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Richard McJUNKINS *v.* Teresa (McJunkins) LEMONS

CA 94-1242 913 S.W.2d 306

Court of Appeals of Arkansas
Division I
Opinion delivered January 17, 1996
[Petition for Rehearing denied February 14, 1996.]

J. Larry Allen, for appellant.

Wright, Chaney, Berry & Daniel, P.A., by: *Travis R. Berry*, for appellee.

JUDITH ROGERS, Judge. Richard McJunkins appeals from an order of the chancery court of Grant County. For reversal, appellant argues that the court erred in dismissing his counterclaim against the appellee, Teresa (McJunkins) Lemons, and in setting child support at $75.00 weekly.

There are some unusual circumstances in this case. After the parties' divorce in 1987, appellant married Debbie Lemons, and appellee married Debbie's former husband, Charles Lemons. In 1989, the parties' chancery case was transferred to the chancery court of Clark County and was combined with the Lemons's divorce and custody case. When the parties' case was transferred back to Grant County shortly before appellee filed her petition in October 1993, two of the parties' children were living with appellee and her husband in Iowa, and one was living in Arkansas with appellant and his wife. Also living with appellant and his wife was a child born to the wife and appellee's husband. There is testimony in the record indicating that appellee's husband was ordered by the chancery court of Clark County to pay $75.00 weekly for the support of his son living with appellant and his wife. Appellee's petition filed in the Grant County court stated that appellant had been ordered to pay $50.00 weekly child support, and she sought an increase in child support. Appellant then filed his counterclaim.

Appellant first argues that the court erred in dismissing his counterclaim. Appellant stated in his counterclaim that when he was awarded custody of the parties' three minor children pursuant to the parties' divorce in 1987, appellee was ordered to notify him if she obtained employment. He sought a finding of contempt pursuant to appellee's alleged failure to comply with the order and child support arrearages. In dismissing appellant's counterclaim, the chancellor stated: "Said counterclaim was based on the parties' decree of divorce entered herein. That the Court specifically rules that said decree was barred by a subsequent order which was entered into in the Chancery Court of Clark County, Arkansas."

On appeal, appellant argues that once the case was transferred back to Grant County, the chancery court of that county "had full jurisdiction and should have considered and heard appellant's counterclaim." We cannot reach this issue. Appellant's abstract in general is very limited, and although appellant has attempted to abstract the divorce decree, he has failed to abstract any portion of the decree ordering appellee to notify appellant of her employment. An abstract of the court's order, which appellant claims appellee violated, is necessary to a resolution of this matter, and therefore appellant's abstract is fla-

grantly deficient on this point.

In any event, appellant misinterprets the chancellor's ruling on this issue. The chancellor clearly found that appellant's claim was barred pursuant to Rule 13 of the Arkansas Rules of Civil Procedure, which addresses compulsory counterclaims. Rule 13(a) provides that a pleading shall state as a counterclaim any claim, which at the time of the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Here, the chancellor noted that proceedings in the Clark County court occurring after the divorce decree barred appellant from bringing his counterclaim against appellee in regards to this particular issue relating to the divorce decree. The reason for Rule 13 is to require parties to present all existing claims simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances. *In Re: Estate of Goston* v. *Ford Motor Co.*, 320 Ark. 699, 705-06, 898 S.W.2d 471 (1995); *Bankston* v. *McKenzie*, 288 Ark. 65, 67, 702 S.W.2d 14 (1986); *Golden Host Westchase, Inc.* v. *First Serv. Corp.*, 29 Ark. App. 107, 117, 778 S.W.2d 633 (1989).

Appellant next argues that the chancellor erred in failing to refer to the child-support chart in setting child support. He contends that child support should have been set at the minimum level required of an unemployed person. Appellee responds that because appellant has failed to provide a transcript of a hearing held March 4, 1994, "which related to the obligation to pay support," the appeal should be dismissed. The decision on child support and the amount thereof, however, was made pursuant to a hearing on May 4, 1994, and the issue before the court relates to whether the chancellor referred to the child-support chart at that time. We therefore find no merit in appellee's contention and address appellant's argument.

The controlling law on what is required to determine the amount of child support is set forth in Ark. Code Ann. § 9-12-312(a)(2) (Repl 1993):

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

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

Reference to the chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by express findings stating why the chart amount is unjust or inappropriate. *See Black* v. *Black*, 306 Ark. 209, 214, 812 S.W.2d 480 (1991). The chancellor, in his discretion, is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case. *Jones* v. *Jones*, 43 Ark. App. 7, 12, 858 S.W.2d 130 (1993). The amount of child support lies within the sound discretion of the chancellor, and this court will not disturb the chancellor's finding absent an abuse of discretion. *Id.*

Appellant admitted at trial that although two of the children had lived with appellee for the past three years, he had not paid child support. He testified that he is employed by his wife's company, D.L. McJunkins Trucking. Appellant stated that he works forty to fifty hours a week driving a truck owned by his wife. He further stated that he receives no cash wages, receives no W-2 forms, and files no federal or state income tax returns. He testified that he has no assets and that his wife pays for all of his living expenses. Appellant stated that he did not receive a salary "[b]ecause I didn't want nothing no more." His wife, Deborah McJunkins, testified that appellant "did not want to own anything again because he had lost all his trucks and everything through the divorce."

At the conclusion of the hearing, the chancellor stated:

> Now, it is quite obvious concerning the support, first, that you work and you work regular and you work 40 to 50 hours a week by your own testimony and you choose not to be paid directly. So you have income. You just don't have it funneled through your pocketbook. It goes through the business, which is in your wife's name. There's one

> child here, two children there. And if you set one off against the other one, I'm setting it at $75.00 a week, exactly what's coming down here. I mean, that's the only fair way to do it.

