v. *International Business Machine Corp.*, 38 Cal. App. 3d 607, 113 Cal. Rptr. 494 (1974); and *Insurance Co. of N. Am.* v. *United States*, 561 F. Supp. 106 (E.D. Pa. 1983). We find that these cases are distinguishable from the case at bar and lend no support to appellant's arguments.

In *First National Bank of Cicero, supra*, the appellant, who alleged it was a bona fide purchaser, admitted that its agent had not contacted the securities information center as was its normal practice to determine whether the securities were stolen. The district court held:

> Under sections 1-201(25) and 8-302, a purchaser of securities will be charged with notice of those adverse claims which were discoverable through adherence to reasonable commercial standards of business conduct. In the present case, compliance with federal regulations *requiring* the verification of collateral is necessary to support a finding that a bank satisfied reasonable commercial standards.

First National Bank of Cicero v. *Lewco Securities Corp.*, 860 F.2d at 1413-14. In the case at bar, appellant has not cited any regulation that required appellee to check the validity of the stock certificate with appellant.

In *Hollywood National Bank* v. *International Business Machine Corp.*, 113 Cal. Rptr. at 498-99, the court held that, where no attempt was made to reconcile the transferee's prior credit record with his possession of a $70,000.00 stock certificate, the circumstances amounted to more than "mere suspicion" and were sufficient to place appellant on notice. The court held that mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, would not preclude a transferee from occupying the position of a holder in due course, unless the circumstances or suspicions were so cogent and obvious that to remain passive would amount to bad faith. Here, appellant has not come forward with any evidence that should have made appellee suspicious of Riney's possession of the stock certificate.

Insurance Company of North America v. *United States, supra*, concerned the appellant's subrogor's failure to follow several industry practices in the subject transaction. No such practices exist in the case at bar.

Appellant also argues that appellee would have discovered that Riney was not a stockholder of appellant if it had investigated the filings in the Secretary of State's office. Appellant produced a copy of its amended articles of incorporation filed with the Secretary of State on April 5, 1983, which showed there were 800 shares of outstanding stock owned by the Joshuas. Appellant, however, did not produce any evidence to show that it would have been a reasonable business practice for appellee to have checked these filings to look for this evidence. Arkansas law does not require a corporation to file the names of its stock-

holders with the Secretary of State's office. *See* Ark. Code Ann. § 4-26-202 (Repl. 1991).

Furthermore, appellant's December 31, 1988, audited financial records upon which appellee relied in accepting appellant's stock certificate as collateral shows that 1,050 shares of stock were outstanding. Appellant also admitted in response to appellee's request for admission that its president, Ernest Joshua, told "the Board [Riney] owned Twenty Five Percent of [appellant] in 1990."

Appellant's argument here is similar to the argument rejected by the supreme court in *Byrd* v. *Security Bank*, 250 Ark. 214, 464 S.W.2d 578 (1971):

> Appellants say that if the Security Bank had checked in the office of the Circuit Court Clerk, it would have found that the Kennett Bank had filed financing statements from appellants as security, said statements covering substantially the same property which had been covered in the financial statements securing appellee's indebtedness; that appellee would accordingly have been put on notice that "something was wrong". We disagree. The evidence reflects that appellee did not learn until June that Parsons had released the financing statements, and that Kennett had a lien on the properties. The Kennett financing statements were not filed until March 30, and it will be recalled that the Security financing statements had been filed in January. Appellee could not possibly have known about the latter filing unless it checked the clerk's records each day, week, or month to determine if the original financing statements were still in effect. Under the circumstances of this case, we cannot see where there was any duty on appellee to go over and check the records regularly to see if it still held effective security. There simply wasn't any reason for this to be done. Of course, this litigation could not have arisen except for appellants signing blank notes. The one fact that contributed most to the situation in which appellants now find themselves, is that they imprudently signed these blank instruments, and in doing so, failed to act as prudent persons.

Id. at 218, 464 S.W.2d at 580.

Appellant for its third point argues that appellee also had constructive notice by way of the "staleness" of its claim. For this proposition, it cites Ark. Code Ann. § 4-8-305 (Repl. 1991), which provides:

> An act or event that creates a right to immediate performance of the principal obligation represented by a certificated security or sets a date on or after which a certificated security is to be presented or surrendered for redemption or exchange does not itself constitute any notice of adverse claims except in the case of a transfer:
>
> (a) After one (1) year from any date set for presentment or surrender for redemption or exchange; or
>
> (b) After six (6) months from any date set for payment of money against presentation or surrender of the security if funds are available for payment on that date.

Appellant's argument, however, does not demonstrate how this section is applicable to Riney's stock certificate except to state that appellee's "claims should have been made not more than six months after default." It appears from the undisputed evidence that appellee did bring its claim within six months of Riney's default. According to appellee's complaint, R.J. Productions, Inc., made payments on appellant's note until October 22, 1992. Under the terms of the loan agreement, the borrowers had thirty days to remedy any default. Therefore, the lawsuit filed by appellee on May 6, 1993, was made within six months.

Appellant also contends that appellee did not prove that it was a "purchaser for value," which it was required to prove in order to be a bona fide purchaser under section 4-8-302. Appellant admitted in its answer to appellee's complaint that, "on March 6, 1990, Anthony Riney pledged the Stock Certificate to [appellee] as collateral for a loan from [appellee] to R.J. Productions, a corporation in which Anthony Riney and his wife, Helene Charlot, are the sole shareholders." This undisputed evidence was sufficient to show appellee was a purchaser for value. *See* Ark. Code Ann. § 4-1-201(44)(a) (Supp. 1993).

Also under this point, appellant argues that appellee should not be allowed to be unjustly enriched at the expense of appellant, even if appellee is a bona fide purchaser. We do not

address this argument because appellant has failed to produce any evidence to show that appellee has been unjustly enriched. Furthermore, the summary judgment awarded appellee by the court specifically provides:

> [Appellee] shall deal with such J.M. Products stock in accordance with the rights of a secured party under the Uniform Commercial Code with the proceeds if any applied to the judgment, costs, and attorney's fees awarded to [appellee] against R.J. Productions, Inc., in this proceeding with any remaining proceeds, after payment in full to [appellee], placed into escrow account for further determination by the court of any other party's interest in said proceeds.

Appellant also argues that Ark. Code Ann. § 4-9-112 (Repl. 1991) required appellee to notify appellant of the status of the collateral, which it contends appellee never did. We disagree. Appellee wrote appellant on two occasions, notifying appellant it held the stock certificate as collateral. Appellant responded to appellee's March 1990 letter but wrote nothing to indicate its adverse claim or to put appellee on notice that Riney was not the owner of the certificate. On January 21, 1992, appellee again wrote appellant regarding the stock certificate, stating:

> This letter is to remind your clients; J.M. Products, Inc., Ernest P. Joshua and Thelma L. Joshua; that Arkansas Capital Corporation ("ACC") has relied and continues to rely on the validity of the Stock Certificate attached hereto. As your clients know, ACC received the Stock Certificate as collateral for a $100,000 loan to R.J. Productions, Inc.
>
> R.J. Productions' debt to ACC has not been accelerated at this time. However, ACC continues to rely on the attached Stock Certificate as the primary collateral for the repayment of R.J. Productions' loan. Your clients should conduct their affairs accordingly until such time as R.J. Productions' debt is repaid in full.

There is no evidence that appellant responded to the letter.

Appellant's final point concerns its contention that the events at issue violate Article XII, Section 8, of the Arkansas Constitution. This section provides:

> No private corporation shall issue stocks or bonds, except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void; nor shall the stock or bonded indebtedness of any private corporation be increased, except in pursuance of general laws, nor until the consent of the persons holding the larger amount in value of stock shall be obtained at a meeting held after notice given for a period not less than sixty days, in pursuance of law.

Appellant argues that, although the stock was exchanged for value, it did not receive the value, and, therefore, the transaction runs afoul of Article XII, Section 8. We do not agree.

In *Gwatney* v. *Allied Companies, Inc.*, 238 Ark. 962, 385 S.W.2d 940 (1965), the supreme court held that, if one is a bona fide purchaser for value of stock certificates, then the certificates cannot be canceled and a corporation cannot claim the invalidity of the original issue of a stock certificate as against a person who, subsequent to the original issue, acquired the stock as a bona fide holder. The court in *Gwatney* relied on *Park* v. *Bank of Lockesburg*, 178 Ark. 669, 11 S.W.2d 483 (1928). There, the court held that one who in good faith lent money represented by a note and took the stock certificate as collateral, which was regular in form and carried no notice of any infirmity upon its face, was entitled to enforce its lien as against the claim of the bank for the purchase money of the stock. Appellant argues that *Park* v. *Bank of Lockesburg* is not controlling in the case at bar because the bank had some responsibility in the outcome as the stock certificate issued by the bank carried no notice whatever of any infirmity on its face. This same argument, however, can be made of appellant. This lawsuit could have been avoided if appellant's officers had not signed the certificate.

Appellant also argues that the stock certificate was not a "security" under Ark. Code Ann. § 4-8-101 *et seq.* (Repl. 1991). Section 4-8-102(1)(a)(i) provides that: "[a] "certificated security" is a share, participation, or other interest in property of or an enterprise of the issuer or an obligation of the issuer which is . . . [r]epresented by an instrument issued in bearer or registered form . . . ." Appellant argues that, in order to be a "security" as defined by Sections 4-8-102(1)(a)(i) *et seq.*, the stock

certificate had to be "issued," and the undisputed evidence here proved that the stock certificate in question was never issued.

In support of its argument, appellant cites *Bankhaus Hermann Lampe KG* v. *Mercantile-Safe Deposit and Trust Co.*, 466 F. Supp. 1133 (S.D.N.Y. 1979), where the court ruled that, since the certificates were stolen en route from the engraver to the issuer and subsequently forged, they could not meet Article 8's definition of securities. In doing so, the district court held that a stock certificate that has never been issued as defined by section 3-102(a) of the Uniform Commercial Code is not a security covered by Article 8. Section 4-3-105 states that "issue means the delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person."

Here, appellant concludes that, because the stock certificate in question was never delivered by appellant to Riney, the certificate is not a security and appellee cannot be a bona fide purchaser. We disagree that the district court's opinion in *Bankhaus* controls the situation at bar. In that case, the "securities" at issue were blank certificates stolen en route from the engraver to the issuer. Here, the stock certificate in question that was received by the appellee provided:

> This certifies that *Anthony Riney* is the owner of *Two Hundred and Fifty* Shares of the Capital Stock of . . . transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed. In witness whereof the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation.

The certificate in question was originally in the hands of the issuer, appellant, where it was dated April 16, 1982, signed by Ernest P. Joshua as president and Thelma L. Joshua as secretary, and stamped with the seal of the corporation.

We do not find the fact that appellant did not physically deliver the stock certificate to Riney controlling as to whether the stock certificate was a "security" in appellee's possession. In *First American National Bank* v. *Christian Foundation Life*

Insurance Co., 242 Ark. 678, 408 S.W.2d 912 (1967), the appellee questioned the validity of certain bearer bonds that were ostensibly issued by the First Methodist Church. The evidence reflected that the church's agent had duplicate bonds printed that he gave to the appellant for collateral. The appellee attempted to dishonor the bonds because they were fraudulently issued, but the appellant claimed it was a good faith purchaser for value. The court stated that there was no good basis for questioning the appellant's standing as a good faith purchaser for value as the term is defined in the Uniform Commercial Code. In that case, the supreme court stated:

> We think the chancellor should have found all bonds held by bona fide purchasers to be binding obligations of the church. It is plain enough that the church was careless in entrusting its treasurer's facsimile signature to Institutional Finance and in failing to take the precaution of requiring authentication of the bonds by a manual signature. By contrast, the holders of the bonds acquired then in the ordinary course of business and in circumstances entitling them to the protection afforded to bona fide purchasers.
>
> The case is controlled by the pertinent provisions of the Uniform Commercial Code. Before the adoption of the Code the church might have been held liable by contract to one purchaser and in damages to the other, but the draftsmen of the Code point out in their Comment to our 85-8-202 that the Code simply validates most defective securities in the hands of innocent purchasers, refusing to prefer one such purchaser over another.

242 Ark. at 682, 420 S.W.2d at 914-15.

Furthermore, Ark. Code Ann. § 4-8-202(4) (Repl. 1991) provides that "[a]ll other defenses of the issuer of a certificated or uncertificated security, *including nondelivery* and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken without notice of the particular defense." (Emphasis added.)

In conclusion, we agree with the court's holding that appellee made a prima facie case that it was a bona fide purchaser and that it did not have any knowledge of appellant's

adverse claim. The burden then shifted to appellant to rebut appellee's evidence, and it failed to do so. None of the exhibits or statements made in its affidavits were controverted by appellant, nor did appellant present any evidence to create a question of fact as to whether appellee knew of any wrongful taking at the time it received the stock certificate as collateral.

Affirmed.

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

Jack JORDAN *v.* TYSON FOODS, INC.

CA 94-705 911 S.W.2d 593

Court of Appeals of Arkansas
En Banc
Opinion delivered December 6, 1995
Substituted Opinion Granting Rehearing

Donald E. Bishop, for appellant.

Bassett Law Firm, by: *Angela Doss*, for appellee.

JUDITH ROGERS, Judge. We previously rendered an unpublished opinion in this case, *Jordan* v. *Tyson Foods*, CA 94-705 slip op. (Ark. App. June 7, 1995), reversing and remanding the case back to the Commission. In response to this opinion, Tyson Foods petitioned this court for rehearing contending that we erred in our decision to reverse the Commission's decision. After thoroughly reviewing the case *en banc*, we grant Tyson's petition for rehearing and now affirm the Commission's decision.

On June 4, 1990, Jack Jordan sustained a compensable injury to his right shoulder while working for Tyson Foods. Compensation was paid, and Mr. Jordan was off work for thirty days. In December of 1990, Mr. Jordan voluntarily quit working for Tyson. Mr. Jordan has not been employed since that time. On April 26, 1991, Mr. Jordan claimed that while he was getting out of bed he stretched his arms and his right shoulder dislocated. Subsequently, he filed a claim for additional benefits on June 28, 1991. The Commission found that Mr. Jordan had failed to prove by a preponderance of the evidence that he remained within his healing period from April 26, 1991, through December 2, 1991.

On appeal, Mr. Jordan argues that the Commission's finding that he failed to prove entitlement to additional benefits is not supported by substantial evidence. We disagree.

In workers' compensation cases, the claimant has the burden of proving by a preponderance of the evidence the com-

pensability of his claim. *Bates* v. *Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992). Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Johnson* v. *American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992). In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). And, the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Id.*

First, we note that Mr. Jordan failed to abstract any medical evidence presented in this case. The only evidence in this case that Mr. Jordan chose to abstract was a portion of his testimony and a portion of his wife's testimony. It is well established that appellant is required to abstract all relevant material pertaining to the issues on appeal. Ark. Sup. Ct. R. 4-2(a)(6). In this case appellant has failed to adequately abstract all relevant evidence and comply with Rule 4-2(a)(6). *See Rapley* v. *Lindsey Const. Co.*, 5 Ark. App. 31, 631 S.W.2d 844 (1982).

Despite Mr. Jordan's flagrantly deficient abstract, the record indicates that there is no evidence restricting or prohibiting Mr. Jordan from working between April 26, 1991, and December 2, 1991. In fact, Mr. Jordan testified that he had been actively seeking employment during this time. The Commission found that Mr. Jordan offered insufficient medical evidence indicating that he remained within his healing period or that he remained totally incapacitated from working during that period of time. The Commission noted that "any indication that claimant was totally incapacitated from working comes directly from the claimant. . . . Claimant's testimony when considered in conjunction with the other evidence of the record does not constitute the preponderance of the credible evidence." After reviewing the record, we cannot say that there is no substantial basis for the Commission's denial of additional temporary total benefits.

Next, Mr. Jordan argues that there is no substantial evidence to support the Commission's finding that Tyson is not liable for his additional medical expenses.

The record reveals that Mr. Jordan did not notify Tyson until after he sought medical treatment and after surgery had been performed. It is also clear that Mr. Jordan did not return to his primary treating physician who treated him at the time of his compensable injury. The record indicates that Mr. Jordan was treated by an unauthorized physician. The record also reveals that Mr. Jordan filed the claim for medical benefits with his wife's insurance, then waited several months after his surgery and after he had hired an attorney to notify Tyson that he had had a recurrence of his compensable injury and was in need of treatment.

Arkansas Code Annotated § 11-9-514 (Supp. 1993) provides that treatment or services furnished or prescribed by any physician other than the ones selected according to the statute, except for emergency treatment, shall be at the claimant's expense. The Commission found that the medical treatment received by Mr. Jordan was unauthorized and, therefore, Mr. Jordan was responsible for the costs. We cannot say that there is no substantial evidence to support the Commission's decision based on the record before us.

Mr. Jordan also contends that the Commission failed to make findings as to whether his medical treatment was emergency treatment.

As Tyson points out in its brief and as the record displays, this argument was not raised below before the ALJ or before the Commission. Because we do not consider issues raised for the first time on appeal, we decline to address Mr. Jordan's final point. *See Mosley* v. *McGehee School Dist.*, 36 Ark. App. 11, 816 S.W.2d 891 (1991).

In conclusion we note that in the previous appeal of this case, we stated that it appeared that the April 26, 1991, occurrence was related to the June 1990 injury and, therefore, compensable. This determination constituted a de novo review rather than a review of the evidence in the strongest light in favor of the Commission's findings. We erroneously weighed the evidence at the appellate level, and perhaps inadvertently overlooked that

the Commission's findings of fact may have been based on credibility determinations that we could not make. Since a thorough review of the record has precipitated that decision, it is our conclusion to grant the petition for rehearing and reverse ourselves on matters where we may have misspoken. Our error was not one of willfulness, but was an honest attempt to reconcile the later injuries with the earlier accident. We were wrong in our review and reverse our earlier opinion. In sum, we grant the petition for rehearing and affirm the Commission's decision denying additional temporary total benefits.

MELVIN MAYFIELD, Judge, dissenting. The petition for rehearing in this case argues two points. I would agree to remand on one point, but on the other point the opinion of the majority has taken a hundred and eighty degree turn to grant rehearing and affirm a decision of the Arkansas Workers' Compensation which this court has previously reversed on two different occasions. Not only do I believe the majority has reached the wrong result on this one point, I think it violates Rule 2-3(g) of the Rules of The Arkansas Supreme Court and Court of Appeals.

To understand the situation involved, it is necessary to start with our unpublished opinion in the first appeal of this case. In that opinion, *Jordan* v. *Tyson Foods*, CA 93-258 slip opinion (Ark. App. February 2, 1994) this court began by stating:

> This is an appeal from the Workers' Compensation Commission's decision finding that appellant had failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits or additional medical treatment.

The opinion then pointed out that on June 4, 1990, the appellant sustained a compensable injury to his right shoulder while working for appellee; that appellant allegedly dislocated his shoulder again on April 26, 1991, when he was no longer working for appellee; that he received surgery after the second incident; and that the Commission reversed the administrative law judge's award of medical expenses and temporary total disability benefits from April 26, 1991, through December 2, 1991. Our opinion then said, with regard to the temporary total benefits, that "the Commission simply stated the appellant had 'offered insufficient medical evidence'" to support his claim. And the opinion

added, "Other than making this bald pronouncement, the Commission does not state facts in support of its conclusions." The last paragraph of the opinion stated:

> We conclude that this case should be remanded to the Commission for a specific finding on the issue of whether appellant is entitled to temporary total disability benefits. In order that the case not be decided piecemeal on appeal, we will not address appellant's remaining issues on appeal.

The case came back to this court after the Commission's decision on remand was issued, and a division of this court issued another opinion on June 7, 1995. But before discussing that opinion, it is important to closely examine the Commission's decision that was issued in response to our first opinion calling for "a specific finding on the issue of whether appellant is entitled to temporary total disability."

In making this examination, we should keep in mind that this case involves only two issues: (1) whether appellant is entitled to temporary total disability; and (2) whether appellant is entitled to medical benefits for payment of the treatment received for the dislocated shoulder he sustained on April 26, 1991. It should also be remembered that appellant had sustained a compensable injury to that shoulder on June 4, 1990, while working for the appellee. Not only had our opinion of February 2, 1994, so stated (and that issue had therefore become the law of the case), but the appellee had admitted this fact and had paid medical expenses for that injury.

Thus, the present case clearly involves the question of whether appellant's dislocation of that same shoulder on April 26, 1991, while at home, was a recurrence of the June 4, 1990, injury. In *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983), in discussing the meaning of "recurrence," we said:

> We conclude that in all of our cases in which a second period of medical complications follows an acknowledged compensable injury we have a applied the test set forth in *Williams* [*Aluminum Co. of America* v. *Williams*, 232 Ark. 216, 335 S.W.2d 315 (1960)] — that where the second period of medical complications is found to be a natural and probable result of the first injury, the employer remains

> liable. Only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. While there may be some variance in the words used to describe the principle, there has been no departure from the basic test, i.e., whether there is a causal connection between the two episodes.

7 Ark. App. at 71, 644 S.W.2d at 324. *Accord McDonald Equipment Co.* v. *Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989).

In keeping with the proposition that the April 26, 1991, dislocation was a recurrence of the June 1990 work-related injury, the Commission in its first decision had said, "[W]e find that even if claimant suffered a compensable injury, he has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits." Our reversal and remand of that decision had stated, "On April 26, 1991, appellant allegedly dislocated his shoulder again when he was stretching his arms in the air," and we remanded because we were "unable to determine from the Commission's decision what evidence, if any, it found insufficient." Thus it appears that we were not sure whether the Commission even found that the appellant dislocated his shoulder. But in its second decision, the Commission did not address the question of whether the April 1991 shoulder dislocation had occurred or whether it was a recurrence of the June 4, 1990, work-related injury.

In our second opinion, which the majority has today reversed by granting appellee's petition for review, we pointed out the fact that the Commission in its second decision did not even discuss the recurrence issue, and we quoted from the Commission's decision the following language:

> [T]he Court of Appeals has requested that we elaborate on our finding that claimant has "offered insufficient medical evidence indicating that he remained within his healing period through that date or that he remained totally incapacitated from working during this period of time." We premised this on the facts contained in the record. Firstly, the record contains absolutely no medical records taking claimant off work. Furthermore, there is no medical evidence releasing claimant to return to work. How-

> ever, there is evidence offered by claimant in his deposition dated September 4, 1991, that as early as mid July, 1991 he was capable of working. In his deposition, claimant testified that he was actively seeking employment having applied at the unemployment office and at a local hospital. Claimant offered no indication that he was refused any employment due to his work-related injury.

It seems clear that the above language is based on the assumption that the appellant's shoulder dislocation on April 26, 1991, was a recurrence of the June 4, 1990, injury, i.e., there was a causal connection between the two episodes. *See Bearden Lumber Co.* v. *Bond, supra.* The Commission's first decision said it was based on that assumption, and the appellant argued in his first brief in the appeal from the Commission's second decision as follows:

> It is initially pointed out that in its initial opinion and order, the Commission declined to decide whether Mr. Jordan suffered a compensable injury on April 26, 1991, and based its decision on the assumption that he did suffer such an injury. (Abstract 23-25). (The Commission's order and opinion on remand makes no reference to this question.) In view of such fact, this Court's review of the Commission's order will necessarily be based on the same assumption, and it is therefore unnecessary to argue the facts and law clearly establishing that Mr. Jordan's shoulder separation of April 26 was a compensable recurrence of his compensable injury of June 4, 1990.

Appellant's Brief at 30.

Of course, the appellee did not agree with the above contention and replied to it as follows:

> Here, the appellant was not working at the time of the alleged recurrence. The appellant's unemployed status was not the result of his compensable injury of June 4, 1990, but rather the result of a conscious decision to quit work because of the distance required to commute to and from work, (Tr. 36) and his decision to not seek employment elsewhere, (Tr.27).

Appellee's Brief at 11.

Faced with the above situation, our second opinion (issued June 7, 1995) stated that we agreed with the appellant's contention, and we then discussed the evidence given by the appellant and the doctors who treated the appellant for the shoulder dislocation sustained on April 26, 1991. Our conclusion in that regard was that "the Commission could deny benefits only by ignoring the medical evidence." We recognized that it was our duty to view the evidence in the light most favorable to the Commission's decision and to affirm that decision if it was supported by substantial evidence. However, we cited *Deffenbaugh Industries* v. *Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993), and *Johnson* v. *General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), for the proposition that we will reverse the Commission if we are convinced that fair-minded persons could not have reached the same conclusion arrived at by the Commission. Therefore, we held that under the evidence the appellant was entitled to an award of temporary total disability benefits from the date of his shoulder dislocation on April 26, 1991, through June 12, 1991, the date of the last medical visit to the doctor who followed appellant through his recovery from the surgery on his dislocated shoulder. But we found that there was substantial evidence to support the Commission's decision that appellant was not entitled to those benefits through December 2, 1991, as he claimed.

There is a distinction between the claim for temporary total disability during the healing period from appellant's surgery and the second point involved in this appeal which presents the question of whether that surgery was "emergency treatment." That distinction will be discussed later, but first I want to finish with my contention that the majority of this court has erred in granting the petition for rehearing insofar as the temporary disability issue is concerned.

On this point, the opinion granting the petition for rehearing has, in all due respect, simply ignored Arkansas Supreme Court and Court of Appeals Rule 2-3(g), which provides:

> The petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain. Counsel are expected to argue the case fully in the original briefs, and the brief on rehearing is not intended to afford an opportunity for a mere repetition

of the argument already considered by the court.

Our supreme court has said that under this rule, which was formerly Rule 20, the repetition of the original argument is inappropriate, *Butler Mfg. Co.* v. *Hughes*, 292 Ark. 198, 206A-B, 731 S.W.2d 214, 215, (1987) (opinion on rehearing), and that such an argument will not be considered, *Warren* v. *Warren*, 273 Ark. 528, 537B, 623 S.W.2d 813, 808 (1981) (opinion on petition for rehearing).

There is no question but what the issue of temporary disability was fully argued by the parties in the original briefs filed in this case. At the time the June 7, 1995, opinion was issued by this court the three judges agreeing to that opinion knew as much about that issue as they do today. Nothing new has been presented on the issue by the petition for rehearing. It is only a repetition of the original argument and under Rule 2-3(g) it should not be considered.

The opinion granting rehearing also faults the appellant for failure to "abstract any medical evidence." I think that comes too late also. Not only is it closely akin to the very thing Rule 2-3(g) is obviously designed to prevent, but I do not agree that there is any defect in appellant's abstract. Clearly the purpose of an abstract is to inform the court of the matters necessary to its determination of the case. This case was sent back to the Commission for specific findings. Apparently the majority of the court now considers those findings to be adequate, and the appellant has abstracted the decisions of the Commission and the decision of the administrative law judge. A portion of the law judge's decision is abstracted as follows:

> The medical reports are replete with references to recurrent dislocation or subluxation. There is no medical report, however, specifically answering the ultimate question. Common sense, however, dictates that each time a shoulder is dislocated that some damage is done to the structure. Therefore, a subsequent nontraumatic dislocation of the shoulder that was the subject of a traumatic compensable dislocation is obviously causally related to the traumatic dislocation. This conclusion is based upon the medical evidence referring to recurrent shoulder dislocations. It is concluded that the claimant's shoulder dis-

location of April 26, 1991, is a recurrence of the compensable injury in itself compensable.

The appellee had no problem with the appellant's abstract of the medical evidence and, in fact, did not even argue, in its brief on appeal from the Commission's decision, that the medical evidence was not sufficient to support the appellant's claim for temporary total disability. The appellee's brief on this point argued that the Commission's opinion should be affirmed because temporary total disability was not available to appellant for the reason that he was not working and earning wages "at the time of the alleged recurrence."

Therefore, the lack of a sufficient abstract of medical evidence is not, in my opinion, a valid reason for granting the appellee's petition for rehearing. If that was ever a valid point — and I do not think it was — it is not a valid point on a petition for rehearing. It does violence to Rule 2-3(g) which does not allow the case to be reargued by a petition for rehearing. The abstract issue and the question of substantial evidence to support the Commission's finding of no liability for appellant's April 1991 shoulder dislocation were resolved by this court's second opinion in this case issued on June 7, 1995. The petition for rehearing on this point simply says the same thing the appellee's brief had said at the time we issued that opinion. The petition for rehearing does contend that we substituted our findings for the findings made by the Commission on the temporary total disability point; however, appellee does not ask that we remand that point to the commission. It simply argues in its petition for rehearing that the evidence is sufficient to support the Commission's decision on that point. This is, of course, the same argument it made in the brief it filed before the opinion it now seeks to reverse was handed down. In *Pannell* v. *State*, 320 Ark. 390, 897 S.W.2d 522 (1995), our supreme court pointed out that Rule 2-3(g) does not allow a case to be reargued by a petition for rehearing and said, "If we were to allow such a practice there would be much less finality to appellate opinions."

I will agree, however, that on the second point in our opinion of June 7, 1995, the petition does call attention to what it considers a specific error of law. Our opinion held that the surgery performed for the April 1991 shoulder dislocation was "clearly

emergency treatment" and therefore the appellee's argument that the surgery was unauthorized medical treatment was misplaced. On this point, the petition for rehearing does say: "At the very least, this Court should have remanded to the Full Commission for a finding on this issue." While I think it doubtful that fair-minded persons could reach the conclusion that the surgery was not "emergency treatment," I will concede that this is a valid point to make by a petition for rehearing, and I would agree to a remand on this point; however, I do not agree to simply reverse on this point.

Therefore, I dissent from the opinion granting rehearing.

JONES-BLAIR COMPANY *v.* Lucy HAMMETT
d/b/a Conway Carpets and Interiors

CA 94-949 911 S.W.2d 263

Court of Appeals of Arkansas
En Banc
Opinion delivered December 13, 1995

Friday, Eldredge & Clark, by: *Jeffrey H. Moore*, for appellant.

Brazil, Clawson, Adlong, Murphy & Osment, by: *Charles E. Clawson, Jr.*, and *Michael L. Murphy*, for appellee.

JAMES R. COOPER, Judge. This appeal results from a judgment entered in favor of the appellee and a subsequent order denying the appellant's motion for a new trial and extension of time in which to file an appeal. For reversal, the appellant argues that the trial court abused its discretion in denying its motion to extend the time in which to file an appeal, that the trial court erred in permitting its attorney to withdraw at trial, and that the evidence is insufficient to support the judgment. We affirm.

In January 1989, the appellant filed a complaint against the appellee to collect over $6,000.00 for paint and wall covering supplies sold to the appellee on an open account. The appellee

answered and counterclaimed alleging that the appellant had competed against her in violation of the parties' agreement and had tortiously interfered with her business relationships. The appellee sought damages in excess of $31,070.00. The appellant was initially represented by David Reynolds in this matter; however, Richard Atkinson was substituted as the appellant's attorney by an order filed on October 5, 1990. The case was subsequently set for trial on January 27, 1993.

On October 22, 1992, Mr. Atkinson wrote the appellant notifying it of the trial date. Mr. Atkinson requested that the appellant contact him as soon as possible to advise him how it wished to proceed. By a letter dated November 10, 1992, the appellant advised Mr. Atkinson that it had charged off the appellee's account in 1990 and further stated, "As for further litigation, we would have to have the particulars in regard to fees, court costs, etc. Thank you." On December 3, 1992, Mr. Atkinson responded by letter and advised the appellant that there was still an active case in Faulkner County on the appellee's counterclaim. Mr. Atkinson's letter went on to state:

> Even if you dismiss your suit against Ms. Hammet, she is not willing to dismiss the counterclaim. If you do not authorize me, or retain other counsel and appear on the 27th of January, the judge will enter a default judgment against Jones-Blair.
>
> My fee is $100.00 per hour. If I do not hear from you within a reasonably short period of time, I will ask the court for permission to withdraw as your attorney of record in this case.

Mr. Atkinson did not receive a response to this letter nor did he have any further contact with the appellant until after the trial. The appellant contends that it never received Mr. Atkinson's December 3rd letter.

At the beginning of the trial on January 27, 1993, Mr. Atkinson was allowed to withdraw as counsel for the appellant and leave the courtroom. No one else was present to represent the appellant. The trial court then dismissed the appellant's complaint against the appellee and proceeded to trial on the appellee's counterclaim. A judgment against the appellant in the amount of

$39,819.90 was entered on January 28, 1993. The appellee's attorney mailed a copy of the judgment to the appellant but it was returned "undeliverable." A copy of the judgment was also sent to Mr. Atkinson; however, he did not notify the appellant of the entry of the judgment nor did he inform the appellant that he had been permitted to withdraw as counsel.

The appellant learned of the judgment entered against it on May 19, 1993. On June 25, 1993, the appellant filed a petition to set aside the judgment which was denied by the trial court on August 6, 1993.

The appellant did not appeal from the denial of its petition; however, on August 17, 1993, it filed a motion for an extension of time in which to file an appeal from the judgment. While this motion was pending, the appellant on September 27, 1993, filed another motion to set aside the judgment pursuant to Rule 60(c) of the Arkansas Rules of Civil Procedure.

On February 9, 1994, a hearing was held on the appellant's motions at which time the appellant was allowed to present evidence in defense of the appellee's counterclaim. The trial court denied the appellant's motions in an order entered June 7, 1994. In its order, the trial court stated:

> Jones-Blair Company was negligent in failing to show up for trial, and that negligence continued after the trial, until it became aware of the Judgment and took some action to set it aside. Considering [appellant's] letter of November 10, 1992, and Mr. Atkinson's letter of December 3, 1992, Mr. Atkinson was not required to take any more reasonable steps to comply with Rule 64 of the Arkansas Rules of Civil Procedure.

On appeal, the appellant first contends that the trial court abused its discretion in denying its motion to extend the time in which to file an appeal. Rule 4(a) of the Arkansas Rules of Appellate Procedure provides:

> (a) *Time for Filing Notice.* Except as otherwise provided in subsequent sections of this rule, a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from . . . Upon a showing of failure to receive notice of entry of the judgment,

> decree or order from which appeal is sought, the trial court may extend the time for filing the notice of appeal by any party for a period not to exceed sixty (60) days from the expiration of the time otherwise prescribed by these rules. Such an extension may be granted before or after the time otherwise prescribed by these rules has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

The appellant relies on the Reporter's Note to the 1986 amendment to Rule 4 which states:

> *Additional to Reporter's Note, 1986 Amendment:* Rule 4(a) is amended to empower the trial court to extend the time for filing a notice of appeal when the party has not received notice of the entry of the judgment or order from which he seeks to appeal. The amendment represents a narrow exception to the rule that the filing of a notice of appeal is jurisdictional and, unless timely filed, there can be no appeal. *White* v. *Avery*, 226 Ark. 951, 291 S.W.2d 364 (1956). The change was deemed necessary to ensure fairness when counsel has not received notice of the entry of the judgment or other appealable order. *Cf. Karam* v. *Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976). Although under longstanding Arkansas custom opposing counsel have been given an opportunity to approve a judgment or order prepared by opposing counsel, circumstances have arisen where counsel did not receive that opportunity and did not otherwise receive notice that a judgment had been entered.

The appellant asserts that Rule 4(a) allows the trial court to extend the period to file an appeal beyond ninety days when the appellant can show that it did not have notice that the judgment from which it seeks to appeal had been entered. The appellant contends that, because the trial court found that it did not have notice of the judgment until more than ninety days after it had been entered, the trial court abused its discretion in denying it an extension of time in which to appeal the judgment.

It is undisputed the appellant did not receive notice of the entry of the judgment until after ninety days from the entry of the judgment. However, under the plain language of Rule 4(a),

upon a showing that the appellant failed to receive notice of the entry of judgment, the trial court could have extended the time in which to file an appeal not to exceed sixty days from the date the appeal should have been filed. Thus, under Rule 4, the trial court in the case at bar did not have jurisdiction to act more than sixty days after the notice of appeal was due. Therefore, we find no error by the trial court in denying the appellant's motion to extend the time in which to file an appeal. Given our resolution of this issue, the merits of the judgment are not properly before us, and we therefore do not address the appellant's argument that the evidence is insufficient to support that judgment.

The appellant also argues that the trial court erred in permitting Richard Atkinson to withdraw as its attorney on the day of trial. The appellant asserts that because of this error, the judgment should be set aside pursuant to Ark. R. Civ. P. 60(c)(1) where the grounds for a new trial are discovered after the expiration of ninety days after filing the judgment. The appellant's ground for a new trial is based upon Ark. R. Civ. P. 59(a)(1) which permits a new trial where there is any irregularity in the proceedings or any order of the court or abuse of discretion by which the party was prevented from having a fair trial. The appellant contends that permitting its attorney to withdraw in the face of the pending counterclaim resulted in prejudice and was such an "irregularity" as to prevent it from having a fair trial.

The appellant argues that *Diebold* v. *Myers General Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987), requires that the appellee's judgment be set aside. However, we think that *Diebold* instead supports the trial court's actions. In *Diebold*, the Supreme Court held that the appellant was not entitled to have a judgment against her set aside under Rule 60(c) because she was negligent in failing to keep herself informed of the suit against her. Furthermore, a party cannot invoke the aid of the appellate court under Rule 60(c) when the party ignored the action and failed to stay informed. *See CMS Jonesboro Rehabilitation, Inc.* v. *Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991). A litigant is required to take notice of all proceedings during the pendency of an action to which it is a party. *Karam* v. *Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976). The burden of showing unavoidable casualty and that appellant was diligent and without negligence rests with appellant. *Id.*

Our review of the record leads us to conclude that the appellant has failed to sustain that burden in the case at bar. The appellant had been aware of the pending counterclaim against it since 1989 and was aware of the trial date as early as Mr. Atkinson's letter of October 22, 1992. The appellant responded to the October 22 letter but made no further attempts to contact its attorney or to inquire about the status of the litigation. The appellant did not appear for trial nor did it inquire regarding the results of the trial. The trial court specifically found that the appellant was negligent in failing to appear for trial, that the negligence continued after trial until it became aware of the judgment, and that the appellant was negligent in not being aware of the entry of judgment.

Under these circumstances, we hold that the appellant's negligence in failing to stay informed of the progress of the litigation precludes entitlement to a new trial under Rule 60(c). Finally, we note that the appellant, in its reply brief, suggests that it will be denied due process of law unless it is permitted to appeal. We do not reach this issue because it has been raised for the first time on appeal. *Hodges* v. *Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995).

Affirmed.

MAYFIELD and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. Although the opinion agreed to by the majority of this court appears to have reached the right result as to the appellant's motion to extend the time to appeal, I cannot agree with the majority opinion's holding that the trial court did not err in failing to grant the appellant's motion to vacate the trial court's judgment, entered on January 28, 1993, and grant appellant a new trial under the authority of Ark. R. Civ. P. 60(c)(1).

The majority opinion recognizes that our supreme court in *Diebold* v. *Myers General Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987), considered the issue of whether the appellant there was entitled to relief under Rule 60(c) based upon the contention that the trial court erred in allowing the appellant's attorney to withdraw in violation of Ark. R. Civ. P. 64. However, the majority opinion notes that *Diebold* did not grant the appellant relief

in that case because "she was negligent in failing to check on or show any interest whatever in the suit against her of which she had been given notice." The majority opinion then points out that the trial judge made a similar finding in the present case, and after a brief review of the evidence the majority opinion affirms the trial court's decision.

My view of the evidence and the law in this case reaches a completely opposite conclusion, although it requires a more detailed explanation. An important consideration, however, is what the court in *Diebold* said was "the most troublesome aspect of this case," and this concerns Ark. R. Civ. P. 64, which governs the conditions under which an attorney may be granted permission to withdraw from representation of a party in a case in court.

The appellant's argument on its Rule 60(c) motion begins as follows:

> [Appellant] moved pursuant to Rule 60(c)(1) to set aside the Judgment where the grounds for new trial "were discovered after expiration of ninety (90) days after the filing of the Judgment." [Appellant's] ground for new trial was based upon Rule 59(a)(1) which permits a new trial where "any irregularity in the proceedings or any order of the court or abuse of discretion by which the party was prevented from having a fair trial." [Appellant] contends that permitting its attorney to withdraw in the face of the pending counterclaim upon which the trial court was about to hear evidence resulted in prejudice to [appellant] and was such an "irregularity" as to prevent [appellant] from having a fair trial. . . . In any event, the trial court did not satisfactorily comply with Rule 64 and summarily permitted Richard Atkinson to withdraw.

In an order entered June 7, 1994, the trial court denied both the motion to extend appeal time and the motion to vacate judgment and grant a new trial. The court based its action upon the finding that "the appellant was negligent in failing to show up for trial, and that negligence continued after trial until it became aware of the judgment, and took some action to set it aside." The court also found that Mr. Atkinson took reasonable steps to withdraw as appellant's attorney. Under the applicable law, I do not think those findings are supported by the evidence. I think the trial

court erred in allowing appellant's counsel to withdraw on the day of the trial at which the appellee obtained judgment for $39,819.90 on her counterclaim against the appellant. And I do not think the appellant was guilty of such negligence that the judgment should not be vacated and the appellant granted a new trial.

The record as abstracted by the appellant shows that Attorney David Reynolds filed this suit for the appellant in January of 1989. The appellant is located in Dallas, Texas, and the suit was filed to collect for material it had sold to appellee. On October 5, 1990, Richard Atkinson was substituted by court order as appellant's attorney. On October 22, 1992, Atkinson wrote appellant notifying it that he had "inherited the case from a former partner"; that the case was set for trial on January 27, 1993; and asking that appellant "contact me as soon as possible to let me know how you wish to proceed." On November 10, 1992, appellant responded to Atkinson's letter asking for particulars in regard to further litigation because it had charged off appellee's account. On December 3, 1992, Atkinson wrote appellant notifying it of the trial date and the possibility of a default judgment on the counterclaim filed against it by the appellee. Although appellant did not respond to this letter, appellant says it never received the letter; there is nothing in the record to show it was received; and there was no finding by the trial court that it was received. In fact, at one place in the trial court's order entered June 7, 1994, from which this appeal comes, the court states "there is some question whether Jones-Blair Paint Company [appellant] actually received the letter dated December 3, 1992," but at another point in that order the court states that Atkinson and the appellant "have both now testified that there was no communication between [them] other than the letters of October 22, 1992, and the letter of November 10, 1992, and Mr. Atkinson's letter of December 3, 1992, which Jones-Blair did not receive."