The court's order simply stated that support was set at $75.00 per week.

Here, appellant denied having any income, and the chancellor's comments at the conclusion of the trial make it clear that he set the amount of support at $75.00 weekly because that is the amount that appellant and his wife receive from appellee for the support of one child. Because two of the parties' children live with appellee and one lives with appellant, the court in essence was setting support for only one child. The court obviously imputed income to appellant, and it was not incumbent on the chancellor to specify the amount of income he imputed to appellant, particularly in the absence of a request to do so by the parties. *See* Ark. R. Civ. P. 52; *Miles* v. *Southern*, 297 Ark. 274, 280-B, 763 S.W.2d 656 (1987) (supplemental opinion denying rehearing); *First Nat'l Bank* v. *Higginbotham Funeral Serv., Inc.*, 36 Ark. App. 65, 70, 818 S.W.2d 853 (1991). It was incumbent on the chancellor, however, to refer to the family-support chart. He failed to make any reference to the chart in his comments or the order. Because it would be difficult to say that the chancellor actually referred to the amount set by the chart pursuant to the imputed income, we agree with appellant that the award, as now made, cannot stand.

On appeal, this court has the power to decide chancery cases *de novo* on the record before it, but in appropriate cases, we also have the authority to remand such cases for further action. *Roland* v. *Roland*, 43 Ark. App. 60, 67, 859 S.W.2d 654 (1993). Therefore, we remand this case to the chancellor for a determination of child support in accordance with Section 9-12-312 and the guidelines for child support enforcement. Because this case requires a remand, we leave it to the discretion of the chancellor to decide whether a more detailed explanation will suffice to meet the requirements of the supreme court's *per curiam* order on child-support guidelines and Section 9-12-312(a)(2).

Affirmed in part; reversed and remanded in part.

PITTMAN and MAYFIELD, JJ., agree.

Larry JACKSON *v.* STATE of Arkansas

CA CR 95-44 914 S.W.2d 317

Court of Appeals of Arkansas
Division I
Opinion delivered January 31, 1996

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

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

JOHN MAUZY PITTMAN, Judge. Larry Jackson appeals from his conviction at a jury trial of possession of a controlled substance (cocaine) with intent to deliver, for which he was sentenced to ten years in the Arkansas Department of Correction with six-and-one-half years suspended. Appellant contends only that the trial court erred in admitting into evidence cash and a pager that were found on his person at the time of his arrest. We affirm.

The evidence indicates that on the afternoon of September 29, 1993, Officer Rick Dunaway of the North Little Rock Police Department observed several young people standing in front of a house. Officer Dunaway testified that the people appeared to be under the age of twenty-one and that at least one of them was drinking beer. The officer stopped his car and walked toward the group. As he approached, he saw appellant throw a matchbox to the ground. The officer retrieved the matchbox, which contained thirteen rocks of what was later determined to be crack cocaine. Appellant was arrested and searched. The search revealed that appellant also possessed $121.00 in cash and a pager.

Appellant contends on appeal that the trial court erred in admitting testimony about the money and pager. He contends that the evidence was irrelevant in the absence of some additional testimony explaining for the jury "why and how" the pager and money would prove that appellant intended to deliver the crack cocaine. We find no error.

As noted above, appellant was charged with possession of cocaine with intent to deliver. A person's intent can seldom be shown by direct evidence and, therefore, must often be inferred from other facts and circumstances. *Johnson* v. *State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982). " 'Relevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401 (emphasis added). The trial court is

vested with wide discretion in determining whether evidence is relevant, and the exercise of that discretion will not be reversed in the absence of abuse. *Pyle* v. *State*, 314 Ark. 165, 862 S.W.2d 823 (1993).

We think that the questions presented in this case should be approached in a manner similar to that used by the supreme court in *Freeman* v. *State*, 258 Ark. 496, 527 S.W.2d 623 (1975). In *Freeman*, the court was faced with the similar issue of whether the trial court had properly admitted as relevant two handguns found in the appellants' possession immediately after the alleged delivery of heroin for which they were arrested and tried. In holding that evidence of possession of the weapons was properly admitted as circumstantial evidence of the appellants' intent, the court stated:

> We would think it to be a matter of common knowledge that narcotics transactions are frequently attended by morally offensive circumstances, and immoral participants. The possession of two pistols by the appellants at the time such transaction was allegedly attempted would appear to have some probative force on the question of what business the men were about.

Freeman, 258 Ark. at 502, 527 S.W.2d at 626-27 (footnote omitted). Subsequently, the supreme court has quoted with approval the Eighth Circuit Court of Appeals' declaration that "a firearm . . . [is] generally considered a tool of the narcotics dealer's trade." *Hendrickson* v. *State*, 316 Ark. 182, 190, 871 S.W.2d 362, 366 (1994) (quoting *United States* v. *Brett*, 872 F.2d 1365, 1370 (8th Cir. 1989)).