Thus it appears that the trial court specifically found that the appellant did not receive the letter of December 3, 1992. And at a hearing on the motions involved in this appeal, held February 9, 1994, Atkinson said that he received a letter from appellant stating it was not aware of the counterclaim; and that, other than the letter dated December 3, 1992, he took no steps prior to trial to protect appellant's rights.

Now it should be remembered that the majority opinion does not approve of the trial court's granting the attorney's motion to withdraw, made on the day of trial, but holds only that the trial court did not err in refusing to vacate its judgment by granting appellant a new trial under the authority of Ark. R. Civ. P. 60(c)(1). And, as stated above, the majority opinion bases that holding on the trial court's finding that the appellant was "negligent in failing to show up for trial, and that the negligence continued after trial until it became aware of the judgment, and took some action to set it aside." (The majority opinion does not quote this specific language of the trial court's finding.) But before the trial court's finding is examined more closely, I think we should look, as did the court in *Diebold*, at the matter of the court's permission to let appellant's attorney withdraw from the case.

Arkansas Rule of Civil Procedure 64(b) contains the following requirement:

> (b) A lawyer may not withdraw from any proceeding or from representation of any party to a proceeding without permission of the court in which the proceeding is pending. Permission to withdraw may be granted for good cause shown if counsel seeking permission presents a motion therefor to the court showing he (1) has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel: . . . .

When we view this matter in light of the above rule, I think it is evident that the trial court erred in allowing Mr. Atkinson to withdraw on the day of the trial. Obviously, if the appellant had received Atkinson's letter of December 3, 1992, the attorney's withdrawal without any attempt to defend the counterclaim at the trial on January 27, 1993, would present a different situation. But the trial judge's order clearly shows that he did not think that the appellant had received Atkinson's letter of December 3, 1992, and the record certainly supports that belief. Rule 64(b) requires good cause for permission to withdraw but beyond that — it requires that counsel show he "has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, *including* due notice to his client, ..." (Emphasis added.) Notice is *not* enough — reasonable steps to avoid foreseeable prejudice

to the rights of the client *must also* be shown to the court. The truth of the matter is that here no such showing was made, and it was obvious that the appellee would get a judgment on her counterclaim if the appellant's attorney was allowed to withdraw on the day of trial.

Although I agree that this appeal turns on the trial court's holding that the appellant was negligent in keeping up with its case, I also think that issue is affected in this case by the court's granting appellant's attorney permission to withdraw. This is exactly the point of difference between this case and the *Diebold* case. In that case the court specifically stated, "Even if the judge had overruled Mr. Hickman's motion to withdraw, Mrs. Diebold would have been no better off, as she was unaware of the proceedings and Mr. Hickman was unavailable." 292 Ark. at 462, 731 S.W.2d at 187. There, when Mrs. Diebold was served with the summons she turned the matter over to her son who hired Mr. Hickman's law firm to file an answer. Hickman testified that he had sought on numerous occasions to discuss the case with Mrs. Diebold and her son, but he was unable to reach her by telephone or through other attorneys and her son had simply "disappeared."

However, in the instant case, even though Atkinson's letter of December 3, 1992, was not received, if he had not been given permission to withdraw he would have under the rules of procedure been furnished a copy of the judgment and would have been obligated to inform his client of the judgment. As it was, counsel for the appellee sent a copy to the appellant but because it was not correctly addressed it was returned undelivered. Appellee's counsel then sent another letter to the appellant, but this was after the expiration of 90 days from the date of the entry of the judgment. Thus, appellant did not learn of the entry of the judgment in time to file a motion for new trial under Ark. R. Civ. P. 59, for relief under Ark. R. Civ. P. 60(a) or (b), or even to file a notice of appeal. Moreover, had Atkinson not been allowed to withdraw he could have asked for a continuance, could have objected to the evidence the appellants say was hearsay, and could have cross-examined the appellee's witnesses. What benefit this would have is problematical, of course, but it surely would be better than not having any representation during the trial.

The majority opinion cites two other cases as support for

its affirmance of the trial court's holding that the appellant was negligent in keeping up with this case.

In *CMS Jonesboro Rehabilitation, Inc.* v. *Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991), the appellees perfected service upon the appellant's registered agent who forwarded the complaint and summons to the appellant. Appellant contacted its insurance carrier which initially agreed to defend the action, but subsequently reneged. Appellant's general contractor agreed to assume the defense, but failed to do so. Appellant did nothing to assure the contractor was indeed defending the suit and after four and one-half months a default judgment was entered against appellant. The issue, however, was whether the default judgment should be set aside for unavoidable casualty or excusable neglect. The issue in the instant case is not the same.

And in *Karam* v. *Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976), the trial court sent the attorneys a memorandum stating its findings and fixing damages, but the appellants and their attorneys failed to make inquiry or take steps to learn whether judgment had been entered until writs of execution and garnishment were issued. The trial court's refusal to set aside the judgment was affirmed on the basis that appellants did not show that their failure to learn that judgment had been entered was not due to their own negligence. In the instant case, the appellant has shown that the entry of the judgment and the delay in knowing about it was due, at least in part, to the trial court's grant of permission for appellant's attorney to withdraw from the case.

In summary, I believe that under the law and the evidence in this case, the trial court erred in allowing the appellant's attorney to withdraw on the day of the trial, and this resulted in the judgment on the appellee's counterclaim. While it is reasonable to believe that the appellant could have been more diligent in keeping up with this case, I do not believe it was negligent to the degree that the judgment against it should not be set aside under Ark. R. Civ. P. 60(c)(1). It must surely be proper to consider the obligations of both the client and the attorney in a situation such as we have here. In *Diebold* the Arkansas Supreme Court said our Civil Procedure Rule 64 "has its basis in what is now called the Code of Professional Responsibility." The Code's Rule 1.16 and Civil Procedure Rule 64 both have specific requirements for attor-

neys to meet before withdrawing from representation of their clients. Judges have the duty to see that the requirements set out in Rule 64 have been met before granting an attorney permission to withdraw from a case pending in court. When the duty of the client to keep informed about his case and the duty of the court to enforce the requirements of Rule 64 are both considered, I think the court erred, under the factual circumstances here, in granting permission for the appellant's attorney to withdraw from this case.

Therefore, I would reverse and remand this case for a new trial.

ROGERS, J., joins in this dissent.

FARM BUREAU MUTUAL INSURANCE COMPANY
v. Wanda WHITTEN

CA 95-114 911 S.W.2d 270

Court of Appeals of Arkansas
Division II
Opinion delivered December 13, 1995

Laser, Wilson, Bufford & Watts, P.A., by: *David M. Donovan* and *Brian Allen Brown*, for appellant.

James W. Haddock, for appellee.

JOHN B. ROBBINS, Judge. Farm Bureau Mutual Insurance Company has appealed from a verdict for Wanda Whitten in her action for insurance coverage on the fire loss of her personal property. On appeal, appellant argues that the trial judge erred in submitting the question of coverage to the jury. We disagree and affirm.

Appellant provided homeowner's insurance to appellee for her residence near Jerome, Arkansas. In September 1990, appellee moved her personal property from the insured premises to a house near Dermott in which she intended to reside permanently. Before

appellee had finished moving, a fire destroyed her personal property in the house near Dermott. When appellee sought recovery for the loss of her personal property, appellant denied her claim because the loss did not occur at the residence listed on the declarations page of the policy.

Appellee then sued appellant. When appellant moved for summary judgment, the circuit judge found that the insurance policy was ambiguous and stated: "The Court further finds that the policy issued by defendant did not state a definite place where personal property would be excluded from coverage. The policy states that personal property coverage is covered by insuror 'any place in the world.' The court finds that a question of fact exists for the jury." At trial, appellant again unsuccessfully argued that the question of coverage should not be submitted to the jury and did not introduce any evidence. The jury returned with a verdict of $20,000.00, and the circuit judge entered judgment for that amount, plus a 12% penalty and an attorney's fee of $7,500.00.

On appeal, appellant argues that this case should not have gone to the jury because (1) "the rules of contractual construction are properly applied as a *matter of law* by the Court, rather than by laymen"; (2) neither party offered any parol evidence as to the meaning of the policy; and (3) the background facts are undisputed. Appellant also argues that the jury ignored the exclusions to coverage and improperly focused upon the policy's provision that it would provide coverage to appellee's personal property "anywhere in the world." The policy provided as follows:

> We cover personal property owned or used by you anywhere in the world. Any personal property, which is usually at your residence but has been temporarily removed by you is covered for up to 10% of the Personal Property Coverage limit but not less than $1,000 while away from the insured residence.
>
> We do not cover . . . personal property while in any other dwelling owned, rented or occupied by you except while you are temporarily residing there . . . .

The initial determination of whether a contract is ambiguous rests with the court, *Moore* v. *Columbia Mut. Casualty Ins. Co.*, 36 Ark. App. 226, 228, 821 S.W.2d 59 (1991), and

when a contract is unambiguous, its construction is a question of law for the court. *Id.* When the language of an insurance contract is unambiguous, and only one reasonable interpretation is possible, it is the duty of the court to give effect to the plain wording of the policy. *Ingram* v. *Life Ins. Co. of Ga.*, 234 Ark. 771, 773, 354 S.W.2d 549 (1962). Further, if the terms of an insurance contract are not ambiguous, it is unnecessary to resort to the rules of construction, *Birchfield* v. *Nationwide Ins.*, 317 Ark. 38, 41, 875 S.W.2d 502 (1994), and the policy will not be interpreted to bind the insurer to a risk which it plainly excluded and for which it was not paid. *General Agents Ins. Co. of Am.* v. *People's Bank & Trust Co.*, 42 Ark. App. 95, 96, 854 S.W.2d 368 (1993); *Baskette* v. *Union Life Ins. Co.*, 9 Ark. App. 34, 36-37, 652 S.W.2d 635 (1983).

In order to be ambiguous, a term in an insurance policy must be susceptible to more than one equally reasonable construction. *Insurance Co. of N. Am.* v. *Forrest City Country Club*, 36 Ark. App. 124, 127, 819 S.W.2d 296 (1991); *State Farm Fire & Casualty Co.* v. *Amos*, 32 Ark. App. 164, 166, 798 S.W.2d 440 (1990); *Watts* v. *Life Ins. Co. of Ark.*, 30 Ark. App. 39, 43, 782 S.W.2d 47 (1990); *Wilson* v. *Countryside Casualty Co.*, 5 Ark. App. 202, 203, 634 S.W.2d 398 (1982). An interpretation that will harmonize all parts of an insurance policy is not always possible when ambiguity exists because of two conflicting provisions. *Home Indemnity Co.* v. *City of Marianna*, 297 Ark. 268, 272, 761 S.W.2d 171 (1988). When the terms of a written contract are ambiguous, the meaning of the contract becomes a question of fact. *Stacy* v. *Williams*, 38 Ark. App. 192, 196, 834 S.W.2d 156 (1992).

Under Arkansas law, the intent to exclude coverage in an insurance policy should be expressed in clear and unambiguous language, and an insurance policy, having been drafted by the insurer without consultation with the insured, is to be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Nationwide Mut. Ins. Co.* v. *Worthey*, 314 Ark. 185, 190-91, 861 S.W.2d 307 (1993); *Baskette* v. *Union Life Ins. Co.*, 9 Ark. App. at 36. If the language in a policy is ambiguous, or there is doubt or uncertainty as to its meaning and it is fairly susceptible of two or more interpretations, one favorable to the insured and the other favorable to the insurer, the one

favorable to the insured will be adopted. *Nationwide Mut. Ins. Co.* v. *Worthey*, 314 Ark. at 191; *Drummond Citizens Ins. Co.* v. *Sergeant*, 266 Ark. 611, 620, 588 S.W.2d 419 (1979); *Pizza Hut of Am., Inc.* v. *West Gen. Ins. Co.*, 36 Ark. App. 16, 18, 816 S.W.2d 638 (1991). *Accord McGarrah* v. *S.W. Glass Co.*, 41 Ark. App. 215, 219, 852 S.W.2d 328 (1993).

Here, the only issue on appeal is whether the circuit judge erred in submitting the question to the jury. Because the language in this policy is susceptible to more than one equally reasonable construction, we hold that it is sufficiently ambiguous to present a question of fact for the jury's determination.

Affirmed.

JENNINGS, C.J., and BULLION, S.J., agree.

Michael PENNINGTON
v. GENE COSBY FLOOR & CARPET

CA 94-812 911 S.W.2d 600

Court of Appeals of Arkansas
En Banc
Opinion delivered December 13, 1995
[Petition for rehearing denied January 17, 1996.]

Robert B. Buckalew, for appellant.

Friday, Eldredge & Clark, by: *James C. Baker, Jr.* and *John C. Fendley, Jr.* for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision. The ALJ found that appellant's claim for additional benefits was barred by the statute of limitations. On appeal, appellant argues that there is no substantial evidence to support the Commission's decision. We disagree and affirm.

The record reveals that appellant suffered a compensable injury on September 18, 1990. Temporary total disability benefits were paid until December 6, 1991. Appellant had been assessed a five percent permanent partial impairment rating that was paid in full on January 28, 1992. On June 23, 1992, appellant visited Dr. Jay Lipke, who was not his treating physician. Appellee's carrier, Cigna Insurance, refused to pay for this treatment and was never billed for Dr. Lipke's treatment. On April 6, 1993, appellant filed a claim for additional benefits. Appellee contested the claim on the basis that the statute of limitations barred appellant's claim.

Arkansas Code Annotated § 11-9-702(b) (Repl. 1993) provides:

> (b) Time for Filing for 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.

Appellant argues on appeal that Dr. Jay Lipke's treatment on June 23, 1992, tolled the statute of limitations, and that consequently, his request for additional benefits on April 6, 1993, was within the one year statutory period. In support of his position, appellant specifically contends that a nurse who worked for his treating physician referred him to Dr. Lipke, constituting a valid referral. We disagree.

Arkansas Code Annotated § 11-9-514(a)(1) (Repl. 1993) provides:

> If the employee selects a physician, the commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the commission that there is a compelling reason or circumstance justifying a change.

The Commission's authority to characterize a change of physician as a referral has its origin in the Commission's own Rule 23, which authorizes the Commission to permit deviation from the Commission's rule when compliance is impossible or impractical. *Patrick* v. *Arkansas Oak Flooring Co.*, 39 Ark. App. 34, 833 S.W.2d 740 (1992). We held in *Electro-Air* v. *Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985), that a referral had occurred where the evidence showed that the claimant's treating physician had referred her to a psychiatrist for specialized treatment. In *White* v. *Lair Oil Co.*, 20 Ark. App. 136, 725 S.W.2d 10 (1987), we held that a change of physician had occurred when the claimant's treating physician refused to see him when emergency services were required. We concluded that this refusal effectively released the claimant from his care and that the claimant's family physician became claimant's treating physician. Also, in the case of *TEC* v. *Underwood*, 33 Ark. App. 116, 802 S.W.2d 481 (1991), we found that a referral occurred when the claimant had moved to Oklahoma, and her treating physician referred her to a physician in Oklahoma. In the above cases, the claimants were referred by their treating physicians or emergency circumstances required a referral for treatment. None of those situations exist in this case.

Here, the record reveals that on May 26, 1992, Janna Craig from Cigna Insurance wrote to appellant regarding his claim. She stated:

> I am writing you with regard to your workers' compensation claim. You need to return to the doctor for final medical evaluation, so that we will know if you have received all the benefits you are entitled.
>
> At one time Attorney Steve Laney informed me you wanted a change of physician. To date I have not received any written confirmation of that request or any written confirmation that Mr. Laney represents you in this matter. Please advise me if you desire a change of physician. If not, please return to your previous doctor.

Appellant testified that he attempted to see Dr. Amal O'Laimey, his authorized treating physician, on June 20, 1992. Appellant said that Dr. O'Laimey was not available so the nurse referred him to Dr. Lipke. Appellant admitted that he did not try to reschedule a time to see Dr. O'Laimey. Interestingly, the record also indicates that appellant was the only one to testify that the nurse at Dr. O'Laimey's office referred him to Dr. Lipke. Appellant concluded that he saw Dr. Lipke on June 23, 1992, which was three days after he sought treatment by Dr. O'Laimey.

The record indicates that Dr. Lipke's office contacted Ms. Craig concerning the bill. Ms. Craig testified, however, that she refused to authorize payment for Dr. Lipke's treatment. She said that she sent the Commission's Form A-11 to appellant's attorney on October 12, 1992, and received no response. Ms. Craig testified further that she never received a bill from appellant or from Dr. Lipke's office. She also stated that she never received a referral slip showing that Dr. O'Laimey's office had referred appellant to Dr. Lipke. The record contains one letter from Dr. Lipke's office which does not mention that appellant was referred from Dr. O'Laimey's office.

Whether treatment is a result of a "referral" rather than a "change of physician" is a factual determination to be made by the Commission. *Patrick* v. *Arkansas Oak Flooring Co., supra.* When the Commission's findings of fact are challenged on appeal, we affirm if they are supported by substantial evi-

dence. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We do not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Id.*

The Commission found that appellant received unauthorized treatment from Dr. Lipke. After reviewing the record, we cannot say that there is no substantial evidence to support the Commission's findings that appellant's treatment by Dr. Lipke was not based on a valid referral and that appellant's claim was barred by the statute of limitations.

Affirmed.

MAYFIELD, J. and BULLION, S.J., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree that the statute of limitations has barred the appellant's claim for additional worker's compensation benefits in this case.

Arkansas Code Annotated § 11-9-702(b) (1987) provides that where compensation has been paid, a claim for additional compensation must be made within one (1) year from the date of the last payment, or within two (2) years from the date of injury.

In this case, the date of injury was more than two (2) years before the additional claim was made on April 6, 1993. However, the appellant testified that he saw a doctor on June 23, 1992. Therefore, unless this visit to the doctor was unauthorized by the appellant's employer and its insurance carrier, Cigna Insurance Company, the appellant's claim for additional compensation was not barred by limitations. This is true because, for statute of limitations purposes, the date that medical benefits are furnished is deemed to be payment of compensation — not the date that payment for the medical services is actually made. *See Heflin* v. *Pepsi Cola Bottling Co.*, 244 Ark. 195, 424 S.W.2d 365 (1968); *Cheshire* v. *Foam Molding Co.*, 37 Ark. App. 78, 822 S.W.2d 412 (1992).

At the hearing before the administrative law judge it was stipulated that the treatment rendered to appellant for his on-the-

job injury by Doctors Olaimey, Williams, Arnold, and Doyle was authorized and that Janna Craig, an adjuster for Cigna Insurance Company, received notice on June 25, 1992, of Dr. Lipke's medical treatment of the appellant on June 23, 1992. The appellant testified that he attempted to see his treating physician, Dr. Olaimey, in June of 1992, but he was unavailable and Dr. Olaimey's nurse told appellant to see Dr. Lipke, who in turn referred him to Dr. William Saer. The Commission found, and the majority opinion agrees, that this referral from Dr. Olaimey's staff was not a valid referral. I do not think the evidence and the law will support that finding.

Janna Craig testified that in March 1992, she received a call from Steve Laney, a Camden attorney, stating he represented the appellant and was seeking a change of physicians for appellant to Dr. John Wilson. She said she told him that was improper procedure and instructed him that he would need to apply to the Workers' Compensation Commission for a change of physicians. Ms. Craig said the next she heard about appellant's claim was when she received a telephone call from Dr. Lipke's office on June 25, 1992, asking that she authorize payment for charges created when appellant was examined by Dr. Lipke, and she refused the charges. She then sent Attorney Laney an A-11 form setting forth the statute of limitations and, after getting no response, closed the file on November 16, 1992.

The appellant testified that Mr. Laney first represented him, but he later retained Robert B. Buckalew of Little Rock, and there is a letter in the record dated July 15, 1993, from Dr. Olaimey to appellant's attorney, Mr. Buckalew, which states:

> Following our conversation per telephone, it was nice talking to you about Mr. Michael Pennington. It is out [sic] policy when I'm not available to refer our patient's [sic] to Dr. Jay Lipkie [sic] for evaluation and reatment [sic] for their orthropedic [sic] care.

There is also a form entitled "Patient Information" in the record. This form is signed "Michael Pennington" and contains handwritten information about the appellant. It states, in part, that he had a "herniated disk" and that it happened on the job. It states that the visit was "related to a workers' compensation injury," that the employer was "Gene Cosby," and that the bill

would be paid by "Cigna Ins. Co." The form also states that the patient was referred by Doctor Olaimey. And there is a handwritten note, across the blanks for information about the insurance company, which states that "Cigna would not authorize."