Here, we likewise think it to be matters of common knowledge that illicit drug sales are ordinarily cash transactions and that those involved in selling drugs frequently do not conduct such transactions from an ordinary storefront during regular business hours, but instead must be reached at various times and locations. Therefore, we think that the trial court could properly conclude that this eighteen-year-old defendant's possession of a significant amount of cash and a pager was relevant to the question of his intent to deliver the cocaine that he possessed. Indeed, our supreme court has held that possession of a large sum of money is relevant to the question of delivery of a con-

trolled substance, *see Pyle* v. *State*, *supra*, and the Eighth Circuit Court of Appeals has recently stated that a pager, like a firearm, is "a tool of the drug trade," *United States* v. *Barth*, 990 F.2d 422, 425 (8th Cir. 1991). From our review, we cannot conclude that the trial court abused its discretion in admitting the challenged evidence in this case.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Walter C. MOORE *v.* Phil Price, DIRECTOR

E 94-231 914 S.W.2d 318

Court of Appeals of Arkansas
En Banc
Opinion delivered January 31, 1996

Walter C. Moore, pro se.

Allan F. Pruitt, for appellee.

JUDITH ROGERS, Judge. This is an appeal from a decision of the Board of Review disqualifying appellant from receiving unemployment compensation benefits. The Board held that appellant was discharged for misconduct connected with the work. This appeal comes to us without benefit of briefs being filed by either party. We affirm.

Both the Agency and Appeal Tribunal in this case denied benefits based on a finding that appellant had voluntarily quit his job without good cause connected with the work pursuant to Ark. Code Ann. § 11-10-513(a)(1) (1987). The Board also denied benefits, but modified the appeals referee's decision by finding that the appellant had been discharged for misconduct pursuant to Ark. Code Ann. § 11-10-514(a)(1) (1987). In *Linscott* v. *Director*, 9 Ark. App. 103, 653 S.W.2d 150 (1983), the Agency and Appeal Tribunal determined that the appellant was disqualified for the receipt of benefits for misconduct connected with the work. The Board of Review, however, denied benefits on the ground that appellant had voluntarily quit his job without good cause connected with the work. We agreed with the argument presented in the appeal and held that it was a denial of due process for the Board to disqualify a claimant on a different ground than that contained in the hearing notice. Consequently, we reversed and remanded for further proceedings.

Here, as in *Linscott*, the Board denied benefits on a ground different from that of the Agency and Appeal Tribunal. However, the decision in *Linscott* does not compel reversal of this case. Fundamental to the decision in *Linscott* was the appellant's claim that the issue to be litigated was confined to the charge of misconduct, and his assertion that he and his legal representative had only prepared and presented evidence pertinent to that one issue. Under those circumstances, we determined that the injection of the voluntary quit issue for the first time in the Board's decision effectively deprived the appellant of notice and the opportunity to defend and be heard on the alternative ground raised by the Board. By contrast, the record in this case demonstrates that the Board's finding that appellant was discharged for misconduct was within the framework of contested issues. The hearing notice plainly states that the "primary issue(s) involved

are: Whether the claimant voluntarily left, was discharged or suspended from last work and whether the circumstances of the separation entitle the claimant to unemployment benefits within the meaning of Ark. Code Ann. 11-10-513 and/or 514." Indeed, the appeals referee framed the issues as such in her opening remarks. Furthermore, it was the appellant's position that he had been discharged as reflected by his testimony: "I was laid off. I did not quit." In sum, the record, without any doubt, reflects that the issues before the Board were whether appellant was entitled to benefits, or whether he was disqualified for either voluntarily quitting without good cause or for being discharged for misconduct. On this record, it cannot plausibly be argued that the Board exceeded the parameters of the defined issues. This case simply does not present a situation where the Board disqualified a claim for benefits on a ground unanticipated by the claimant. Therefore, we hold that appellant was not denied due process.

After a careful and thorough review of the record, we find no error in the Board's decision and further conclude that it is supported by substantial evidence.

Affirmed.

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

MELVIN MAYFIELD, Judge, dissenting. I respectfully dissent from the majority opinion in this case. In the first place, I think the decision of the Board of Review was reached under circumstances that were fundamentally unfair. And in the second place, I think that in pro se appeals to this court from the Board of Review it is our duty to see that the Board complies with the rules of procedure and decides the cases in keeping with the law and the evidence.

The first reason for my dissent is based on the failure of the majority opinion to apply the law in *Linscott* v. *Director*, 9 Ark. App. 103, 653 S.W.2d 150 (1983), to the present case. In *Linscott* the appellant's claim for unemployment benefits was denied by the agency on the basis that he had been discharged for misconduct in connection with his work. His disqualification was affirmed upon appeal to the Appeal Tribunal. However, on appeal to the Board of Review, the Board denied benefits on the

basis that he had voluntarily quit his job without good cause connected with the work. On appeal to this court, we held:

> Here, the injection of the voluntary quit issue for the first time in the board's decision effectively denied appellant proper notice of the disputed issue, the opportunity to subpoena witnesses on his behalf, to confront and cross-examine adverse witnesses, and to present rebuttal evidence on the voluntary quit issue. In short, appellant was denied the minimum requirements of due process of law . . . .

9 Ark. App. at 105-06, 653 S.W.2d at 151 (citations omitted).

Linscott was a unanimous decision of this court, sitting en banc. The decision was later cited by a Missouri Court of Appeals, along with cases in other states, to support that court's holding that "many other courts" have found that this situation violates due process. *See Wilson* v. *Labor and Industrial Relations Commission*, 693 S.W.2d 328, 330 (Mo. App. 1985). Moreover, one of the Oregon cases cited in *Linscott* has been cited again by that court as authority for holding that an appeal to an Appeals Board must be remanded where the Board decided the case on an issue presented for the first time in the appeal to the Board. *See Cascade Corporation* v. *Employment Division*, 800 P.2d 305 (Or. App. 1990). And the Vermont case cited in *Linscott* has been relied upon for another similar decision in that state. *See Call* v. *Department of Employment Security*, 138 Vt. 52, 411 A.2d 1336 (1980).

However, the majority opinion in the present case seeks to distinguish this case from *Linscott* and the rule followed in the above cited cases, on the basis that "the record in this case demonstrates that the Board's finding that appellant was discharged for misconduct was within the framework of contested issues." I must, with due respect, vigorously disagree.

The record in this case shows that on February 8, 1994, the appellant filed a "Claimant's Statement Concerning Discharge" in which he stated that he had received a letter discharging him from work and was told his discharge would be considered a voluntary quit. On February 18, 1994, the employer wrote a letter to the Employment Security Division stating that appellant

"voluntarily quit without attributable cause to the employer," and the "Employer Response" dated February 21, 1994, to the agency request for additional information states that the appellant "quit."

The agency cited Ark. Code Ann. § 11-10-513(a)(2) (1987), under which one who voluntarily leaves work is disqualified for benefits until he has 30 days covered employment, and denied appellant benefits on the basis that he left work without good cause connected with the work. Appellant appealed to the Appeal Tribunal and the Appeal Tribunal held that "the determination of the Agency denying the claimant benefits under Ark. Code Ann. § 11-10-513 is affirmed."

The appellant then appealed to the Board of Review, and the Board's opinion cited a different section of the Employment Security Law — Ark. Code Ann. § 11-10-514(a) (1995 Supp.) — and held that the appellant was disqualified "for misconduct" under that section and could not receive benefits "for a period of eight (8) weeks, of unemployment . . . ." I think it is clear that the Board was wrong in using section 11-10-514 to find appellant guilty of misconduct when he had only been charged with having voluntarily left work without good cause under section 11-10-513.

At the hearing on appellant's claim, the referee said that "the Agency determined this to be a voluntary quit," and Robert Gant, who appeared in behalf of the employer, testified they considered that appellant "voluntarily quit." Gant testified further that Ron Arney verbally offered appellant light duty work on August 20 and appellant refused.

Appellant testified that he did not quit; that he was "laid off"; and that "they told me that I quit July 15th, which was incorrect." Appellant said that he had injured his knee, but he did not remember being offered "light duty"; that Arney told him that "he would get back" with him; and the "next thing I know, I got a letter stating that I had voluntarily quit." He testified further that he never told anyone he quit; that "all of a sudden" he no longer had a job; and that he wanted to know why he was "terminated."

Under these circumstances, I do not believe the misconduct

issue was "within the framework of contested issues." The employer continuously claimed that the appellant had voluntarily quit. The agency held that the appellant had voluntarily quit. The issue that was contested before the referee was whether the appellant had voluntarily quit. And the referee affirmed the agency finding that the appellant had voluntarily quit. Therefore, I believe that the only issue before the Board of Review was whether the appellant had voluntarily quit. When the Board departed from that issue and found that the appellant had been discharged for misconduct, that determination was made on an issue which was not before the agency, the Appeal Tribunal, or the Board.

It is true that Ark. Code Ann. § 11-10-525(a)(2) (1987) provides:

> Upon review on its own motion or upon appeal, and on the basis of evidence previously submitted in the case, or upon the basis of such additional evidence as it may direct to be taken, the board may affirm, modify, or reverse the findings and conclusions of the appeal tribunal or may remand the case.

The above provisions were quoted in *Brown Jordan* v. *Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ark. App. 1980) (at that time the provisions were Ark. Stat. Ann. § 81-1107(d)(3) (Repl. 1976)), and the court said, "we interpret 'previously submitted' to mean submitted in some previous hearing at which either party would have an opportunity to question or support." 269 Ark. at 583, 600 S.W.2d at 23. Because the "additional evidence" in that case had not been "previously submitted" the court reversed the decision of the board and "remanded for the taking of further evidence." We amplified the "additional evidence" point in *Jones* v. *Director*, 8 Ark. App. 234, 650 S.W.2d 601 (1983), when we said, "We think that phrase means additional evidence directed to be taken at some hearing, conducted by the board or someone designated by the board, at which witnesses could appear and opportunity for cross-examination could be afforded." 8 Ark. App. at 236, 650 S.W.2d at 603. The action of the Board in allowing or refusing to allow additional evidence to be taken is discretionary, and we have affirmed the Board where it remanded the case to the Appeal Tribunal for the taking of addi-

tional evidence, *Edwards* v. *Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988), and where it refused to remand for that purpose, *Arkansas Game & Fish Commission* v. *Director*, 36 Ark. App. 243, 821 S.W.2d 69 (1992). The controlling issue, however, in the decision to remand for the taking of additional evidence is stated in *Maybelline Co.* v. *Stiles*, 10 Ark. App. 169, 174, 661 S.W.2d 462, 465 (1983), as whether "each side has notice of and a fair *opportunity* to rebut the evidence of the other party."

So, in the case at bar, the issue is the right to a fair hearing before the Board of Review. The Appeal Tribunal found that appellant voluntarily quit work without good cause, but on appeal the Board found that he was discharged for misconduct. There was no way for him to know that the Board was even going to consider the misconduct issue. The specific question involved is whether it was fundamentally fair for the Board to consider the misconduct issue without notice to appellant and opportunity to produce evidence on that issue.