Also in the record is a letter from Dr. Lipke to Dr. Olaimey, dated June 23, 1992, stating that Michael Pennington has "been seen by Dr. Ronald Williams and Dave Arnold and apparently had a personality conflict with Dr. Arnold." The letter also states that Mr. Pennington relates that he "wants to have his back fixed via surgery" and "I've suggested he see Dr. Ted Saer, Dr, Arnold's former associate, for further evaluation."

And the record contains a letter from Janna Craig to the appellant, dated May 5, 1992, in which she states:

> I am writing you in regard to your workers' compensation claim. You need to return to the doctor for a final medical evaluation, so that we will know if you have received all benefits to which you are entitled.
>
> At one time Attorney Steve Laney informed me you wanted a change of physician. To date I have not received any written confirmation of that request or any written confirmation stating that Mr. Laney represents you in this matter. Please advise me if you desire a change of physician. If not, please return to your previous doctor.

Now it is perfectly clear from the record that after the appellant had sustained a work-related injury, had been treated by doctors authorized by Cigna Insurance Company, and had been paid some temporary and some permanent disability benefits, he then received a letter from Janna Craig, an adjuster for the insurance company, telling him to return to his doctor for a final medical evaluation "so that we will know if you have received all the benefits to which you are entitled." This letter was written on May 5, 1992, and on June 23, 1992, the appellee — in keeping with the suggestion of Cigna's adjuster — went to see an authorized doctor, Dr. Olaimey. The doctor was not available and his nurse — in keeping with the doctor's policy — referred the appellant to Dr. Lipke. That doctor's office personnel had the appellant fill out a form, and Dr. Lipke saw the appellant on June 23, 1992. Dr. Lipke also wrote Dr. Olaimey that same day reporting

what he had told the patient. And Ms. Craig testified that on June 25, 1992, Dr. Lipke's office called her asking that she authorize payment for the appellant's visit to Dr. Lipke and that she refused to do so.

There is no dispute about the above events. The law judge's opinion was adopted by the full Commission "including all findings and conclusions therein," and the law judge's opinion does not indicate that any of these events were in doubt factually. His discussion assumes that these events occurred and is based on two conclusions of law. First, the opinion states:

> For statute of limitations purposes, compensation for medical benefits is deemed to be the date on which treatment is furnished, not the date on which the medical bill is paid. *Heflin* v. *Pepsi Cola Bottling Co.*, 244 Ark. 195, 198, 424 S.W.2d 365 (1968). Implicit in this rule is that conclusion that the furnished treatment cannot be considered compensation unless it has been paid.

And the second conclusion of law given by the law judge to support his decision is stated as follows:

> Here, the claimant's claim for additional benefits came too late, falling outside the statute of limitations since he obtained treatment without approval (within the limitation period) and this was not accepted or paid by the carrier.

The problem is that both conclusions contain errors of law; however, there is no problem about the occurrence of the events involved. Thus, I do not agree with the majority opinion's conclusion that the law judge's conclusion (adopted by the Commission) is supported by substantial evidence. The problem is really not the evidence. It is the law that is applied to the evidence.

The appellant contends that because a nurse in Dr. Olaimey's office told him to go see Dr. Lipke, this was a valid referral. In support of this argument he cites *White* v. *Lair Oil Co.*, 20 Ark. App. 136, 725 S.W.2d 10 (1987), and *TEC* v. *Underwood*, 33 Ark. App. 116, 802 S.W.2d 481 (1991).

In a case cited by both of the above cases, *Electro-Air* v. *Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985), this court

held that a referral had indeed occurred where the evidence showed that a claimant's treating physician had referred her to a psychiatrist. We observed:

> [W]e believe the commission erred in characterizing the treatment by Dr. Butts as a change of physicians rather than a referral. In its opinion the commission stated:
>
> > There is some indication that Dr. Ledbetter, who was treating claimant, wished to have claimant examined by Dr. Butts. However, the record also indicates that claimant was initially referred to Dr. Butts by her attorney. Therefore, we believe claimant's treatment by Dr. Butts should be characterized as a change of physicians rather than as a referral.
>
> Dr. Ledbetter stated in his deposition that he had referred the appellee to Dr. Butts who provided her with psychological treatment and profiling as well. We think it immaterial that appellee's attorney also recommended Dr. Butts. We believe the record is clear that this was a referral and that the commission, although it improperly labeled it as a change of physicians, correctly approved the referral.

16 Ark. App. at 105, 697 S.W.2d at 934.

In *White, supra*, we required the employer to cover the appellant's medical expenses after his treating physician refused to see him. We stated:

> When Dr. Tsang refused to assist appellant when emergency services were required, he effectively released his patient from his care. At that point, Dr. Dunaway [appellant's family physician] stepped into Dr. Tsang's shoes and became appellant's treating physician. Because the change was not of appellant's seeking but was instead prompted by exigent circumstances, we cannot conceive that a reasonable mind could reach the conclusion that a change of physician had occurred.

20 Ark. App. at 138, 725 S.W.2d at 12.

In *TEC, supra*, the claimant had moved to Oklahoma and had been seeing a doctor there. The appellant argued that this con-

stituted an unauthorized change of physician and cited cases to support its position. We said:

> However, these cases have no application here because Dr. Mertz's treatment was a "referral" rather than a "change of physician." Appellee testified that she had telephoned the office of Dr. Wolfe and asked for a referral "over there," that she was told "they" would talk to Dr. Wolfe and he would refer her to someone; that she was given the name of Dr. Mertz; that Dr. Wolfe sent her "records and everything to Dr. Mertz and let him know that I was going to be seeing him." The record also contains a letter from Dr. Mertz to Dr. Wolfe thanking him for referring appellee. The law judge held that appellee's request for a referral was not "doctor shopping under the circumstances." The full Commission made the same factual determination and adopted the law judge's finding. We think the Commission's decision is supported by substantial evidence and the law. *See Electro-Air* v. *Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985).

33 Ark. App. at 120, 802 S.W.2d at 484.

I agree with the appellant's contention that when the nurse in Dr. Olaimey's office referred him to Dr. Lipke because Dr. Olaimey was unavailable, this was a valid referral, not a change of physicians; therefore, the furnishing of medical services by Dr. Lipke tolled the statute of limitation. Although I view this as an issue of law because the facts involved are really not in dispute, even if the issue is one of substantial evidence I think this court must still hold that the appellant's visit to Dr. Lipke was a referral rather than a change of physicians. Our rule is clear. We view the evidence in the light most favorable to the Commission's decision and affirm that decision if it is supported by substantial evidence; but substantial evidence exists only if reasonable minds could have reached the conclusion reached by the Commission, and we will reverse the Commission if we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion reached by the Commission. *Deffenbaugh Industries* v. *Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993); *Price* v. *Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993). Here, I do not think the law judge's

finding (adopted by the Commission) that appellant's visit to Dr. Lipke was obtained without approval is supported by substantial evidence. Under the law and the evidence fair-minded men would conclude that the visit to Dr. Lipke was a referral by a doctor who was authorized to treat the appellant.

The other error made by the law judge (and adopted by the Commission) is the statement that implicit in the *Heflin* v. *Pepsi Cola* case, *supra*, is, "The conclusion that the furnished treatment cannot be considered compensation until it has been paid." That case clearly holds that with regard to the limitations period it is the *furnishing* of medical services that constitutes payment of compensation within the meaning of the workers' compensation act and not the *payment* of the charges therefor. It is true that the employer or its insurance carrier must have reason to know that the medical services are being furnished the injured worker. *Superior Federal Savings & Loan Ass'n* v. *Shelby*, 265 Ark. 599, 580 S.W.2d 201 (1979); *McFall* v. *United States Tobacco Co.*, 246 Ark. 43, 436 S.W.2d 838 (1969). But those cases do not hold that furnished treatment cannot be considered compensation until it has been paid for as the law judge in the case at bar stated in his decision.

In our case of *Cheshire* v. *Foam Molding Co.*, 37 Ark. App. 78, 822 S.W.2d 412 (1992), we referred to the *Heflin* case and said, "In that case, the court held that the furnishing of medical services constitutes payment of compensation within the meaning of Ark. Code Ann. § 11-9-702(4)(b) (1987) [formerly Ark. Stat. Ann. § 81-1318(b) (Repl. 1960)], based upon reasoning that the claimant is 'compensated' by the furnishing of medical services and not by the payment of the charges therefore." And in *Plante* v. *Tyson Foods, Inc.*, 319 Ark. 126, 131, 890 S.W.2d 253, 255 (1994), the court cited *Heflin* as authority for the statement that "it is the furnishing of the services that tolls the statute, not the payment therefor." The court also stated that "regardless of whether the respondent had actual knowledge of the 1989 and 1990 visits, the respondent should have known they would occur, ..."

In the present case, Cigna Insurance Company certainly knew or should have known of appellant's visit to Dr. Lipke. His office called and asked if Cigna's adjuster, Ms. Craig, would

authorize the payment. While Ms. Craig said she would not authorize payment for the visit, she had written the appellant and suggested that he "needed to return to the doctor for a final medical evaluation." That is exactly what he did. And in keeping with the policy of the doctor that the insurance company had authorized to treat the appellant, the appellant was referred to Dr. Lipke. On April 6, 1993, within one year after the appellant's visit to Dr. Lipke on June 23, 1992, the appellant filed a claim for additional compensation. Under this evidence and the law, the appellant's claim is not barred by limitations because the appellant was referred to Dr. Lipke by the doctor that Cigna Insurance had authorized to treat appellant, the visit to Dr. Lipke was made within the time limitations of the statutes, and Ms. Craig knew or should have known of the visit.

I am authorized to state that Special Judge Bruce Bullion joins in this dissent.

PINE BLUFF WAREHOUSE and Continental Loss Adjusting Services *v.* Arlie BERRY and Death and Permanent Total Disability Trust Fund

CA 95-193 912 S.W.2d 11

Court of Appeals of Arkansas
Division II
Opinion delivered December 13, 1995

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Brian Allen Brown*, for appellants.

David L. Pake, for appellee Death and Permanent Total Disability Fund.

BRUCE T. BULLION, Special Judge. The claimant in this workers' compensation case, Mr. Arlie Berry, suffered a compensable injury to both legs in March 1988. He filed a claim for benefits asserting that he was permanently totally disabled. The appellants contested this and, after a hearing, the administrative law judge found in an opinion dated September 18, 1992, that the claimant's healing period ended on September 11, 1991, and that the claimant was permanently and totally disabled as a result of his compensable injury. No appeal was taken from this decision. Subsequently, a dispute arose between the appellants and the appellee Death and Permanent Total Disability Trust Fund concerning the date the claimant's healing period ended. After considering arguments from both parties concerning the doctrines of res judicata and collateral estoppel, the Commission found that the unappealed-from decision of September 18, 1992, setting forth the end of the claimant's healing period was final and controlling with respect to the present parties. From that decision, comes this appeal.

For reversal, the appellants contend that the Commission erred in finding that litigation was precluded regarding the end of the claimant's healing period. In addition, the appellants contend that, if litigation is precluded regarding the end of the healing period, then litigation is precluded regarding all aspects of the decision of September 18, 1992. Finally, the appellants contend that the evidence does not support the finding that the claimant's healing period ended on September 11, 1991. We affirm.

We first address the appellant's contention that the Commission erred in finding that further litigation was precluded regarding the end of the claimant's healing period. We note in this regard that the appellants were parties to the litigation which culminated in the decision of September 18, 1992, but that the

appellee Death and Permanent Total Disability Trust Fund did not become involved until afterwards. The date of the healing period's termination is significant with respect to the present parties because it determines the date upon which the Fund may commence taking credit against its maximum obligation to the claimant pursuant to Ark. Code Ann. § 11-9-502(b)(1) (1987).

Although the appellant advances arguments relating both to the doctrine of res judicata and to the doctrine of collateral estoppel, we limit our discussion to collateral estoppel because we find it to be determinative. Collateral estoppel, or issue preclusion, bars relitigation of issues of law or fact which were actually litigated in the first suit. *Crockett & Brown, P.A.* v. *Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993). Four requirements must be satisfied for collateral estoppel to apply: (1) the issue sought to be litigated must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *Id.*

We think that the requirements of collateral estoppel have been satisfied in the case at bar. The date on which the claimant's healing period ended was determined by a specific finding in the prior litigation based upon evidence adduced therein. The administrative law judge's order of September 18, 1992, was not appealed by any party within 30 days and therefore became final. *See Rogers* v. *Darling Store Fixtures*, 45 Ark. App. 68, 870 S.W.2d 776 (1994). Furthermore, the determination of the end of the healing period was essential to the judgment because the issue in the prior litigation was whether the claimant was permanently and totally disabled: a finding of permanent impairment necessarily entails a determination of the end of the healing period because permanent impairment is defined in terms of the permanent functional or anatomical loss remaining after the end of the healing period has been reached. *Johnson* v. *General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *see Thurman* v. *Clarke Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

The appellant also argues that the Fund may not assert res judicata and collateral estoppel because the Fund was not a

party to the earlier proceeding. We do not agree. Identity of parties is not required for the application of the doctrine of collateral estoppel. *Crockett & Brown, P.A.*, v. *Wilson, supra; Fisher* v. *Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993). Furthermore, the key question regarding the application of both res judicata and collateral estoppel is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Cater* v. *Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993). In the case at bar, the earlier decision is being asserted against the appellants, who were in fact parties to the earlier action. Under these circumstances, we hold that the Commission did not err in finding that further litigation was precluded concerning the end of the claimant's healing period.

Our resolution of the foregoing issue makes it unnecessary to address the appellant's argument that the evidence does not support a finding that the claimant's healing period ended on September 11, 1992. We note that the appellant has also argued that, if the decision of September 11, 1992, is held to be preclusive with regard to the end of the claimant's healing period, then certain other aspects of that decision should also be binding on the Fund. However, because the Commission's opinion contains no findings relating to the other aspects of the prior decision which are the subject of this argument, the issue is not preserved for appeal and there is nothing before us to review. *See Odom* v. *Tosco Corp.*, 12 Ark. App. 196, 672 S.W.2d 915 (1984).

Affirmed.

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

Bryan K. BURNETT *v.* STATE of Arkansas

CA 95-87 912 S.W.2d 441

Court of Appeals of Arkansas
Division I
Opinion delivered December 20, 1995

Robert E. Irwin, for appellant.

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

JOHN E. JENNINGS, Chief Judge. This is a civil forfeiture

action brought by the State under Arkansas Code Annotated section 5-64-505 (Repl. 1993) seeking the forfeiture to the State of a 1992 Chevrolet Silverado pickup truck, a 16-foot bass boat, and an outboard motor. After a hearing the circuit court found that the truck was being used to transport a controlled substance in violation of the law and that it should be forfeited to the State. The court also found the boat and motor should not be forfeited.

On appeal Burnett contends that the evidence was insufficient to support the court's decision to order the truck forfeited. We agree and therefore reverse and dismiss.

[redacted] Arkansas Code Annotated section 5-64-505(a)(4) (Repl. 1993) provides that all conveyances, including vehicles, which are used to transport controlled substances for the purpose of sale or receipt are subject to forfeiture.

At the forfeiture hearing Jack Allen, a detective at the Cleburne County Sheriff's Department, was the only witness. He testified that he received a call from the owner of a pawn shop in Greers Ferry who was concerned because Burnett had come in and pawned a shotgun there but had told the owner he owned a pawn shop himself. The sheriff's office ran a check on Burnett and found several misdemeanor warrants on him for traffic violations. The officers went to Greers Ferry and found Mr. Burnett inside the Quik-Mart store. They arrested the defendant, who gave the officers permission to search the truck. They saw a .45 caliber pistol in plain view on the seat of the truck and a marijuana "roach" in the ashtray. In Burnett's wallet, which was also in the cab of the truck, they found .9 grams of methamphetamine. Burnett was subsequently charged and convicted in federal court for possessing the methamphetamine.

On this evidence the trial court made a finding that the truck "was being used to transport a controlled substance in violation of the law and that the same should be forfeited to the State." The statute, however, requires that the State prove that the vehicle was used to transport the controlled substance "for the purpose of sale or receipt."

[redacted] A forfeiture action is an in rem civil proceeding, independent of any criminal charges that may be pending. *Gallia* v. *State*, 287 Ark. 176, 697 S.W.2d 108 (1985). The burden

of proof in the trial court is by a preponderance of the evidence. *Limon* v. *State*, 285 Ark. 166, 685 S.W.2d 515 (1985). Because the forfeiture statute is penal in nature and because forfeitures are not favorites of the law, the statute is interpreted narrowly. *Beebe* v. *State*, 298 Ark. 119, 765 S.W.2d 943 (1989). On appeal, we reverse the findings of the trial court only if they are clearly against a preponderance of the evidence. *Davison* v. *State*, 38 Ark. App. 137, 831 S.W.2d 160 (1992).

In the case at bar we can find no evidence whatsoever that appellant's truck was being used to transport the methamphetamine "for the purpose of sale or receipt." We recognize that Arkansas Code Annotated section 5-64-401 (Repl. 1993) permits an inference of intent to deliver when a defendant is in possession of more than 200 milligrams of a "stimulant drug." However, the State concedes, and we agree, that the statute has no application to a civil forfeiture proceeding.

Because our resolution of appellant's first issue disposes of the case, we need not reach the other issues raised.

Reversed and Dismissed.

ROGERS, J., and BULLION, S.J., agree.

Leah S. CAMPBELL *v.* STATE of Arkansas

CA 94-1375 912 S.W.2d 446

Court of Appeals of Arkansas
Division II
Opinion delivered December 20, 1995

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

Winston Bryant, Att'y Gen., by: *Angela S. Jegley*, Senior Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Chief Judge. This is an appeal from an order involuntarily committing the appellant to the Arkansas State Hospital for a forty-five day period. The sole argument raised on appeal is that there was insufficient evidence to support the probate court's finding that appellant posed a clear and present danger to herself or others. We agree and reverse and dismiss.

On October 6, 1994, Mrs. Lyda Campbell filed a petition seeking the involuntary commitment of her daughter Leah Campbell for treatment of mental illness. Leah Campbell is a thirty-six-year-old board-certified psychiatrist. The petition alleged that Dr. Campbell had "at least a four-year history of mental illness" and that on the 5th of October the manager of Forest Place, the apartment complex where Dr. Campbell lived, told the petitioner that Dr. Campbell had physically attacked a Terminix man who was spraying her apartment and "nearly pushed him off the second floor balcony." The manager said that Dr. Campbell would have to move because it was her second assault, in that she had tried to attack a maintenance man two weeks earlier. The manager also complained that Dr. Campbell was walking about wearing only a bathrobe. The petition also alleged that Dr. Campbell had screamed that the petitioner was going to hell and slammed a door and refused a request from her father on the same date to get help. It said that Dr. Campbell had walked off two jobs since returning to Little Rock in August 1993 and was not getting care for her illness. The petition also alleged that she was dependent

on her mother and father for support. The petition listed Margaret Raney, the manager of Forest Place, as an additional witness.

On October 7, 1994, the Pulaski County Probate Court held a hearing to decide whether Dr. Campbell should be committed for a seven-day period for evaluation. Lyda Campbell testified that she and her husband saw their daughter on October 4 and asked her to get some treatment "because she was unemployed and had run out of money." She testified that on October 5, Dr. Campbell was very rude to her parents and acted with hostility toward them. She testified that the statement about a four-year history of mental illness was based on what "mutual friends in New York" had told her.

Margaret Raney, the assistant manager at the apartment complex where Dr. Campbell lived, also testified. She said that on approximately September 14, 1994, Dr. Campbell came into her office upset because she had been to her bank to withdraw money to take a cruise and had been told her account only had $20.00 in it. Dr. Campbell told Ms. Raney that she felt like the bank manager was happy about not giving her the money. Ms. Raney testified that Dr. Campbell then lit a cigarette despite a sign on Ms. Raney's desk that says, "Please, do not smoke." When a gentleman who happened to be in the office, whom Ms. Raney described as a native American, called Dr. Campbell's attention to the sign, she told him to "shut the blank up" and called him a "spic." In the course of the conversation Dr. Campbell told Ms. Raney that she hated her parents and that "if it were not for prison, she would murder them O.J. Simpson style." Ms. Raney testified that Dr. Campbell then got up and made some gestures that "mimicked a chimpanzee." Ms. Raney said that Dr. Campbell seemed to be "a very upset lady on the edge." Ms. Raney also testified that she had observed Dr. Campbell walk across the parking lot in her bathrobe without any undergarments.

Dr. Campbell testified that she acted with "some hostility" toward her parents because they came to her apartment to take her car away for the second time in the recent past. She testified that she was treated as an outpatient for depression about a year ago after she had returned to Little Rock. She testified that she could have made the statement that she would like to kill her

parents because they "continually come over and provoke arguments with me and set up very frustrating situations." She conceded that she had been outside in her bathrobe in the past when her cat had gotten out.