It is therefore important to note that the petition for review in this court was filed on September 19, 1994. Although it was filed on a form designed for appeal to the Board of Review, it was filed within 20 days after it was mailed on August 31, 1994, and qualified as a timely petition for appeal to this court. There is a question on the form asking if the appellant has additional evidence to present, and it was checked by appellant. This certainly indicates that after he received the Board's decision mailed to him on August 31, 1994, the appellant wanted to present additional evidence on the misconduct issue. As we did in *Linscott*, and as other courts have done in similar situations, I think we should remand this case to the Board of Review with directions that it either decide the single issue of whether the appellant voluntarily quit work without good cause in connection with that work, or that the Board remand to the Appeal Tribunal for it to allow the parties an opportunity to introduce additional evidence and cross-examine witnesses on the discharge-for-misconduct issue. This will enable the Board to apply the law set out in Ark. Code Ann. § 11-10-525(a)(2) (1987) in a way that is fundamentally fair to all parties.

I also want to comment upon a point that was mentioned in our discussion in conference on this case. That point concerns

our duty and responsibility in unemployment compensation cases appealed pro se to the Arkansas Court of Appeals. Before this court was established and started to function in July of 1979, these cases were appealed to the circuit court and then to the Arkansas Supreme Court. Section 2 of Act 252, enacted by the Arkansas General Assembly in 1979, codified as Ark. Code Ann. § 11-10-529 (1987), provided for appeals from the Board of Review to be made directly to the Arkansas Court of Appeals, and the Emergency Clause of that Act stated that "the present system of judicial review has not been adequate to insure the prompt and final determination of the issues involved in such matters and, as a result, there has been undue delay to the prejudice of the State and the parties involved." A computer printout reveals that almost 200 such published cases have been appealed to the Court of Appeals in the almost 16 years since this court was established. From 1935 to 1979, a total of almost 45 years prior to the establishment of this court, a computer printout reveals less than 100 such cases were appealed from circuit court to the Arkansas Supreme Court. Therefore, it would seem that the direct appeal to this court has also provided a more accessible method for the review of the decisions of the Board of Review.

From the beginning of the operation of this court we have recognized that most of the appeals from the Board of Review were pro se, and we have treated these appeals in a somewhat different manner. For example, in *Hunter* v. *Daniels*, 2 Ark. App. 94, 616 S.W.2d 763 (1981), we said:

> We first consider the Board's Rule 9 argument. While it is true that Hunter's brief did not meet the requirements of that rule, we hold that it was not required to do so. Our Rule 7(a) requires the filing of briefs in all civil cases. We have not heretofore treated petitions for review from the decisions of the Board of Review as cases in which briefs are required. It is rare when appellants in unemployment benefit cases are represented by counsel. It is even rarer when we are furnished anything other than a transcript of the proceedings on appeal. We have not treated unemployment benefit cases the same as other civil cases under our Appellate Rules. Accordingly, we hold that appellant is not required to

> abstract the record under Rules 7 or 9 of this court since this appeal involves an unemployment benefit case.

2 Ark. App. 96, 616 S.W.2d 765.

In *Smith* v. *Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982), a pro se case, we stated in a supplemental opinion on denial of rehearing as follows:

> In Employment Security cases, the Board of Review, appeal tribunals and special examiners are not bound by common law, statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before such hearing officers must be conducted in a manner to ascertain the substantial rights of the parties. Ark. Stat. Ann. § 81-1107(d)(4) (Repl. 1976) [now Ark. Code Ann. § 11-10-526(a)(1) (1987)]. Here, the appellee urges us to adopt a rule which would impose a duty on the parties to formally interpose objections in order to preserve a record for an appeal to this Court. If we required the parties to formally object or proffer evidence to preserve a record for appeal purposes, we would be imposing a duty contrary to that envisioned by the Arkansas General Assembly when it enacted § 81-1107(d)(4). We believe it would be fundamentally unfair to adopt such a rule in this type case. Parties in Employment Security cases are rarely represented by attorneys, and the records on review often reflect clear errors that affect the substantial rights of the parties. The appeal tribunals and the Board of Review are mandated by law to conduct hearings and appeals in a manner to ascertain the substantial rights of the parties. If they fail to do so, we have a correlative duty to remand these cases to require it to be done.

6 Ark. App. at 339A-339B, 642 S.W.2d at 322.

In summary, I do not think that the legislature provided for this court to have direct appeals from the Board of Review in order for us to simply summarily affirm the Board's decision. I think we are supposed to give these cases a close inspection whether or not the parties are represented by attorneys. My view in this regard was ably expressed in a dissent written by now Justice David Newbern when he was a judge on the Court

of Appeals:

> It is apparently easy for an administrative agency to slip, unintentionally, into a high-handed and complicated procedure in administering the "governmental largess." Over ten years ago, Charles Reich made the point, with some erudition, that we must treat this form of wealth distribution as affecting and effecting property rights. Reich, The New Property, 73 Yale L.J. 733 (1964). We are hearing ESD appeals mostly in cases where citizens can afford to appeal pro se only. Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word.
>
> In 1937 Chief Justice Charles Evans Hughes said:
>
> > The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play. [*Morgan* v. *United States*, 304 U.S. 1, 58 S.Ct. 999 (1937)].
>
> Forty two years would seem enough to have learned this small lesson. . . .

Teegarden v. *Director*, 267 Ark. 893, 899, 591 S.W.2d 675, 678 (Ark. App. 1979).

I would reverse the decision of the Board of Review and remand this case for further proceedings in keeping with this dissent, and I regret that the appellant, who is without the bene-

fit of legal counsel, will probably not know that he can file a petition asking that the Arkansas Supreme Court review the decision reached by the three to three vote of the judges who participated in this case.

BRUCE T. BULLION, Special Judge, dissenting. I agree with Judge Mayfield and Judge Robbins and vote to reverse and remand this case to the Board of Review so it may arrange for a hearing upon the question of work-related misconduct. I remain neutral of opinion on that portion of Judge Mayfield's written dissent regarding the intention of the General Assembly concerning our review in unemployment compensation appeals. I would reverse and remand this case to the Board of Review.

ROBBINS, J., joins in this opinion.

Dennis MILLIGAN and Water Treatment Services
v. Chris BURROW, Director of Arkansas State
Building Services, et al.

CA 95-53 914 S.W.2d 763

Court of Appeals of Arkansas
Division II
Opinion delivered January 31, 1996

Satterfield Law Firm, by: *G. Randolph Satterfield*, for appellants.

Winston Bryant, Att'y Gen., by: *Arnold M. Jochums*, Asst. Att'y Gen., for appellees Chris Burrow and Doug Bown.

Winston Bryant, Att'y Gen., by: *Thomas S. Gay*, Senior Asst. Att'y Gen., for appellee Ed Erxleben.

WENDELL L. GRIFFEN, Judge. Dennis Milligan and Water Treatment Services, Inc. ("WTS") brought suit in the Circuit Court of Pulaski County, Sixth Division, the Honorable David Bogard presiding, against defendants Ed Erxleben, Director of the Office of State Purchasing, and Chris Burrow and Doug Bown, employees of Arkansas State Building Services ("SBS"). Milligan and WTS alleged that the defendants wrongfully denied a state contract to Milligan and WTS for the service of water treatment equipment at six state buildings. Milligan and WTS submitted a bid for the contract and insisted they were the low bidders, yet the contract was awarded to a California company. Milligan then contacted one of his state legislators, Representative Mark Riable, who wrote a letter to SBS asking why WTS did not get the job. Bown replied by letter to Milligan and stated that SBS was not bound by the bidding process set forth in the Arkansas Purchasing Law (Ark. Code Ann. §§ 19-11-201—19-11-261 (Repl. 1994)). Bown's letter further stated that SBS was aware of complaints concerning Milligan's service and that price was not the only consideration in awarding the contract.

Milligan and WTS filed suit alleging violations of the Arkansas Purchasing Law, breach of good faith, and tortious interference. Their complaint sought compensatory damages, punitive damages, and costs. Milligan and WTS appeal from the trial court's grant of a motion to dismiss pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

Milligan and WTS raise numerous points on appeal. We address only three: sovereign immunity, exhaustion of administrative remedies, and allowable remedies under the Arkansas Purchasing Law.

The concept of sovereign immunity is well grounded in Arkansas law. Ark. Const. art. 5, § 20; Ark. Code Ann. § 19-10-305(a)(Repl. 1994); *Paige* v. *McKinley*, 196 Ark. 331, 118 S.W.2d 235 (1938). Here, appellants sued three state employees

for acts performed in their official capacities. Although the action was filed nominally against state employees, it is tantamount to an action against the State of Arkansas. *See Beaulieu* v. *Gray*, 288 Ark. 395, 705 S.W.2d 880 (1986). Sovereign immunity, therefore, applies to this case and protects not only the State but its employees as well. Appellants are correct when they assert that the immunity is a qualified one, but they have failed to show facts that would place these state employees outside even a qualified immunity. *Smith* v. *Denton*, 320 Ark. 253, 895 S.W.2d 550 (1995); *Cf. Robinson* v. *Beaumont*, 291 Ark. 483, 725 S.W.2d 839 (1987).

This appeal also fails at a threshold level because Milligan and WTS have failed to exhaust their administrative remedies. The Arkansas Purchasing Law includes a provision that adopts the exhaustion doctrine for disputes arising from bids for state services. Ark. Code Ann. § 19-11-244 (Repl. 1994). We do not decide whether the Arkansas Purchasing Law applies. Appellants chose to bring suit under the Purchasing Law and were bound by the procedural requirements of the statute, but they argue that they fall within a recognized exception to the exhaustion doctrine whereby a litigant need not exhaust administrative remedies where it would be futile to do so or where there was no genuine opportunity to do so. *Arkansas Motor Vehicle Comm'n* v. *Cantrell Marine*, 305 Ark. 449, 808 S.W.2d 765 (1991). Appellants seek refuge under the exception based on an assertion by a state employee (Bown) that the Arkansas Purchasing Law no longer applied to the bid at issue. Appellants were not justified in assuming that Bown's assertion was correct. More specifically, appellants were not justified in further assuming that the purchasing law's dispute resolution process was no longer applicable. Litigants are under at least a minimal duty to investigate the extent of the administrative remedies available to them before resorting to the courts. *See, e.g.*, *Barr* v. *Arkansas Blue Cross & Blue Shield, Inc.*, 297 Ark. 262, 761 S.W.2d 174 (1988).

Finally, even if appellants' action could survive these threshold inquiries, they seek the wrong remedy. The Arkansas Purchasing Law provides for termination of the contract or "other remedies provided by law" if an award is in violation of the law. Ark. Code Ann. § 19-11-247 (Repl. 1994). These

"other remedies" might include an injunction or perhaps mandamus, but a violation of a competitive bidding statute does not give rise to a claim for damages. *Klinger* v. *City of Fayetteville*, 297 Ark. 385, 762 S.W.2d 388 (1994). Appellants' complaint sought compensatory and punitive damages, but failed to seek injunctive relief or mandamus.