On this evidence the court ordered the involuntary commitment of Dr. Campbell for the purpose of a seven-day evaluation.

On October 14, 1994, the probate court held a second hearing. The only witness was Dr. Jarrod Adkisson, a second-year resident at the University of Arkansas for Medical Sciences, working as a psychiatrist for the Arkansas State Hospital. Dr. Adkisson testified that he had diagnosed Dr. Campbell as "bipolar, type II." He testified that "type II"

> indicates that within the last two years there has been an episode of major depression, which did occur last year by her own report. That also implies that there aren't a lot of specific criteria to meet what we would call a florid, grandiose, manic stage, that there are activities which we consider to be hypomanic, which in themselves would be some of the intrusiveness that she's shown, from the impulsivity, some of the difficulties that she has shown both in her professional life and in her private life. It does meet the criteria for bipolar type disorder, but it's a lesser diagnosis, less severe—it's not as severe a form of bipolar as the regular bipolar diagnosis.

Dr. Adkisson testified that Dr. Campbell had shown some evidence of hostility toward staff and some evidence of "bizarre behavior." He testified that she made the comment that she threw up her medication because the Italians made her do it. He testified that "another night she got angry at staff and made a rather flippant remark that she might get out of here and kill somebody." When asked about it the next day, "she said that she was upset and had gotten angry with the staff, but denied any [intention] of wanting to hurt herself or anyone else." Dr. Adkisson recommended that Dr. Campbell begin a trial treatment of the drug Lithium, but that she had refused to begin treatment. He testified that a drug screen was performed on appellant and that it was negative.

Finally, Dr. Adkisson testified repeatedly that Dr. Campbell was not currently a danger to herself or anyone else and that she did not require any further inpatient treatment. He testified that he believed she suffered from a "mood instability."

After hearing the evidence the court stated that there was ample evidence to indicate Dr. Campbell suffered from a mental illness and needed some treatment. The order involuntarily committing Dr. Campbell for a forty-five day period stated that the court found by clear and convincing evidence that Dr. Campbell posed a clear and present danger to herself or others.

The case at bar is moot in a sense because the forty-five day commitment order has run its course. We nevertheless decide this case on its merits because this kind of proceeding will almost always become moot before the litigation can run its course and a decision here might avert future litigation. *See Campbell* v. *State*, 311 Ark. 641, 846 S.W.2d 639 (1993).

In order to obtain a forty-five day commitment order the State bears the burden of proving by clear and convincing evidence that the person sought to be committed is a clear and present danger to himself or others. Ark. Code Ann. § 20-47-214(b)(1)(A) (Repl. 1991). Arkansas Code Annotated section 20-47-207(c) (Repl. 1991) provides:

> (c) INVOLUNTARY ADMISSION CRITERIA. A person shall be eligible for involuntary admission if he is in such mental condition as a result of mental illness disease or disorder that he poses a clear and present danger to himself or others;
>
> (1) As used in this subsection, "a clear and present danger to himself" is established by demonstrating:
>
> . . . .
>
> (C) The person's behavior demonstrates that he so lacks the capacity to care for his own welfare that there is a reasonable probability of death, serious bodily injury, or serious physical or mental debilitation if admission is not ordered.
>
> (2) As used in this subsection, "A clear and present dan-

ger to others" is established by demonstrating that the person has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another, and there is a reasonable probability that such conduct will occur if admission is not ordered.

When the burden of proof in the trial court is by clear and convincing evidence, our standard of review is whether the trial court's finding is clearly erroneous. *See Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). We give due deference to the superior position of the probate judge to evaluate the evidence. *See Warren* v. *Tuminello*, 49 Ark. App. 126, 898 S.W.2d 60 (1995). In the case at bar there is certainly ample evidence to support the trial court's finding from the bench that Dr. Campbell suffered from a mental illness and needed some treatment. We are convinced, however, that the court's determination that the State proved by clear and convincing evidence that Dr. Campbell posed a clear and present danger to herself or others is clearly erroneous. While two assaults were alleged in the original petition, we note that neither Lyda Campbell nor Margaret Raney gave any testimony relating to any assault. The only witness at the forty-five day commitment hearing, Dr. Adkisson, testified unequivocally that Dr. Campbell did not pose a danger to herself or anyone else. We do not doubt that the probate judge was attempting to help the appellant nor do we doubt that the appellant needed help. Even so, an order of involuntary commitment may not issue unless the statutory requirements are met.

The order of the probate court is reversed and dismissed and the record of appellant's involuntary commitment is to be removed from her record at the Arkansas State Hospital. *See Campbell* v. *State*, 311 Ark. 641, 846 S.W.2d 639 (1993).

Reversed and dismissed.

ROBBINS, J., and BULLION, S.J., agree.

C. H., Jr., a Minor *v.* STATE of Arkansas

CA 94-991 912 S.W.2d 942

Court of Appeals of Arkansas
En Banc
Opinion delivered December 20, 1995
[Petition for rehearing denied January 17, 1996.]

Heather Patrice Hogobrooks, for appellant.

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

JOHN MAUZY PITTMAN, Judge. This is an appeal from a judgment of the St. Francis County Chancery Court, Juvenile Division. Appellant was convicted of theft of property, a Class A misdemeanor, was sentenced to three months unsupervised probation and was ordered to pay court costs of $35.00. Appellant contends that insufficient evidence was presented to support the conviction, that the delinquency petition failed to allege a criminal offense, and that his constitutional right of equal protection was violated. Only appellant's sufficiency argument is preserved for appeal. We find no error and affirm.

In reviewing the sufficiency of the evidence in a delinquency case, we apply the same standard of review as in criminal cases. *D. D.* v. *State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992). When the sufficiency of the evidence is challenged on appeal from a criminal conviction, we consider only the proof that tends to support the finding of guilt, and we view the evidence in the light most favorable to the State. *Kennedy* v. *State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995). We will affirm if the conviction is supported by substantial evidence. Substantial evidence is that which is of sufficient force and character to compel a conclusion one way or the other without resorting to speculation or conjecture. *Hardrick* v. *State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994).

A person commits theft of property if he knowingly takes or exercises unauthorized control over the property of another person, with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 1993).

George Chapman, a security guard at Fred's Department Store in Forrest City, testified that he observed appellant in the store with his mother and grandmother. Chapman said that he noticed that appellant's mother handed appellant an umbrella from the store which he carried while in the store. Chapman stated he next saw appellant attempt to exit the store through an entrance turnstile which, to prevent shoplifting, moved only in

one direction. Chapman testified that he told appellant that he could not exit there, and appellant turned back into the store. Chapman stated that he later observed appellant holding the umbrella in a checkout lane with his grandmother. When his grandmother completed her purchase, appellant left with her and was still holding the umbrella.

Josie Rogers, a cashier at Fred's, testified that she checked out appellant's grandmother and that appellant had the umbrella. Neither paid for the umbrella, and the grandmother indicated to her that appellant's mother would pay for the umbrella when she checked out. No one paid for the umbrella.

Appellant argues that there is no evidence that he intended to steal the umbrella. We disagree. Intent is a state of mind which is not ordinarily capable of proof by direct evidence, but may be inferred from the circumstances. *Tiller* v. *State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993). Appellant had attempted to leave the store with the merchandise through the turnstile. He did not remain in the store for his mother to pay for the umbrella, and he carried the umbrella when he left the store with his grandmother. We cannot say that there is no substantial evidence to support his conviction.

Appellant also argues that there was no allegation in the delinquency petition that he took the property with the purpose or intent of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 1993). Appellant raises this argument for the first time on appeal and we decline to address it. *Stewart* v. *State*, 320 Ark. 75, 894 S.W.2d 930 (1995). Appellant's abstract states that "the petitioner moved the court to quash the delinquency petition," and that the court denied his motion to dismiss. We cannot tell from the abstract on what basis appellant moved to dismiss. It is well established that we decline to go to the trial transcript to reverse a case, and that the abstract constitutes the record on appeal. *Midgett* v. *State*, 316 Ark. 553, 873 S.W.2d 165 (1994); *Haynes* v. *State*, 314 Ark. 354, 862 S.W.2d 275 (1993). We note also that an objection to the sufficiency of an information must be made prior to trial. *Meny* v. *State*, 314 Ark. 158, 861 S.W.2d 303 (1993).

We decline to address appellant's equal protection argument raised for the first time on appeal. *Stewart, supra.*

Affirmed.

MAYFIELD and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. The appellant, who was eleven years old at the time of the incident, was adjudged delinquent for shoplifting an umbrella valued at $5.99. He was sentenced to 3 months unsupervised probation and $35 in court costs. I would reverse because I do not think the evidence is sufficient to support the trial court's decision. Since the case was tried by a judge and not a jury, no motion for directed verdict was necessary. *See Iqwe* v. *State*, 312 Ark. 220, 489 S.W.2d 462 (1993); *Bradley* v. *State*, 41 Ark. App. 205, 849 S.W.2d 8 (1993).

In hearings concerning delinquency, the trial judge must be convinced of the accused's guilt beyond a reasonable doubt. Ark. Code Ann. § 9-27-325(h)(1) (Repl. 1993). However, in appeals from criminal convictions, where the reasonable doubt standard is applied in the trial court, the test on appeal is that of substantial evidence and if the conviction is supported by such proof we are not at liberty to disturb the conviction, even though we might think it to be against the weight of the evidence. *See Graves & Parham* v. *State*, 236 Ark. 936, 370 S.W.2d 806 (1963). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; evidence is not substantial if it leaves the fact finder to speculation and conjecture in choosing between two equally reasonable conclusions and merely gives rise to a suspicion. *Surridge* v. *State*, 279 Ark. 183, 650 S.W.2d 561 (1983). Although a juvenile delinquency hearing is not a criminal proceeding, this substantial evidence standard has been applied in considering the appeal of a juvenile case. *D.D.* v. *State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992).

Here, George Chapman, a security guard, testified that he observed the appellant with his mother and grandmother in Fred's Department Store in Forrest City; that the mother took an umbrella off the rack and handed it to the appellant; that the appellant carried it through the store; and then appellant tried to go through the turnstile, which is two shopping carts away from the checkout lines and only turns one way, with the umbrella. Chapman said he told the appellant that he could not go through the turnstile and appellant walked back to his grandmother who was then at register 6.

Chapman said he observed the grandmother check out, get her merchandise, take the appellant by the hand, and walk out the door. He said he next observed the mother standing in another line to be checked out. He said the appellant was holding the umbrella in his hand when he walked out. He also said the appellant did not attempt to conceal the umbrella but "if he had a jacket on he probably would have." When asked whether appellant did anything suspicious after he rejoined his grandmother, Chapman responded that "he just stood there with her in the line."

Counsel also asked whether Chapman could agree that it was possible the appellant was trying to go through the turnstile to get to the front of the aisle where his grandmother was checking out instead of trying to leave the store, and Chapman responded no, "because he tried to go through the turnstile to go out the door." However, Chapman also admitted that no one had ever tried to go through the turnstile to go out the door with merchandise.

Josie Rogers, the clerk who rang up the grandmother's purchases, testified that she noticed the umbrella in appellant's hand; that she asked about the umbrella; and that the grandmother said the boy's mother was going to pay for it. Ms. Rogers testified, "I don't believe the boy stole anything. The grandmother absolutely said the mother was going to pay for it."

Now this is the evidence upon which the judge found that the appellant was a juvenile delinquent for stealing an umbrella. I think it is abundantly clear that the evidence is unusually weak. The first problem is that the mother took the umbrella off the rack and gave it to the boy. Josie Rogers testified that the grandmother said the mother was going to pay for it. But the security guard, Mr. Chapman, testified that he did not give "them" an opportunity to pay for it. He said "they" had that opportunity when "they" were standing at the cash register. However, Mr. Chapman also testified that when the appellant and his grandmother walked out of the store, the appellant's mother was standing in another line to be checked out. So, it is clear that when Chapman said "they" had the opportunity to pay for the umbrella he was referring to the boy and his grandmother. Of course it was the mother, according to Josie Rogers, who was going to pay for the umbrella, but she was not given the opportunity.

Moreover, the security guard "thought" the boy was trying to go through the turnstile to leave the store, but he admitted that no one had ever tried to go through the turnstile to go out of the door with merchandise. Also, he "thought" the appellant would "probably" have attempted to conceal the umbrella "if he had a jacket on."

I do not believe that reasonable minds, without resorting to speculation and conjecture, could conclude from this evidence that the appellant committed theft of property.

I would reverse.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, dissenting. I concur with Judge Mayfield's dissent. I write separately to state that given the seriousness of most offenses heard in juvenile court, the diversion process should be utilized in these minor matters.

Young people who are charged with committing first-time, minor offenses without any physical injury should not become embroiled in protracted legal cases which burden our courts. I realize that there is a cost involved in even minor matters and that swift AND certain punishment should be utilized to deter young people from committing other offenses. But anything that is as de minimis as this case should not be a waste of precious judicial resources. The juvenile court is a place where judgment and wisdom should be exercised. I wonder why it wasn't in this case.

Joyce KINKEAD *v.* ESTATE OF Harold KINKEAD

CA 94-1209 912 S.W.2d 442

Court of Appeals of Arkansas
Division I
Opinion delivered December 20, 1995

Joyce Kinkead, Pro Se.

Hoyt Thomas, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant, Joyce Kinkead, appeals from an order of the Cleburne County Probate Court. She contends that the court erred in denying her claim of $11,960.50 for legal work she performed for the decedent prior to his death and in imposing sanctions against her under Rule 11 of the Arkansas Rules of Civil Procedure. We agree that the probate court erred in imposing sanctions and affirm as modified.

In her claim against the estate of her late father-in-law, Dr. Harold Kinkead, appellant sought legal fees for representing him in an action against his brothers and sisters to obtain an easement for ingress and egress to two acres of river property that Dr. Kinkead had received from a settlement of a family partition action. Appellant was also a party to the partition action and the resulting settlement and indemnity agreement between the parties. Appellant testified that Dr. Kinkead asked her to represent him in obtaining an easement to his two acres across his brothers' adjoining property. Appellant admitted that Dr. Kinkead's two acres also adjoined property that she and her husband received from the family settlement; that Dr. Kinkead did not have an easement because it was decided at the time the settlement agreement was signed that Dr. Kinkead would sell his two acres to appellant and her husband; and that Dr. Kinkead later refused to transfer his two acres to her husband, resulting in her husband's refusal to let Dr. Kinkead cross their property. The easement action ended when the chancery court entered a directed verdict in favor of the defendants, finding that Dr. Kinkead had failed to prove any right to an easement and further finding that Dr. Kinkead had settled any claims or rights he had against the defendants' property under the parties' prior settlement agreement.

Appellant testified that, after the conclusion of the easement trial, Dr. Kinkead told her to send him a bill. Appellant testified she told him that her services would probably run approximately $10,000.00 and to wait until after the order was entered. She claimed that she had an oral agreement with Dr. Kinkead

that he would pay her legal fees of $95.00 per hour for representing him. The judgment entered in the easement lawsuit awarded the defendants attorney's fees of $2,943.75. Appellant testified that she received a check from Dr. Kinkead for $2,207.81, which she claims represented three-fourths of the attorney's fees that he owed to defendants' attorneys, the Friday Firm. She stated that, when she received the final order, the chancellor had also included an award to the defendants of their costs. She stated that she then wrote Dr. Kinkead on July 28, 1989, and advised him that he also owed $39.82, which represented three-fourths of the court costs awarded to the defendants. Appellant claims that, in response to her letter, she received Dr. Kinkead's August 7, 1989, note that stated in full: "Pay the Friday firm. I have stolen more chain than I can swim with as it is. I will not attempt an appeal. Let me know how much money I owe you, so I can make a loan at the bank." The note was signed "Harrold."

Although Dr. Kinkead's easement lawsuit was concluded by the judgment entered August 2, 1989, appellant never sent Dr. Kinkead a bill of any kind for her legal services. The first demand appellant made for payment of her legal fees was when she filed her claim against Dr. Kinkead's estate on November 17, 1993, more than four years after she rendered her last legal service for Dr. Kinkead. The estate, appellee herein, objected to appellant's claim, pleading the statute of limitations, the statute of frauds, accord and satisfaction, that the charges were unreasonable, and that appellant had volunteered her legal services.

At the hearing on her claim, appellant contended that her claim for legal services was not barred by the three-year statute of limitations for oral contracts because her claim was based on a written instrument, *i.e.*, Dr. Kinkead's August 7, 1989, note, and therefore, her claim was within the applicable five-year statute of limitations. *See* Ark. Code Ann. § 16-56-111(a) (Supp. 1993).

After the conclusion of the hearing, a letter opinion dated May 9, 1994, was sent by the probate court and read in part:

> An obvious and legitimate argument can be made on these facts that if [appellant] would try to do her client [Dr. Kinkead] out of his land while he was alive and she was representing him, she certainly wouldn't hesitate to do his estate out of money after he's dead. She waited for

> the last day of filing to present her claim for legal fees, and she admits that she never presented a bill under her alleged contract until that time. YET HER LAST LEGAL WORK FOR MR. KINKEAD WAS DONE ON JULY 26, 1989, AND HE DIDN'T DIE UNTIL MORE THAN FOUR YEARS LATER! . . . I think her claim is barred by the Statute of Limitations. But more importantly, I just simply don't believe she ever had any contract of employment with Mr. Kinkead.

In its order entered on May 25, 1994, the probate court found that appellant had failed to sustain her burden of proof of establishing an employment contract for compensation with [Dr. Kinkead] as set forth in the claim filed against the estate. The court also found that appellant's claim against the estate alleged an oral contract of employment and would fall within a three-year statute of limitations. The order assessed sanctions against appellant in the amount of a $750.00 attorney's fee in favor of the estate's attorneys and expenses incurred in the amount of $162.33.

Appellant contends in her first point on appeal that the probate court erred in determining that her claim against the estate was based on an oral contract of employment. Appellant contends that Dr. Kinkead's note dated August 7, 1989, is clearly a written promise to pay legal services rendered in connection with his easement lawsuit.

In support of her argument that an original debt is a sufficient legal consideration for a subsequent new promise to pay, appellant cites *Kitchens* v. *Evans*, 45 Ark. App. 19, 870 S.W.2d 767 (1994), where this court stated:

> The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But, in order to continue or revive the cause of action after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay the debt, or else an express acknowledgment of the debt, from which his promise to pay may be inferred.

Kitchens v. *Evans*, 45 Ark. App. at 23-24, 870 S.W.2d at 769 (quoting *Morris* v. *Carr*, 77 Ark. 228, 232, 91 S.W. 187, 189

(1905)). Appellant also cites *Sims* v. *Miller*, 151 Ark. 377, 383, 236 S.W. 828 (1922), which held, in an action on a written contract witnessed by correspondence, that the five-year statute of limitations applies although an account is filed specifying the items on which the three-year statute would have applied if the action had been brought on account. Appellant also relies on *H.B. Deal & Co.* v. *Bolding*, 225 Ark. 579, 283 S.W.2d 855 (1955), for its holding that the fact that oral proof is required to establish the amount due under a written contract does not prevent the five-year statute of limitations from applying.

The note on which appellant relies as creating a written contract from Dr. Kinkead to pay her legal fees is ambiguous at best. The note merely acknowledges that Dr. Kinkead owes something and does not specify the amount or the debt. The general rule is that, before a contract may be enforceable, it must be definite and certain in all of its terms. *Welch* v. *Cooper*, 11 Ark. App. 263, 670 S.W.2d 454 (1984). Parties, however, by their conduct, can enable a court to give substance to an indefinite term of a contract, and the court looks to the conduct of the parties to determine what they intended. Here, the probate court referencing the conduct of the parties, found that appellant had failed to prove that there was ever an agreement between the parties that appellant would be paid for her legal services. Probate cases are tried *de novo* on appeal, and the findings of the probate judge will not be reversed unless they are clearly erroneous, giving due deference to his superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Gilbert* v. *Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994). Based on the evidence that was produced in this case, we do not think the chancellor's finding on this point is clearly erroneous.

Although appellant argues that the amount of her fees were shown by her written statements attached to her claim and her testimony, appellant cannot rely on her written fee statement because she admitted that it was never sent to Dr. Kinkead. As for her reliance on her own testimony to establish an agreement by Dr. Kinkead to pay her attorney's fees, the probate judge found that she was not a credible witness. Appellant's admissions at the hearing support his finding.

Appellant admitted that no bill for her services was ever

sent to Dr. Kinkead, although he wrote her the note on August 7, 1989, and did not die until August 1, 1993. When questioned by the court as to why she did not send Dr. Kinkead a bill back in 1989, she replied that her mother-in-law had died in 1989 prior to the easement trial; that her husband's sister had a baby and Dr. Kinkead was in the process of buying that sister a mobile home; that he bought a mobile home for another sister, Carol Ann; and that she felt sorry for the man and did not want to push him. Appellant also admitted, however, that she and her husband had filed an adverse possession claim against Dr. Kinkead's estate; seeking possession of the same two acres for which Dr. Kinkead had sought an easement in the lawsuit in which she represented him; that their adverse possession claim against the estate alleged that she and her husband had adversely possessed against Dr. Kinkead since 1986, seven years prior to his death and during the time she represented him in the easement action; and that she and her husband had received a $50,000.00 offer for Dr. Kinkead's two acres. She also admitted that Dr. Kinkead's will, dated January 29, 1990, disinherited her husband and that her husband has challenged the will, claiming that Dr. Kinkead was incompetent to make a will and unduly influenced. She also admitted that her claim against the estate and the adverse possession case were filed after her husband was advised by the executrix that he had been disinherited.

Appellant's second point contends that the probate court erred in finding that the three-year statute of limitations was applicable to her claim filed against the estate. We do not address this point because the probate court found that appellant failed to prove that an agreement existed between the parties, and, for the reasons previously discussed, we cannot say the court's finding in this regard is clearly erroneous.

Appellant's final point goes to the court's award of sanctions under Rule 11 of the Arkansas Rules of Civil Procedure. This rule provides in part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith

> argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Appellant argues that, because her claim was based on a written promise to pay and was brought within five years, her claim was proper, and it was error to award sanctions. In awarding sanctions, the probate judge stated in his letter opinion that the claim should not have been brought and that Rule 11 sanctions were appropriate in this matter.

We infer from the probate court's letter opinion that he found appellant's conduct in representing Dr. Kinkead while at the same time she was attempting to take his property by adverse possession to be, at a minimum, a serious conflict of interest. While we agree with him in this regard, we cannot say her conduct in filing a claim against the estate for legal fees was a violation of Rule 11. Rule 11 is not intended to permit sanctions just because the court later decides that the lawyer was wrong. *Crockett & Brown, P.A.* v. *Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995). Accordingly, the judgment is modified to delete the imposition of sanctions.

Affirmed as modified.

MAYFIELD and ROGERS, JJ., agree.

Caron Sue WHALEY *v.* HARDEE'S

CA 94-1026 912 S.W.2d 14

Court of Appeals of Arkansas
En Banc
Opinion delivered December 20, 1995

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

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

JAMES R. COOPER, Judge. The appellant in this workers' compensation case was employed by the appellee as a biscuit maker from September 1989 until November 1992. She began to experience pain in her right elbow and sought treatment in March 1992. She filed a claim for workers' compensation benefits and, after a hearing before the administrative law judge, was awarded permanent partial disability benefits based upon a 5% permanent physical impairment rating. On *de novo* review, the Commission found that the appellant failed to prove by a preponderance of the evidence that she is entitled to compensation for a permanent physical impairment. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that she failed to prove she incurred a 5% permanent physical impairment. We affirm.

In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Grimes* v. *North American Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Tyson Foods, Inc.* v. *Disheroon*, 26 Ark.

App. 145, 761 S.W.2d 617 (1988). In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Grimes* v. *North American Foundry, supra.* The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). Where, as here, the Commission has denied a claim because of a failure to show entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Williams* v. *Arkansas Oak Flooring, Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

Two physicians testified on the issue of permanent impairment. Dr. Oates opined that the inflammation was not permanent.[1] The appellant's case therefore rested entirely upon the opinion of Dr. Martinson, who believed the appellant had a 5% impairment. In its opinion, the Commission discussed the basis for its rejection of Dr. Martinson's impairment rating:

> Dr. Martinson opined that the claimant sustained a 5% permanent impairment to her upper extremity. However, in reaching this conclusion, Dr. Martinson made the following comments:
>
> > The *AMA Guidelines* do not fit this clinical situation well. At this point she has no *objective* [emphasis in original] physical abnormalities in her right upper extremity with the exception of the tenderness. The *Guidelines* do permit some latitude in those cases where the severity of the clinical findings does not correspond to the true extent of the physical problem. On that basis, I believe it would be appropriate

[1]There is no issue involved in this case as to whether the appellant suffered from inflammation in her upper right extremity — only what that inflammation meant as to permanent disability is at issue.

> to assign her a five percent impairment rating for her dominant right upper extremity because of her underlying soft tissue abnormality and the likelihood of recurrence when put to use.

Consequently, Dr. Martinson's opinion is based on her perception of the "true extent of the physical problem," which she developed after examining the claimant on one occasion. With regard to the nature of this problem, Dr. Martinson makes the following comments:

> The customary course of this condition is one of exacerbation and remission depending upon the amount and type of use demanded of the muscles of the arm. The underlying pathology is believed to be one of microscopic tears within the substance of the muscle origin. These heal with scar which, like all scar, responds poorly to additional repetitive stretching producing chronic inflammatory signs and symptoms. . . .

Consequently, Dr. Martinson's opinion is based on her assumption that scar tissue is in fact present which is causing the inflammation. However, as discussed, the findings of tenderness and increased pain with resistive extension merely establish the presence of inflammation; these findings do not indicate the presence of scar tissue or any other permanent impairment, a fact which Dr. Martinson concedes when she recognizes that there are no objective physical abnormalities in her right upper extremity with the exception of tenderness. . . . Consequently, we find that Dr. Martinson's opinion is based on speculation and conjecture and that her opinion regarding permanent impairment is entitled to little weight.

The Commission's rejection of Dr. Martinson's opinion was clearly based on its assessment of the weight to be given that evidence. We have often said that the credibility of witnesses and the weight to be given their testimony are matters solely within the province of the Commission. *See e.g., Maxwell* v. *Carl Bierbaum, Inc.*, 48 Ark. App. 159, 893 S.W.2d 346 (1995); *Bartlett* v. *Mead Containerboard*, 47 Ark. App. 181, 888 S.W.2d 314 (1994). Furthermore, we have said that the weighing of medical

evidence and the resolution of conflicts therein is a question of fact for the Commission, *Bartlett, supra*, and that when the Commission chooses to accept the testimony of one physician over another in such cases we are powerless to reverse the decision. *Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987). In the case at bar, the medical experts disagreed, and the Commission rejected one physician's opinion on the basis of the limited patient contact and the absence of objective physical abnormalities to confirm that physician's assessment. While we may not have reached this conclusion were the matter before us for *de novo* review, we cannot say that reasonable minds could not have arrived at that conclusion or that the Commission's opinion fails to display a substantial basis for denial of relief. Consequently, we hold that the Commission's decision is supported by substantial evidence, and we affirm.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. In this appeal from a decision of the Worker's Compensation Commission appellant challenges only the denial of benefits for a five percent permanent partial disability rating. The administrative law judge had awarded the appellant temporary total disability through June 10, 1993; permanent disability equal to 5 percent to the right upper extremity; and held that she was entitled to a vocational rehabilitation evaluation and possible training program. The Commission affirmed the award of temporary total disability, reversed the award of permanent partial disability, and vacated the rehabilitation evaluation because it had not been raised by either party below. Appellant has appealed only the issue of permanent partial disability.

The appellant, Caron Sue Whaley, age 48, had been employed by Hardee's for approximately three years making biscuits. She mixed the ingredients with her fingers and manually kneaded the dough. She then rolled the dough out with a three foot rolling pin. She made between 13 and 20 batches of biscuits a day, depending on demand.

In early 1992 appellant began to experience pain in her right elbow. Her family physician, Dr. Randall Oates, diagnosed

"overuse" syndrome and relieved her from work. When she was not making biscuits her condition improved. When she would return to work, she would again experience pain in her right elbow. And when appellant began to have pain in her left arm, Dr. Oates referred her to Dr. Thomas R. Dykman, a rheumatologist.

Dr. Dykman diagnosed appellant as having epicondylitis (also called tennis elbow) and mild fibrositis. He returned her to the care of Dr. Oates and recommended continuing conservative treatment. In late November 1992 Dr. Oates again removed appellant from work and recommended vocational rehabilitation for appellant. In February 1993 Hardee's informed appellant that it had no work within her physical restrictions. At the time of the hearing, June 29, 1993, appellant had not worked since November 1992.

Dr. James F. Moore, an orthopaedist, in a report dated March 25, 1993, diagnosed appellant's condition as right tennis elbow and injected her with DepoMedrol.

Dr. Alice M. Martinson, an orthopaedist, examined appellant at the request of the employer on June 10, 1993. She also diagnosed right lateral epicondylitis (tennis elbow). However, by the time Dr. Martinson examined appellant, appellant had not worked since the prior November and her condition had greatly improved. Dr. Martinson reported that appellant told her she had "only a mild non-disturbing soreness in the lateral side of her right elbow. It is more an awareness of that part of her anatomy than it is a pain." However, the doctor gave her a 5 percent permanent physical impairment rating to her dominant right upper extremity.

In reversing the administrative law judge's award of 5 percent permanent partial disability the Commission stated that Dr. Martinson's impairment rating was based on her *assumption* that scar tissue had formed in appellant's elbow. What Dr. Martinson actually said was:

> The customary course of this condition is one of exacerbation and remission. . . . The underlying pathology is believed to be one of microscopic tears within the substance of the muscle origin. These heal with scar which, like all scar, responds poorly to additional repetitive stretching producing chronic inflammatory signs and symptoms.

After quoting this statement and emphasizing that Dr. Martinson found appellant to have "no *objective* physical abnormalities in her right upper extremity with the exception of the tenderness" (Emphasis in Dr. Martinson's report), the Commission held that the findings of increased pain and tenderness around the elbow only established the presence of inflammation, not scar tissue, and were not adequate to support an award of permanent disability.

The Commission also said:

> In the present claim, the physical examination of each of the physicians who examined the claimant revealed prominent tenderness in the area of the lateral epicondyle of the humerus, and the examinations of Dr. Dykman, Dr. Moore, and Dr. Martinson revealed increased pain with resisted extension maneuvers of the elbow, wrist or fingers. . . . [W]e find that the findings of tenderness over the lateral epicondyle and the increased pain with resisted extension maneuvers satisfies the statutory requirements of Ark. Code Ann. § 11-9-704(c)(1). [objective and measurable physical findings] However, we note that both of these procedures are subject to manipulation by the patient, and there is no evidence that any controls were utilized to minimize the possibility of contrived responses. Consequently, although there is no suggestion that the claimant contrived her responses, the reliability and dependability of the findings are diminished, and the weight given to the findings must be adjusted accordingly.

Appellant notes that the Commission then apparently gave "no weight" to the rating of permanent impairment by Dr. Martinson and characterizes this as a "totally arbitrary standard set by the Commission" and that any claimant "would find it impossible to win any case under this standard of review."

I am in complete agreement with the appellant. The Commission in its opinion cited our cases of *Keller* v. *L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992); *Reeder* v. *Rheem Manufacturing Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992); and *Taco Bell* v. *Finley*, 38 Ark. App. 11, 826 S.W.2d 313 (1992), and recognized that under these cases there is medical evidence here to support the requirement of Ark. Code Ann.

§ 11-9-704(c)(1) that the existence or extent of physical impairment shall be supported by "objective and measurable physical or mental findings." However, the Commission, although finding "there is no suggestion that the claimant contrived her responses," found that "the reliability and dependability of the findings are diminished" because the procedures used by the doctor to make her determination "are subject to manipulation."

In other words, without making a finding of fact on the point, the Commission rejects the evidence because *it might not be* true. I think this is wrong.

The Commission is also wrong in holding that a finding of inflammation — which occurs every time the appellant returns to work — cannot support an award of permanent wage loss disability. *See Johnson* v. *General Dynamics*, 46 Ark. App. 188, 194, 878 S.W.2d 411, 414 (1994); and *Bragg* v. *Evans-St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985).

I would reverse and remand this case for the Commission to examine the evidence and make findings of fact and conclusions of law in keeping with this dissenting opinion.

Steven Dean ARMER *v.* STATE of Arkansas

CACR 94-1177 912 S.W.2d 436

Court of Appeals of Arkansas
En Banc
Opinion delivered December 20, 1995

Doug Norwood, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Steven Dean Armer was convicted by a jury of possession of Valium with intent to deliver and possession of drug paraphernalia. He waived jury sentencing, and the trial judge sentenced him to four years in the Arkansas Department of Correction for each conviction, with the sentences to run concurrently. Mr. Armer now appeals, arguing that the trial court improperly limited his voir dire of the potential jurors. We affirm.

The evidence in this case showed that, on July 17, 1993, a police officer found Mr. Armer passed out in the back seat of his vehicle. In plain view inside the car were approximately 1000 Valium tablets and various items of drug paraphernalia. Upon discovering this contraband, the police took Mr. Armer into custody.

On the day of Mr. Armer's trial, his counsel attempted during voir dire to question potential jurors about punishment and sentencing. The trial court stated that the only questioning that would be allowed regarding sentencing would be whether any member of the jury panel would be uncomfortable sending Mr. Armer to prison for the maximum term of ten years if found guilty. Mr. Armer's counsel requested, but was not permitted, to ask the following questions to the prospective jurors:

1. Would the jury members automatically give the maximum sentence to each offense charged just because it was a drug case and whether their attitude was to lock up and throw away the key, put these people away for a long period of time?

2. Is prison the only alternative? Would the jury members consider a fine? Is a fine appropriate in a drug offense case?

3. Do the jury members think that drug addicts should be treated differently than people who are drug dealers?

4. Do the jury members know the difference between misdemeanors and felonies?

5. Do the jury members believe in individualized penalties based upon the facts and circumstances of each particular case?

6. Do the jury members think that first offenders should be treated differently than multiple offenders?

For reversal, Mr. Armer contends that the trial court erroneously prevented him from asking the above questions. He argues that, had he been allowed to make his proposed inquiries regarding sentencing and punishment, he would have had an opportunity to strike jurors who may have been inclined to give him the maximum sentence. Since he was unable to ask these questions, Mr. Armer asserts that he had no practical choice but to waive jury sentencing.

The purposes of voir dire examination are to discover if there is any basis for challenging for cause and to gain knowledge for the intelligent exercise of peremptory challenges.

Ark. R. Crim. P. 32.2(a); *Nutt* v. *State*, 312 Ark. 247, 848 S.W.2d 427 (1983). The extent and scope of voir dire examination of prospective jurors are matters lying within the sound judicial discretion of the trial court, the latitude of which is rather broad. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979). A trial court's limitation of voir dire examination is not reversible on appeal unless it constitutes a clear abuse of discretion. *Fauna* v. *State*, 265 Ark. 934, 582 S.W.2d 18 (1979).

In the case at bar, we need not address the merits of Mr. Armer's argument because any possible prejudice against Mr. Armer was removed when he waived jury sentencing and was sentenced by the trial court. In *Clinkscale* v. *State*, 13 Ark. App. 149, 680 S.W.2d 728 (1984), this court affirmed the appellant's conviction despite his complaint that two jurors declared that they could not sentence him impartially. In doing so, we held that although the appellant was faced with a biased jury, any prejudice was cured because the jury unanimously elected to let the trial court set the sentence, and the trial court did so. A somewhat analagous situation was addressed by the supreme court in *Smith* v. *State*, 300 Ark. 330, 778 S.W.2d 947 (1989), and is also instructive. In that case, the appellant took issue with the trial court's refusal to grant his motion in limine to exclude his prior felonies on cross-examination by the State. The appellant chose not to testify on his own behalf as a result of the ruling, but the supreme court held that his assignment of error was not preserved for review because he did not testify at trial. The court stated:

> To perform the weighing of the prior conviction's probative value against its prejudicial effect, as required by Rule 609(a)(1), the reviewing court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify. Any possible harm flowing from a trial court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. Moreover, when the defendant does not testify, the reviewing court has no way of knowing whether the State would have sought so to impeach, and cannot assume that the trial court's adverse ruling motivated the defendant's decision not to testify. Even if these difficulties could be surmounted, the reviewing court would still face the ques-

> tion of harmless error. If *in limine* rulings under Rule 609(a) were reviewable, almost any error would result in automatic reversal, since the reviewing court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring a defendant to testify in order to preserve Rule 609(a) claims enables the reviewing court to determine the impact any erroneous impeachment may have in light of the record as a whole, and tends to discourage making motions to exclude impeachment evidence solely to "plant" reversible error in the event of conviction.

In the instant case no reversible error occurred because, although Mr. Armer was unable to question potential jurors regarding sentencing, he was not sentenced by the jury. As in *Clinkscale* v. *State* and *Smith* v. *State*, it would be pure speculation for us to attempt to weigh any possible harm suffered by Mr. Armer as a result of the alleged error. It is entirely possible that, even if Mr. Armer had been allowed to voir dire the jurors and then decided to submit the case to the jury for sentencing, the jury would have exacted the same or greater punishment than that given by the trial court. It is also wholly conceivable that, had Mr. Armer not waived jury sentencing, the jury may have given a lighter sentence than the trial court despite the excluded voir dire questioning. Moreover, when Mr. Armer waived jury sentencing, he failed to indicate that he was doing so as a result of the excluded voir dire. Mr. Armer has not shown prejudice, therefore we affirm his convictions.

Affirmed.

PITTMAN, J., concurs.

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

MELVIN MAYFIELD, Judge, dissenting. The point raised in this appeal is actually a new point even though on the surface it may not appear to be new. The question presented is linked to Ark. Code Ann. § 16-97-101 (Supp. 1993) which provides for a bifurcated trial procedure in jury trials on felony charges. In summary, as pertains to this appeal, this statute provides that after the jury has found a defendant guilty, it shall then hear additional evidence, if any, relevant to sentencing, and then retire and

determine the sentence; however, with the agreement of the prosecution and consent of the court the defendant may waive jury sentencing and let the court impose sentence.

This procedure was enacted into law by Acts 551 and 535 of 1993, and became effective on January 1, 1994, and shall expire on June 30, 1997. The appellant in this case was tried, found guilty, and sentenced in May of 1994, so this procedure applied in this case. *See Williams* v. *State*, 318 Ark. 846, 887 S.W.2d 530 (1994). He was found guilty of possession of a controlled substance with intent to deliver and possession of drug paraphernalia and was sentenced to four years on each charge, with the sentences to run concurrently. The judgment and commitment order show that these crimes are Class C felonies, and under Ark. Code Ann. § 5-4-401(a)(4) (Repl. 1993) the maximum sentence on each is ten years.

Appellant's sole argument on appeal is that his voir dire of the jury was improperly limited by the trial judge. His brief shows (and the State concedes) that during voir dire the appellant's attorney stated to the court that he wanted to ask the prospective jurors some questions about sentencing, and the trial judge said that counsel could only inquire whether any member of the panel would be uncomfortable with sending the defendant to the penitentiary for the maximum of ten years if they found him guilty. The judge clearly said, "that's all I am going to permit on the issue of punishment." Defense counsel then told the judge that he "would ask further questions," but would proffer them later "if you don't want me to do it right now — " and the judge cut him off by again stating, "That's all I'm going to permit on this voir dire."

Later, after all the evidence had been presented in the guilt phase of this bifurcated trial, appellant's counsel moved for a directed verdict on both charges. The judge overruled the motion, and counsel then proffered for the record the questions he wanted to ask the jury on voir dire. Generally, the questions would have asked the prospective jurors if they would automatically give the maximum sentence just because the charge was a drug offense; whether their attitude was to lock up and throw the key away; would they consider a fine or did they think prison was the only alternative; did they believe in individualized penalties based upon the facts and circumstances in each particular case; and

whether they thought first offenders should be treated differently than multiple offenders.

The court then instructed the jury, and after deliberation, the jury returned a verdict of guilty on each charge. The court then advised the appellant that he had the right to proceed to the second phase of trial with jury sentencing or waive jury sentencing. Counsel stated that they would waive jury sentencing and leave that matter to the court, and upon the appellant's confirmation of that decision, the judge sentenced appellant to four years on each count, to run concurrently.

Appellant cites the case of *Smith* v. *State*, 33 Ark. App. 52, 800 S.W.2d 440 (1990), where this court, sitting en banc, reversed and remanded because the trial court abused its discretion in refusing to allow appellant to ask on voir dire whether the prospective jurors thought they could identify black persons as well as they could identify white persons; how they would feel if they were on trial by a courtroom full of black people; and whether they could give equal weight to the testimony of a black witness who testified differently than a white witness. Our opinion there noted the case of *Cochran* v. *State*, 256 Ark. 99, 505 S.W.2d 520 (1974), and its statement that in many instances an attorney decides "whether to use a peremptory challenge not so much on what a venireman may say, but on how he says it." And we reversed in the *Smith* case saying, "we do not hold that the appellant had a right to ask all three questions which were disallowed by the trial judge" but "only hold that the questioning regarding racial bias was insufficient to focus the attention of prospective jurors to any racial prejudice they might entertain."

In the instant case, the appellant also cites us to the case of *Tobar* v. *State*, 874 S.W.2d 87 (Tex. App. 1994), where the court held it was error to refuse the appellant the right to ask the jury panel on voir dire, "What is your particular theory of punishment and what should be its purpose?" We are also cited to *Morgan* v. *Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed. 2d 492 (1992) where the Court reversed because the trial judge would not allow the voir dire question of whether the jury would vote for the death penalty regardless of the facts. And we are cited to *People* v. *Oliver*, 637 N.E.2d 1173 (Ill. App. 1994), where the court said in reversing a conviction:

> [P]rejudice and bias are deep running streams more often than not concealed by the calm surface stemming from an awareness of societal distaste for their existence. Extended and trial-delaying interrogation may not pierce the veil, yet a few specific associational questions as a maieutic process may indicate the dormant seeds of prejudice, preconceived and unalterable concepts or other nonfairness disqualifications. The result may not reach the stage of being a basis for cause challenge but could well, because of an abundance of counsel caution, bring about a peremptory challenge which an omniscient eye would have known should have been exercised.