Therefore, we agree with the trial court that jurisdiction was lacking due to sovereign immunity. *Pitcock* v. *State*, 91 Ark. 527, 121 S.W. 742 (1909). Jurisdiction was also lacking due to appellants' failure to exhaust administrative remedies. *Barr, supra.* Moreover, appellants' choice of remedy is simply not in accordance with the law. *Klinger, supra.*

Affirmed.

COOPER and STROUD, JJ., agree.

Lindsay M. THOMAS *v.* CITY OF LITTLE ROCK, et al.

CA 94-1049 914 S.W.2d 328

Court of Appeals of Arkansas
Division II
Opinion delivered February 7, 1996

The Gill Law Firm, by: *Victor A. Fleming*, for appellants.

Thomas A. Carpenter, Little Rock City Att'y, by: *Stephen R. Giles*, Deputy City Att'y, for appellee City of Little Rock.

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *James H. Penick, III*, for appellees Amy and Leon Pugh.

Chisenhall, Nestrud & Julian, P.A., by: *Jim L. Julian* and *Janie W. McFarlin*, for appellee Arkansas Power & Light Co.

JOHN E. JENNINGS, Chief Judge. Lindsay and Mary Thomas appeal from an order granting summary judgment in favor of the City of Little Rock and Leon and Amy Pugh. At issue was the Pugh's use of thirty feet of a 150-foot platted alleyway running east and west in block one of Little Rock's Country Club Heights subdivision.

The subdivision was platted in 1912, and the bill of assurances granted to the public "an easement over and upon" the alleys. In 1980 the Thomases purchased property bordering the north boundary of the easternmost 120 feet of the alley. This was the only portion of the alley that had been graded and graveled. The westernmost thirty feet was overgrown with weeds and shrubs.

In 1993 the Pughs bought property abutting the western terminus of the 150-foot alley. They built a parking garage on the northeast corner of their property and, over the objections of the Thomases, cleared the westernmost thirty feet of the alley and began using the alley for primary access to their property.

The Thomases filed suit on November 10, 1993, and amended their complaint on February 2, 1994, alleging that the public's claim to the westernmost thirty feet of the alley became extinguished by common law abandonment. They also sought to quiet title, subject to utilities' easements, to the north five feet of the alley's westernmost thirty feet. The Pughs and the City of Little Rock answered, and both moved for summary judgment, arguing that there was no genuine issue of material fact, and that the issue was whether, as a matter of law, common law abandonment applied to platted and dedicated alleys in municipal subdivisions. The trial court, finding that there were no genuine issues of material fact, granted summary judgment in favor of the Pughs and the City of Little Rock.

Appellants argue two points on appeal:

1. The right of vehicular ingress and egress to the Pugh property over the property in question — if it ever existed — has been abandoned.

2. Vehicular usage of the West-most 30 feet for primary access to the Pugh property is not authorized by the bill of assurance and is not in accordance with applicable city code.

In support of their second argument, appellants note that the Country Club Heights Bill of Assurance reserved to the grantor the right to grant franchises to public utilities for the purposes of laying pipe beneath the alleys. The appellants also note that the Little Rock City Code defines alley as "a permanent public service way which affords only secondary means of access to abutting property." The argument is that the grant to the public "of an easement over and upon the alley" is not sufficiently specific to permit the public to drive a car down the alley.

■ We cannot agree that the dedication to the public of streets and alleys requires an express reference to vehicular usage. Unless there are reservations on the purposes for which a

dedication is made, the public may use dedicated property for any use not inconsistent with the common purposes of the easement. *See Harvey* v. *Bell*, 292 Ark. 657, 732 S.W.2d 138 (1987). Nor do we agree that *Kennedy* v. *Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987), relied upon by the appellants, controls. In *Kennedy*, the supreme court affirmed a chancellor's factual determination as to the scope of an easement. The easement did not appear to have been an alley dedicated for the public's general use, but rather was found by the chancellor to be intended for use as a "jogging trail" by the property owners in the subdivision.

Appellants' primary argument is that the westernmost thirty feet of the alley had been abandoned by the public. We do not agree. Arkansas Code Annotated section 14-301-301 (1987) gives cities of the first class the power and authority to vacate public streets and alleys. Arkansas Code Annotated section 14-301-303 provides, in part, that "no street or alley, or any portion thereof, shall be abandoned or vacated unless there has been filed with the council the written consent of the owners of all lots abutting on the street or alley, or the portion thereof, to be vacated." *See also Jones* v. *American Home Life Ins. Co.*, 293 Ark. 330, 738 S.W.2d 387 (1987). In *Bushmiaer* v. *City of Little Rock*, 231 Ark. 848, 333 S.W.2d 236 (1960), the court noted that then Ark. Stat. Ann. § 19-3831 provided that title to an alley, or any portion thereof, could not be acquired by adverse possession. The court also said:

> "The equitable doctrine of laches cannot be successfully invoked to defeat the right of the city to open the street which was dedicated to that use. . . .
>
> Nor is the city estopped, on account of the inaction of its officers for a long period of time, to proceed to open the street. . . . The owners of lots abutting on the platted street had notice of the dedication, and are presumed to have had knowledge of the city's right to proceed in its own time to open the street. They could therefore, build up no right to continued occupancy of the dedicated strip on account of delay in opening the street to public use."
>
> . . . .

> "[T]he dedication of it as a public way has now become irrevocable, and the city can accept it at anytime. Meanwhile the public has the right to use it, and the plaintiff has no right to obstruct it." [Citations omitted.]