In the instant case, the State simply argues that the appellant suffered no prejudice by the trial court's ruling because the "appellant waived sentencing by the jury and requested that the trial court impose a sentence." The majority opinion agrees with the State and says, "we need not address the merits of Mr. Armer's argument because any possible prejudice against Mr. Armer was removed when he waived jury sentencing and was sentenced by the trial court." The appellant says that he waived jury sentencing because "he was faced with the prospect of having jurors who were inclined to sentence him to the maximum sentence, even though he was a drug user with no prior drug convictions." Thus, he argues, he was "presented with a catch-22 situation." He also points out that he exercised only one of the eight peremptory jury strikes and, therefore, could have excused other jurors if their answers appeared adverse to appellant's best interest in regard to sentencing.

I agree with appellant's argument. The clear implication of the majority opinion is that the only way the appellant could preserve error for our review would be to let the jury determine the sentence. I do not believe the appellant should be relegated to such a draconian choice in order to preserve the point for an appeal to which he has as "a matter of right." *See Schalchin* v. *State*, 317 Ark. 644, 885 S.W.2d 1 (1994). Also, the position taken by the majority clearly demonstrates its failure to appreciate what is involved here. In all criminal prosecutions the accused has the right to trial by an "impartial jury" under the Constitution of the United States and the Constitution of the State of Arkansas. *See* U.S. Const. amend. VI; Ark. Const. art. 2, § 10.

See also Schalchin v. *State, supra.* Not only that — but the very statute which provides for the bifurcated trial procedure employed in this case, Ark. Code Ann. § 16-19-101(5) (Supp. 1993), provides:

> (5) After a jury finds guilt, the defendant, with the agreement of the prosecution and the consent of the court, may waive jury sentencing, in which case the court shall impose sentence.

Thus, the appellant here had the right under the above statute to have his sentence fixed by the jury. The majority opinion agrees that "the purposes of voir dire examination are to discover if there is any basis for challenging for cause and to gain knowledge for the intelligent exercise of peremptory challenges." But the majority opinion is wrong in suggesting that the situation here is analogous to that in *Smith* v. *State*, 300 Ark. 330, 778 S.W.2d 947 (1989), where the court said it was adopting prospectively a rule to require that for a defendant to raise and preserve for review a claim of improper impeachment with prior conviction, the defendant must actually testify. The court said in *Smith* that this rule will keep the defendant from obtaining a ruling on a motion *in limine* on the basis that if the impeachment evidence of a prior conviction is allowed the defendant will not testify but then deciding whether to testify based upon the ruling on his previous motion. The court said its newly adopted rule would avoid "gamesmanship between the State and the defendant."

However, under the existing law unless — *before* voir dire of the jury panel — each side makes an irrevocable election to waive jury sentencing each side must exercise its right to voir dire the jury panel before the trial begins. This is, of course, obvious because Ark. Code Ann. § 16-19-101(5) provides that it is only "with the agreement of the prosecution and the consent of the court" that the defendant may waive jury sentencing. Therefore, unless it is known before the jury is selected *that it will not* fix the sentence, either side cannot truly exercise its right to voir dire the jury in regard to matters that are proper to be known in regard to sentencing by the jury.

Here, it is clear that the trial judge would let the appellant's attorney make only one inquiry of the jury panel before the jury was selected. The judge said the attorney could ask "whether any

member of the jury panel would be uncomfortable sending this person to the penitentiary if found guilty for the maximum amount of ten years." I do not think, and the majority opinion does not reach that point, that this one question is sufficient for a party to properly exercise its right of voir dire. This is not to say that each question proffered by the appellant should be allowed. The majority opinion sets them out and surely number 5, "Do the jury members believe in individualized penalties based upon the facts and circumstances of each case" is a proper question to ask on voir dire.

As to the State's argument that "the appellant suffered no prejudice because the trial court did not impose the maximum sentences on appellant," I would simply reply that four years in prison seems rather prejudicial to me. We should remember that the question is not whether the judge was prejudiced against the appellant but whether the appellant's right to have his sentence fixed by the jury was prejudiced by the judge's error in not letting the defendant properly voir dire the jury. I say it was, and we should reverse.

Under the statutory law in effect at the time this case was tried, I think the trial court erred in refusing to let the appellant ask, at least, question number 5 before the jury was selected.

I would reverse and remand.

JENNINGS, CJ., and COOPER, J., join this dissent.

Franklin HARPER *v.* HI-WAY EXPRESS

CA 94-1245 912 S.W.2d 21

Court of Appeals of Arkansas
En Banc
Opinion delivered December 20, 1995

George Bailey, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Franklin Harper sustained a compensable back injury while unloading a truck for appellee Hi-Way Express on January 2, 1992. Temporary total disability benefits and certain medical expenses were paid through May 25, 1992, at which time Hi-Way Express terminated compensation. Mr. Harper contended that he was entitled to additional temporary total disability benefits through September 7, 1993, and that he had a permanent impairment of either 5% or 10% to the body as a whole. In addition, he sought wage-loss disability in the amount of 50%. The Commission denied Mr. Harper's claim in its entirety, finding that he failed to prove any entitlement to temporary total disability benefits beyond May 25, 1992. The Commission also ruled that any impairment rating was not supported by objective and measurable findings as required by Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1993), and that as a result Mr. Harper was not entitled to compensation based on his alleged permanent impairment or for wage-loss disability. For reversal, Mr. Harper argues that the Commission's denial of benefits for a permanent impairment is not supported by substantial evidence and resulted from a misapplication of the law. In addition, he contends that as a result of this erroneous ruling the Commission erred in refusing to consider wage-loss disability.

When reviewing decisions from the Workers' Com-

pensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

Mr. Harper's first argument on appeal attacks the Commission's determination as to permanent impairment, and relies upon the opinions of Drs. Ronald Harris and Barry Cutler. Dr. Harris treated Mr. Harper and opined that he suffered from a 10% disability, while Dr. Cutler assigned a 5% permanent impairment rating. The examination conducted by Dr. Cutler included a positive straight leg raise. The examination conducted by Dr. Sheldon Meyerson, a neurosurgeon who reported to Dr. Harris, also included a positive straight leg raise. Mr. Harper asserts that these opinions were based upon objective and measurable findings and should have been accepted by the Commission.

The applicable portion of Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1993) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." In *Taco Bell* v. *Finley*, 38 Ark. App. 11, 826 S.W.2d 313 (1992), this court interpreted the language of the statute and determined that the word "objective" meant based on observable phenomena or indicating a symptom or condition perceived as a sign of disease by someone other than the person afflicted. In *Reeder* v. *Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992), we held that "determination" as used in the statute refers to the Commission's determination of physical impairment and that the statute prohibits such a determination unless the record contains supporting "objective and measurable physical or mental findings."

In the case at bar, the Commission (which adopted the ALJ's opinion as its own) concluded that Mr. Harper failed to

prove by a preponderance of the credible medical evidence that he is entitled to permanent partial disability benefits or wage-loss benefits. It is not clear as to what the findings of the Commission were which could constitute a basis for this conclusion. The portion of the ALJ's opinion which addresses permanent disability benefits quotes from two medical reports. The first, written by Dr. Cutler on September 7, 1993, stated the following:

> If I must give a percentage of rating, in view of the paucity of objective findings, I would give him a 5 percent rating.

The other medical report was prepared by Dr. Harris on November 5, 1993, and stated:

> Mr. Harper remains totally disabled for his previous occupation as a truck driver as well as any non-sedentary work that requires no bending, lifting, pulling or pushing. He has approximately 10% disability to the body as a whole, accounting for his low back limitation and pain.

The ALJ then concluded with this statement:

> After reviewing the other medical documents and in considering the provisions of A.C.A. § 11-9-704(c)(1), I find that the ratings assigned to the claimant by Dr. Cutler and Dr. Harris are not based upon objective and measurable findings.

A fair reading of this sentence is that the Commission disregarded the reports and opinions of these medical doctors because the Commission does not consider positive straight leg raises to constitute objective physical findings. If this is what the Commission did, it is in error. We held in *Taco Bell* v. *Finley, supra*, that "observations made by a doctor as a result of range of motion tests qualify as 'objective physical findings'." Although the Commission may have intended to mean something other than what we have interpreted its statement to say, we can arrive at no other reasonable interpretation.

We hold only that Ark. Code Ann. § 11-9-704(c)(1) does not require that either the opinion of Dr. Cutler or Dr. Harris be disregarded by the Commission. This case must be remanded to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I concur in the majority's decision to remand this case back to the Commission. However, I believe that the case should be remanded back for the Commission to make specific findings of fact upon which it relied in making its decision.

Here, the Commission affirmed the administrative law judge's decision, adopting it as its own. The ALJ denied benefits quoting Dr. James Cutler as saying:

> If I must give a percentage rating in view of the paucity of objective findings, I would give him a 5 percent rating.

The ALJ then quoted a medical report prepared by Dr. John Harris:

> Mr. Harper remains totally disabled for his previous occupation as a truck-driver as well as any non-sedentary work that requires no bending, lifting, pulling or pushing. He has approximately 10% disability to the body as a
>
> whole, accounting for his low back limitation and pain.

The ALJ concluded with this statement:

> After reviewing the other medical documents and in considering the provisions of Ark. Code Ann. § 11-9-704(c)(1), I find that the ratings assigned to the claimant are not based upon objective and measurable findings.

The Commission's duty is to translate the evidence on all issues before it into findings of fact. *Sanyo Manufacturing, Inc.* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). Although the Commission may specifically adopt the findings of fact made by the ALJ, here the ALJ failed to make the necessary findings of fact to allow review. The ALJ merely summarized the testimony of two witnesses and referred to "other" unidentified evidence. I am unable to determine, as the majority does, the factual basis upon which appellant's claims were denied. There may be evidence in the record to support the Commission's decision; however, neither the ALJ nor the Commission made the required find-

ings. The majority concedes this fact in its statement "[i]t is not clear as to what the findings of the Commission were which could constitute a basis for this conclusion." However, the majority reviews the case de novo and makes findings of fact that the Commission disregarded "the reports and opinions of these medical doctors because the Commission does not consider positive straight leg raises to constitute objective physical findings." This court does not review decisions of the Commission *de novo* on the record or make findings of fact. *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1987). Therefore, I would reverse and remand this case to the Commission to make those specific findings of fact upon which it relied in making its decision.

BUDGET TIRE & SUPPLY CO., et al.
v. FIRST NATIONAL BANK of Fort Smith, et al.

CA 94-504 912 S.W.2d 938

Court of Appeals of Arkansas
En Banc
Opinion delivered December 20, 1995

[redacted]

[redacted]

[redacted]

Robert R. Cloar, for appellant Budget Tire & Supply Co.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *Ray R. Fulmer, II*, for appellee First National Bank of Fort Smith.

Pryor, Barry, Smith, Karber & Alford, by: *Gregory T. Karber*, for apppellees Greg Whitsitt, Donna Whitsitt, and Greg's Exxon, Inc.

Jones, Gilbreath, Jackson & Moll, by: *Mark Moll*, for appellee Mosley Abstract Company.

Hal Davis, for appellees Glenn Viefhaus and Jessamine Viefhaus.

Donald K. Campbell, III, P.A., and *Kemp, Duckett, Hopkins & Spradley*, by: *Hal Joseph Kemp, P.A.*, for appellee First Commercial Bank, N.A.

JUDITH ROGERS, Judge. We must dismiss this appeal from the Sebastian County Chancery Court because appellants, Budget Tire & Supply Co., John A. Griffin, and Stephen Griffin, failed to file a timely notice of appeal as required by Rule 4(a) of the Arkansas Rules of Appellate Procedure.

On February 14, 1994, appellants filed their notice of appeal "from the final order entered in this case on January 26, 1994." The January 26, 1994, order, however, is simply the chancellor's confirmation and approval of a commissioner's report of the sale of real and personal property in foreclosure. An order approving the commissioner's deed and a commissioner's bill of sale were also entered on that date.

The sale of this real and personal property followed the entry of a consent decree on November 16, 1993, in an action styled *First National Bank of Fort Smith, Arkansas* v. *Larry C. Womack, Jr., et al.*, which had been consolidated with appellees Greg and Donna Whitsitt's lawsuit against appellants in the

chancery court. The November 16, 1993, consent decree gave judgment in rem against real and personal property securing a debt owed appellee First National Bank by Larry and Deborah Womack and appointed the clerk as commissioner to sell the property in satisfaction of the judgment. The personal property to be sold included "all equipment existing or acquired and proceeds located at business conducted at 3019 Grand Avenue and 4601 Rogers Avenue." Ownership of a few of the items of personal property included in the consent decree was, however, also determined in a previous decision styled "Findings of Fact and Conclusions of Law" entered on April 30, 1993, wherein the chancellor determined the relative rights of appellants and the Whitsitts.

On appeal, appellants' argument is based upon alleged errors in the April 30, 1993, decision. In order to determine whether appellants should have filed a notice of appeal within thirty days of the April 30, 1993, decision, it is first necessary to decide whether that decree was a final order.

For an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Lamb* v. *JFM, Inc.*, 311 Ark. 89, 91, 842 S.W.2d 10 (1992). For a judgment to be final, it must be of such a nature as to not only decide the rights of the parties, but to put the court's directive into execution, ending the litigation or a separable part of it. *Pledger* v. *Bosnick*, 306 Ark. 45, 49, 811 S.W.2d 286 (1991), *cert. denied*, 113 S.Ct. 3034 (1993); *Mid-State Homes, Inc.* v. *Beverly*, 20 Ark. App. 213, 214, 727 S.W.2d 142 (1987); *Smith* v. *Flash TV Sales & Serv., Inc.*, 17 Ark. App. 185, 188, 706 S.W.2d 184 (1986). A final judgment or decision is one that finally adjudicates the rights of the parties, putting it beyond the power of the court which made it to place the parties in their original positions; it must be such a final determination of the issues as may be enforced by execution or in some other appropriate manner. *Estate of Hastings* v. *Planters and Stockmen Bank*, 296 Ark. 409, 412, 757 S.W.2d 546 (1988). *Accord Pledger v. Bosnick, supra.*

Arkansas Rule of Civil Procedure 54(b) provides that an order which disposes of fewer than all of the claims or all of the parties is not a final appealable order unless the court makes an express determination that there is danger of hardship or injus-

tice which an immediate appeal would alleviate. *See Freeman* v. *Colonia Ins. Co.*, 319 Ark. 211, 213, 890 S.W.2d 270 (1995). Under Rule 54, the trial court may direct the entry of final judgment with regard to fewer than all of the claims or parties by an express determination that there is no just reason for delay. *Maroney* v. *City of Malvern*, 317 Ark. 177, 181, 876 S.W.2d 585 (1994). The fundamental policy behind Rule 54(b) is to avoid piecemeal appeals. *Cortese* v. *Atlantic Ritchfield*, 320 Ark. 639, 640, 898 S.W.2d 467 (1995). An order merely announcing the court's determination of the rights of the parties, but contemplating further judicial action, is not appealable. *Bonner* v. *Sikes*, 20 Ark. App. 209, 213, 727 S.W.2d 144 (1987). An order dismissing certain parties but leaving other claims and parties remaining in a case is also not a final order. *Otter Creek Mall* v. *Quinn Cos., Inc.*, 297 Ark. 136, 137, 759 S.W.2d 810 (1988).

In *State Farm Mutual Automobile Insurance Co.* v. *Thomas*, 312 Ark. 429, 431-32, 850 S.W.2d 4 (1993), the supreme court stated:

> This court will only review final matters on appeal. Ark. R. App. P. 2(a). A judgment which adjudicates fewer than all of the claims of all of the parties does not terminate the action. Ark. R. Civ. P. 54(b). The failure to comply with Rule 54(b) by the absence of an order adjudicating the rights of all parties is a jurisdictional issue that we are obligated to raise on our own. *Smith* v. *Leonard*, 310 Ark. 782, 840 S.W.2d 167 (1992); *Quality Ford, Inc.* v. *Faust*, 307 Ark. 371, 820 S.W.2d 61 (1991). We have held in this regard that for an order to be final and appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Id.* It is not enough to dismiss some of the parties; the order must cover all parties and all claims in order to be appealable. *See Parks* v. *Hillhaven Nursing Home*, 309 Ark. 373, 829 S.W.2d 419 (1992).

Clearly, the April 30, 1993, decision was not a final order for purposes of appeal because all of the claims in the consolidated case involving the bank's action against the Womacks, including those relating to the items of personal property, remained for trial.

Next, it is necessary to determine whether the November 16, 1993, consent decree was final for purposes of appeal. An order determining the parties' rights and obligations in a foreclosure action but failing to provide for execution and indicating that further judicial action would be necessary before foreclosure and execution would be ordered is not a final appealable order. *Scaff* v. *Scaff*, 5 Ark. App. 300, 302, 635 S.W.2d 292 (1982). A decree granting foreclosure and placing the court's directive into execution is, however, final and appealable. *McAdams* v. *Automotive Rentals, Inc.*, 319 Ark. 254, 256, 891 S.W.2d 52 (1995). An appeal taken from a decree granting foreclosure must be taken within thirty days from the date that order is entered. *Id.* A decree confirming a foreclosure sale is also a separate, final, and appealable order, and a notice of appeal must also be given within thirty days of that decree. *Id.* In *Scherz* v. *Mundaca Investment Corp.*, 318 Ark. 595, 597, 886 S.W.2d 631 (1994), where the supreme court held that a decree was final because it placed the court's directive into execution and no additional orders were required prior to a foreclosure sale. In *Scherz*, the court relied upon *Alberty* v. *Wideman*, 312 Ark. 434, 437, 850 S.W.2d 314 (1993), where the supreme court stated:

> Thus, a decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under Ark. R. App. P. 2(a)(1). When there is such an order, a certification under Rule 54(b) is not necessary. Such a rule is very practical. Under it, the parties are able to appeal an order directing a judicial sale and have a determination of the issues at that time. If it were otherwise, and there were questions about the validity of sale, prospective bidders might not bid a reasonable amount because there would be a cloud over the matter, and no one wants to buy a lawsuit. Those issues can be finally determined under our procedure. As a separate matter, any questions concerning the validity and adequacy of the bids might be heard on a later appeal from the order confirming title.

In *Watanabe* v. *Webb*, 320 Ark. 375, 379-80, 896 S.W.2d 597 (1995), the supreme court followed *Scherz* v. *Mundaca Investment Corp., supra*, and *Alberty* v. *Wideman, supra*, in dismissing an appeal from a foreclosure decree because the appellants' notice

of appeal was not filed within thirty days. The court did, however, hear that part of the appeal dealing with the trial court's confirmation order, from which a timely notice of appeal was filed.

Rule 4(a) of the Arkansas Rules of Appellate Procedure controls the time in which an appeal must be filed and provides: "Except as otherwise provided in subsequent sections of this rule, a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from." The failure to file a timely notice of appeal deprives this court of jurisdiction. *Williams* v. *Hudson*, 320 Ark. 635, 636, 898 S.W.2d 465 (1995); *Rossi* v. *Rossi*, 319 Ark. 373, 374, 892 S.W.2d 246 (1995).

We therefore hold that the April 30, 1993, decision was not a final order from which appellants should have filed a timely notice of appeal. However, the only issues for which a timely appeal has been taken relate to the confirmation and approval of the report of the foreclosure sale, and appellants have not alleged error in that sale. Because appellants did not file their notice of appeal within thirty days from the entry of the November 16, 1993, consent decree, which was final and appealable, this court lacks jurisdiction to hear this appeal.

Dismissed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to dismiss the appeal in this case. Even a casual reading of the majority opinion discloses that "when the appellate court thinks the trial court's judgment is a final, appealable order" is not a very satisfactory guide for the trial attorney to use in making the decision of when to file a notice of appeal. Especially is this true since the premature filing of the notice of appeal no longer allows it to become effective when the appealable order is actually filed.

Therefore, I think the better course to follow is to decide the case on its merits if the question of when to appeal is doubtful. And I think there is enough doubt here that I am not willing to simply *say* that all of the appellants' argument is based upon alleged errors in the April 30, 1993, decision and therefore dismiss the appeal.

QUALITY TRUCK EQUIPMENT COMPANY
v. Mike LAYMAN

CA 94-1243 912 S.W.2d 18

Court of Appeals of Arkansas
Division I
Opinion delivered December 20, 1995

Snellgrove, Laser, Langley & Lovett & Culpepper, by: *Todd Williams*, and *Barrett & Deacon*, by: *D. P. Marshall, Jr.*, for appellant.

Woodruff & Huckaby, P.A., by: *Arlon L. Woodruff*, for appellee.

JUDITH ROGERS, Judge. Quality Truck Equipment Company has appealed from a judgment in the amount of $54,750.00 entered against it for appellee, Mike Layman d/b/a Layman Seed Company, following a jury verdict. The only issue on appeal is whether the jury verdict is supported by substantial evidence. We hold that it is and affirm.

In 1990, appellee leased a Stahly field applicator, which is a large air-activated fertilizer applicator, from Mid-South Ag Equipment, Inc., in Memphis, Tennessee. The lease included an option to purchase the machine. Appellant assembled the chassis for the machine and sold it to Mid-South Ag, which, in turn, added the spray system and leased the truck to appellee. Appellee used the applicator without mishap during the spring and fall of 1990 and exercised the option to purchase in December of that year.

In the spring of 1991, the applicator began breaking down with severe problems in the rear axle. The first time that the rear axle broke, appellee submitted an accident claim to his insurance carrier, which ultimately paid that repair bill. When appellee notified Mid-South of the breakdown, Gary Reed, Mid-South's representative, directed appellee to tow the applicator to Jonesboro, Arkansas. Mr. Reed assured appellee that the problem would be taken care of and that the applicator was covered by warranty. It took one day to get the truck towed to Jonesboro. Appellee was told that he would be contacted the next day, but the time passed. After eight or nine days, appellee was told of the rear axle problem. Appellee again contacted Mid-South and was advised to turn it in on the insurance policy and not to worry about it. The applicator was down for repairs twelve to thirteen days.

Appellee used the applicator on June 6, 1991. After covering 40 acres, the rear end failed again. Appellee called Town & Country, the company which warranted the repaired machine. A person was sent to the location and the rear end was pulled and taken to Jonesboro. The next day a new rear end was installed.

In April of 1992, while on a job, the applicator began making a loud popping sound in the rear end. Appellee tried to drive the truck to Lepanto, which is three miles away, but the rear end exploded. That day, which was a Sunday, he called J&O Diesel. J&O came that afternoon and pulled the rear end out of the applicator. The rear end was taken to Truck Parts Specialists in Memphis, which rebuilt it the next day. Monday night J&O and appellee met on the side of the road where the applicator had been sitting and put the truck back together. Appellee called Mid-South on Monday and made them aware of the problem.

In October of 1992, the applicator broke down again. J&O diesel came again and pulled the rear end out while the machine sat in the field. The rear end was taken to Truck Parts, where it was rebuilt.

The applicator went down again in November of 1993, and appellee called Diesel Services Unlimited, a repair shop in Hughes.

In May 1994, appellee sued appellant and Mid-South for breach of warranty. Mr. Layman testified that he lost a total of

$68,775.00 in business because of the rear end failures over a four-year period and expended a total amount of $9,961.51 in repairs. The jury awarded appellee $73,000.00 and apportioned fault as follows: Mid-South Ag — 15%; appellant — 75%; appellee — 10%. The circuit judge then entered judgment for appellee against appellant in the amount of $54,750.00.

On appeal, appellant argues that the verdict is not supported by substantial evidence because appellee did not mitigate his damages. Appellant admits that appellee incurred damages for the repairs but argues that it should be liable for no more than eight days of lost profits at $2,450.00 per day because appellee did not promptly repair the field applicator each time that it broke down.

On appeal from a jury verdict, this court views the evidence in the light most favorable to the appellee and affirms if that evidence is substantial. *Little Rock Wastewater Util.* v. *Larry Moyer Trucking, Inc.*, 321 Ark. 303, 311, 902 S.W.2d 760 (1995). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable and material certainty; it must force the mind to pass beyond suspicion or conjecture. *Minerva Enters., Inc.* v. *Howlett*, 308 Ark. 291, 295, 824 S.W.2d 377 (1992).

When a party seeks to recover anticipated profits under a contract, he must present a reasonably complete set of figures to the jury and not leave the jury to speculate as to whether there could have been any profits. *Little Rock Wastewater Util.* v. *Larry Moyer Trucking, Inc.*, 321 Ark. at 312. Lost profits must be proven by evidence showing that it was reasonably certain the profits would have been made had the other party carried out its contract. *Id.* While lost profits will not be allowed as damages if the trier of fact is required to speculate as to the fact or amount of profits, less certainty is required to prove the amount of lost profits than is required to show that profits were lost. *Tremco, Inc.* v. *Valley Aluminum Prods. Corp.*, 38 Ark. App. 143, 145, 831 S.W.2d 156 (1992). Loss may be determined in any manner which is reasonable under the circumstances. *Id.* at 146. With respect to breach of warranty, lost profits are held to be foreseeable if they are proximately caused by and are the natural result of the breach. *Id.* The question of damages, both as to measure and

amount, is a question of fact. *Carter* v. *Quick*, 263 Ark. 202, 210, 563 S.W.2d 461 (1978).

The doctrine of avoidable consequences limits the amount of recoverable damages. It provides that a party cannot recover damages resulting from consequences which he could have avoided by reasonable care, effort, or expenditure. *Beardsley* v. *Pennino*, 19 Ark. App. 123, 126, 717 S.W.2d 825 (1986). It has often been stated that a plaintiff must use due diligence to minimize his damages and must do nothing to aggravate his loss. *Gibson* v. *Lee Wilson & Co.*, 211 Ark. 300, 310-11, 200 S.W.2d 497 (1947). "[W]here a party is entitled to the benefit of a contract, and can save himself from loss arising from a breach thereof at a small expense or with reasonable exertions, it is his duty to do so, and he can only recover such damages as he could not thereby prevent." *Curtner* v. *Bank of Jonesboro*, 175 Ark. 539, 541, 299 S.W. 994 (1927). *Accord Wisconsin & Ark. Lumber Co.* v. *Scott*, 167 Ark. 84, 87, 267 S.W. 780 (1924).

The determination of whether one has acted reasonably in mitigating damages is, however, a question of fact. *Crain Indus., Inc.* v. *Cass*, 305 Ark. 566, 577, 810 S.W.2d 910 (1991); *Western Grove School Dist.* v. *Strain*, 288 Ark. 507, 510, 707 S.W.2d 306 (1986); *Coomer* v. *National Credit Corp.*, 282 Ark. 299, 301, 668 S.W.2d 521 (1984). *See also Harris Constr. Co.* v. *Powers*, 262 Ark. 96, 105, 554 S.W.2d 332 (1977); *Beardsley* v. *Pennino*, 19 Ark. App. at 127. Further, the burden of proving that a plaintiff could have avoided some or all of the damages by *acting* prudently rests on the defendant, not only on the question of damages for failure to avoid harmful consequences, but also on the question of the amount of damage that might have been avoided. *Id.* at 126-27.

Appellant argues that the rapidity with which appellee managed to have the equipment repaired the second and third times that it broke down shows that appellee unreasonably delayed getting the equipment repaired the first, fourth, and fifth times it broke down. Appellant also argues that the testimony of its witness, Mike Kelly, that repairs usually take about half a day, supports its position. Appellee points out, however, that Mike Kelly admitted that he had never encountered any axle problems as were involved in this case and did not testify as to how long it

should take to repair such problems. In fact, appellant offered no testimony in support of its defense that appellee took too long in repairing the equipment.

Further, appellee testified that, when the equipment first broke down, he contacted Mid-South's agent, Gary Reed, who told him to tow the truck to the nearest authorized dealer, which was in Jonesboro, and that appellee reluctantly followed Mr. Reed's advice. According to appellee, when he got the truck to Jonesboro, Mr. Reed informed him that he had talked to Terry Stahly, appellant's owner, who said that the truck was under warranty and that there would be no problem. Appellee said that, although Mr. Reed told him that they would get back with him "tomorrow," the problem dragged on.

We are troubled by the scant amount of evidence submitted by appellee regarding the reasonableness of his efforts to promptly repair the equipment. Nevertheless, the burden rested upon appellant to prove that appellee could have avoided most of these damages, and this it failed to do. Accordingly, we hold that the amount awarded by the jury is supported by substantial evidence.

Affirmed.

PITTMAN and MAYFIELD, JJ., agree.

Gertie GUTHRIE *v.* TWIN CITY BANK

CA 95-591 913 S.W.2d 792

Court of Appeals of Arkansas
En Banc
Opinion delivered December 20, 1995

Jones & Tiller Law Firm, by: *L.H. Mahon*, for appellant.

Claibourne W. Patty, Jr., and *Thurman & Sims*, by: *John B. Thurman, Jr.*, for appellee.

PER CURIAM. Appellee Twin City Bank moves to dismiss the appeal filed by Gertie Guthrie on the basis that her notice of appeal was untimely.

Appellant's action against appellee was dismissed by summary judgment filed in the trial court on April 13, 1994. On April 25, 1994, appellant filed a motion for reconsideration requesting the trial court to set aside the summary judgment and proceed to trial. We characterize this motion as a motion for a new trial. Although a motion for a new trial must be filed not later than

ten days after entry of judgment, appellant's motion was timely because the intermediate Saturday and Sunday are excluded from computation pursuant to Ark. R. Civ. P. 6(a). Appellant amended her motion on May 9, 1994.

The trial court heard arguments on appellant's motion twice, apparently on June 24, 1994, and again on November 18, 1994. By order filed December 5, 1994, the court denied appellant's motion. Appellant filed notice on December 21, 1994, that she was appealing the December 5, 1994, order.

Appellant's motion for new trial was deemed denied not later than June 8, 1994, thirty days after her amendment to the motion was filed.[1] Ark. R. App. P. 4(c). Consequently, appellant was required to file her notice of appeal from the summary judgment within thirty days after June 8, 1994, the date her motion was deemed denied. Her notice of appeal was not filed until December 21, 1994, and was untimely.

Appellant's notice of appeal specifically recited that she was appealing the order dated December 5, 1994, which denied her motion for new trial. Even if the time for appealing an order denying a motion for new trial, as distinguished from the judgment which is sought to be set aside, does not begin to run from the date it is "deemed denied" under Ark. R. App. P. 4(c), the trial court lost jurisdiction, or the power, to act on the motion thirty days after it was filed, *Ark. State Hwy. Comm.* v. *Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992); *Wal-Mart Stores, Inc.* v. *Isely*, 308 Ark. 342, 823 S.W.2d 902 (1992), long before the court entered its order denying appellant's motion.

If we characterized appellant's motion for reconsideration as something other than a motion for a new trial, or one of the other post-judgment motions listed in Ark. R. App. P. 4(b), then the "deemed denied" provision of Ark. R. App. P. 4(c) would not apply. However, if appellant's motion for reconsideration does not fall within the categories listed in Ark. R. App. P. 4(b), it must necessarily be viewed as an Ark. R. Civ. P. 60(b) motion seeking to correct an error or mistake or to prevent a miscar-

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[1]We need not now decide whether an amendment to a motion for a new trial extends the time for filing a notice of appeal, because appellant's notice was untimely even if the amendment did extend the time.

riage of justice.[2] If so characterized, appellant's position is not improved because the trial court would have lost jurisdiction to set aside or modify the April 13, 1994, summary judgment ninety days after its entry in filing. *Griggs* v. *Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993); *Parks Leasing, Inc.* v. *Bray Corp.*, 43 Ark. App. 74, 861 S.W.2d 116 (1993); *Story* v. *Spencer*, 41 Ark. App. 27, 847 S.W.2d 48 (1993). Consequently, even with this characterization, we could not consider the merits of the trial court's order denying appellant's motion for reconsideration because it was entered by the trial court without jurisdiction.

This appeal is dismissed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I do not believe that the appeal in this case should be dismissed. Before discussing my reasons, it is important to clearly state the factual situation presented.

This case started with the appellant filing a complaint in circuit court in which she alleged that the appellees, individually and collectively, failed to exercise due diligence in keeping with their legal responsibilities to prepare a trust agreement that would vest the corpus of the trust in the appellant upon the death of the settlor of the trust. The complaint alleged that the appellees' actions constituted willful and wanton negligence and asked for judgment against the appellees, jointly and severally, in the amount of $1,330,000, plus interest and costs. The appellees denied the allegations and also pleaded *res judicata.*

Subsequently, the appellees filed a motion for summary judgment which the court granted by an order entered April 13, 1994. The order held that the appellant's claims were barred by *res judicata* because they were "adjudicated, or should have been adjudicated" by a chancery court judgment entered on October 2, 1992, between the same parties. More specifically, the order stated that the present suit in circuit court was based upon a tort claim which was not alleged in the chancery court case, but which could have been adjudicated in that case "under the cleanup doctrine."

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[2]There is no allegation that the motion asserted any of the grounds listed in Ark. R. Civ. P. 60(c) for setting aside the subject judgment.

No notice of appeal was filed from the order granting the summary judgment, but the appellant filed a motion for reconsideration on April 25, 1994, and an amendment to that motion on May 9, 1994. After a hearing, the trial court entered an order on December 5, 1994, denying the motions, and on December 21, 1994, the appellant filed a notice of appeal. The majority opinion treats these motions as if they were motions for new trial and holds that they were "deemed denied" under Ark. R. App. P. 4(c), and at the end of thirty days after the last one was filed. Therefore, the majority holds that the notice of appeal had to be filed within thirty days of June 8, 1994, long before December 21, 1994.

It is true that under Ark. R. App. P. 4(b) the time for filing a notice of appeal is extended by the timely filing of a motion for judgment notwithstanding the verdict under Ark. R. Civ. P. 50(b), of a motion to amend the court's finding of fact or to make additional findings under Ark. R. Civ. P. 52(b), or of a motion for new trial under Ark. R. Civ. P. 59(b). However, I do not think, that the appellant's motion for reconsideration (and/or the amendment thereto) constitutes a motion listed in Appellate Procedure Rule 4(b).

The motions for reconsideration allege that the court's order granting summary judgment was in error in holding that appellant's tort claim was barred by the judgment in the chancery court suit because the chancery judge did not act on that claim but granted the appellant's specific request to preserve the "tort issues" for future litigation and told the appellant that she could file a lawsuit on the tort issues in circuit court. Therefore, in her motion to reconsider, the appellant said that the circuit court should "reverse" its order granting summary judgment in favor of the appellees.

In *Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993), the appellant was convicted of manufacturing marijuana and he filed a "motion to set aside the judgment" alleging that it was inconsistent with the verdict. Although the Arkansas Supreme Court affirmed the trial court's judgment, the supreme court did not agree with the State's argument that because the appellant's notice of appeal was filed before the order denying the motion was entered the court was without jurisdiction to hear the appeal.

Noting the provisions of Appellate Procedure Rule 4(b), which are the same as those involved in the instant case, our supreme court said: "As the 'motion to set aside the judgment' is not analogous to any of the motions listed in Ark. R. App. P. 4(b), we decline to say we lack jurisdiction of this appeal." 313 Ark. at 685, 858 S.W.2d at 73.

The supreme court reaffirmed the *Enos* holding in *Fuller* v. *State*, 316 Ark. 341, 872 S.W.2d 54 (1994), where a motion for reconsideration was filed which contended that the trial court should reconsider its decision finding the appellant guilty of second degree assault and find him not guilty of the charge. The Arkansas Supreme Court noted that the State had raised the point that the appeal was not properly before the court because of the application of the provisions of Appellate Procedure Rule 4 and said:

> We conclude that Fuller's post-judgment motion is not analogous to a motion under Rule 50(b), Rule 52(b), or Rule 59(b). We have said that we will look to see what a motion actually is in determining Rule 4 questions such as the one before us. *See Jackson* v. *Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992) (per curiam). It is clear, however, that Fuller's motion is not a request for amended or additional findings or for a new trial. Nor does it qualify as a request for a judgment NOV, which contemplates a jury verdict.

316 Ark. at 344, 872 S.W.2d at 55.

Based upon the above decisions, I cannot agree that appellant's motion for reconsideration in the instant case should be treated as a motion referred to in Appellate Procedure Rule 4(b). However, the majority opinion says that even if we do not treat the appellant's motion for reconsideration as one of the motions referred to in Appellate Procedure Rule 4(b), then it must fall within the categories listed in Ark. R. Civ. P. 60(b). This is true, the majority opinion says in a footnote, because no grounds are asserted for it to fall under 60(c). And if it falls under 60(b), the majority says that *Griggs* v. *Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993), and cases following its reasoning, hold that the trial court would have lost jurisdiction to set aside or modify the April 13, 1994, summary judgment order ninety days after its entry.

There are two answers to that view. The first one is that the appellant claims that such a view violates the Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States of America. Her response to the motion to dismiss makes this allegation and shows a copy served on the Arkansas Attorney General. A memorandum brief is filed by the appellant in support of this position.

I do not know whether this argument is valid, but the second answer to the view of the majority opinion is that it requires us to overlook the fact that the trial court ruled on the merits of the motion for reconsideration and did so after the appellees, without any objection to the trial court's authority or jurisdiction to make the December 5 order, had filed a response to the motion for reconsideration and had engaged in a hearing on the motion which has been transcribed and consists of 150 pages in the transcript. In almost every comparable situation the appellate courts in Arkansas would hold that a party who participated in obtaining an order without making any objection to the trial court's authority to make the order is either estopped to raise that issue on appeal or has waived the right to question it. *See Hodges* v. *Gray*, 321 Ark. 7, 18, 901 S.W.2d 1, 6 (1995) (trial court's finding of contempt affirmed; arguments based on lack of notice and opportunity to defend not addressed because they were not made in the trial court; even constitutional arguments are waived if not raised at trial). *See also Mikkelson* v. *Willis*, 38 Ark. App. 33, 826 S.W.2d 830 (1992) (trial court granted new trial and appellant chose not to appeal that order and submitted his case to the court for another trial; appellant held bound by his election and was limited on appeal to issues decided at the subsequent trial). And as to estoppel, the Arkansas Supreme Court held in *Crain* v. *Foster*, 230 Ark. 190, 322 S.W.2d 443 (1959), that one who accepts the benefit of a decree is estopped to deny its validity; and in *Mason* v. *Urban Renewal*, 245 Ark. 837, 840, 434 S.W.2d 614, 615 (1968), the court said, "One who shares in the fruits or benefits of a judgment or decree is estopped to challenge its validity, *even where there is a want of jurisdiction of the subject matter.*" (Emphasis added.)

Therefore, I do not think it is necessary or proper to dismiss this appeal without a decision on the merits, and for the reasons stated above, I dissent from the majority decision.

Eddie HILLIGAS *v.*
POTASHNICK CONSTRUCTION COMPANY

CA 95-108 912 S.W.2d 945

Court of Appeals of Arkansas
En Banc
Opinion delivered December 20, 1995

David Earl Smith, for appellant.

Friday, Eldredge & Clark, by: *Chuck Gschwend*, for appellee.

PER CURIAM. In this case the appellant has filed a notice of appeal from the Arkansas Workers' Compensation Commission, but the record on appeal was tendered to the clerk of this court nine days too late. Appellant has now filed a motion for a rule on the clerk to require the record to be filed, and the attorney for appellant has admitted that the failure to file the record on time was the attorney's fault.

This is not a reason that will allow the record in a civil case to be filed out-of-time. This reason is allowed in criminal cases because "to do otherwise would be a denial of a constitutional right; that is, the right to effective assistance of counsel." *Moore* v. *State*, 267 Ark. 548, 592 S.W.2d 450 (1980). *See also Kennedy* v. *State*, 321 Ark. 564, 905 S.W.2d 70 (1995). In *Davis* v. *C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981), we discussed this point and pointed out that the Arkansas Supreme Court had allowed records to be filed out-of-time in civil cases only in the "most extraordinary circumstances." We have consistently applied this rule in appeals from the Workers' Compensation Commission since the *Davis* v. *C & M Tractor* case. *See Novak* v. *J.B. Hunt Transport*, 48 Ark. App. 165, 892 S.W.2d 526 (1995), where we refused to allow a record from the Workers' Compensation Commission to be filed because it was tendered one day past the filing deadline.

In *Novak* and some other cases, the failure to timely file the record has resulted from the fact that the appellant has relied upon the Commission, which prepares the record, to file it within the required period of ninety days from the filing of the notice of appeal. We noted in *Evans* v. *Northwest Tire Service*, 21 Ark. App. 75, 728 S.W.2d 523 (1987), that Arkansas Supreme Court and Court of Appeals Rule 26 had been amended to allow a dated and certified copy of an order of an administrative agency or commission to be filed in the appellate court asking that a writ of certiorari be issued directing that the record on appeal be filed in the appellate court. Rule 26 also provided that the writ would order that the record be completed and filed within thirty days. That Rule is now Rule 3-5.

Therefore, in appeals from the Workers' Compensation Commission it would be wise to routinely make a calendar note to file a petition for writ of certiorari about three weeks

before the record is required to be filed in the appellate court. For practical purposes this is the only way to extend the filing deadline in those cases since the method for obtaining an extension of time as provided in Arkansas Rule of Appellate Procedure 5(b) does not apply to appeals from the Commission. *See Evans, supra.*

The motion for rule on the clerk in the instant case must be denied.

[redacted]

[redacted]