Bushmiaer v. *City of Little Rock, supra.*

Appellants rely on *Bank of Fayetteville* v. *Matilda's, Inc.*, 304 Ark. 518, 803 S.W.2d 549 (1991), for the rule that an easement may be lost by abandonment. But that was a private easement, not a street or alley dedicated for the use of the public. In *Drainage Dist. No. 16* v. *Holly and Roach*, 213 Ark. 889, 214 S.W.2d 224 (1948), the supreme court affirmed a chancellor's finding of fact that a flowage easement for the purpose of the construction and maintenance of a levee had been abandoned by the district. Again, we note that this case did not involve a platted and dedicated street or alley. But *Drainage Dist. No. 16* is distinguishable on another ground: There "[t]he District suffered the appellees to erect buildings of a permanent nature on the old right-of-way." In this regard the case resembles *City of Rochelle* v. *Suski*, 206 Ill. App. 3d 497, 564 N.E.2d 933 (Ill. App. Ct. 1990), also relied upon by the appellants. In that case, where a portion of Suski's trailer park encroached upon a platted street and alley, the Court said:

> Normally, nonuse by a municipality does not constitute an abandonment of a right-of-way. The exception to the above maxim arises when the nonuse is of long standing duration and, in reliance thereon, adjacent owners have made improvements of such a lasting and valuable character as to prevent the assertion by the public body to repossess itself of the road. The extent of the pecuniary loss and sacrifice to the party making the improvement must be great. Abandonment usually requires an affirmative act on the part of the municipality.

Suski, 564 N.E.2d at 938.

■ We need not decide whether a dedicated alley can ever be abandoned except by following the procedures set out by statute. Even if it were possible for the appellants to acquire title to a portion of the alley by way of abandonment, the construction in good faith of valuable improvements upon the alley would be

a prerequisite. There is no contention here that appellants made any such improvements.

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

Affirmed.

ROBBINS and ROGERS, JJ., agree.

Barry JAMES *v.* Leann JAMES

CA 94-1260 914 S.W.2d 773

Court of Appeals of Arkansas
Division II
Opinion delivered February 7, 1996

Michael J. Medlock, for appellant.

Gary R. Cottrell, for appellee.

MELVIN MAYFIELD, Judge. Barry James appeals from an order of the Chancery Court of Crawford County. He contends the trial court erred in awarding judgment for child support arrearage which accrued after the parties' oldest child, Jacy, reached eighteen, and in granting any relief to appellee Leann James because she failed to file any written pleadings asking for relief.

The parties were divorced in July 1987. At that time their three children, Jacy, Ben, and Cody were minors. Appellee Leann James was awarded custody of the children, and the appellant was ordered to pay $450 a month in child support and to maintain medical and hospitalization insurance on the children. On October 8, 1990, the court entered a supplemental order regarding visitation and the matter of claiming the children as income tax exemptions.

On July 8, 1992, appellant filed a statement with the chan-

cery court clerk's office which said that "Jacy James became age 18 of July 5th. I am now stopping child support payments. Based by your pay scale I am to pay 360.00 mo." However, he did not file any motion to modify the divorce decree until May 5, 1994, when he filed a pleading entitled "Motion for Modification" in which he requested that the previous court orders be modified.

Appellee, who lives in Kansas City, Kansas, did not file a response to appellant's motion, but appeared with counsel at the hearing held July 6, 1994.

Appellant testified that since the divorce he kept a policy of medical insurance on the minor children, but he had taken Jacy off the policy despite the fact that Jacy could have been covered at no extra cost. Appellant said he chose not to keep Jacy covered because appellee would not pay $70 a month for his insurance. Appellant testified further that when Jacy turned 18 appellant began paying reduced child support of $360 based upon "the chart" the clerk gave him.

The appellee testified that when she discussed keeping Jacy insured appellant said, "Pay me $80.00 a month and I will keep him on that." She said that she talked with Blue Cross and discovered the insurance was free as long as Jacy was a full-time student. The appellee also testified that appellant quit paying the full $450.00 child support on July 5, 1992.

In an order entered August 31, 1994, the chancellor granted judgment to the appellee in the amount of $2,160.00 for the $90.00 per month for the 24 months of reduced child support paid by the appellant. The chancellor also incorporated the standard order concerning medical and dental expenses, but directed appellant to keep the medical insurance at his place of employment in effect; did not require the appellee to obtain insurance because of the increased cost to her; and directed appellant to carry Jacy on his policy as long as he could do so at no extra cost.

On appeal, appellant argues the chancellor erred in awarding judgment for the arrearage and in granting any relief to the appellee because she failed to file written pleadings asking for relief. He also argues that he owed no obligation for child sup-

port after Jacy reached the age of 18.

Appellant contends Ark. R. Civ. P. 12(a) requires a party to file "his Answer within twenty (20) days after the service of Summons."

Arkansas Rule Civil Procedure 7(a) provides:

> (a) Pleadings Allowed. There shall be a complaint and an answer; a counterclaim; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleadings shall be allowed.

But the appellee was not served with a complaint. The appellant simply filed a "Motion for Modification" requesting that the trial court modify its previously entered orders. Arkansas Rule Civil Procedure 7(b) entitled "Motions and Other Papers," contains no requirement of an "answer." Therefore, appellee was not required to file an answer.

Appellant also contends that he was at a "complete disadvantage and materially prejudiced by the judgment entered herein having absolutely no notice of any claim of the Appellee." We do not agree.

The decree of divorce provided that the appellant shall "pay the sum of $450.00 per month as and for child support" and "maintain a policy of hospitalization and medical insurance on said children." Appellant's motion asked the chancellor for "modification of the Court Orders previously entered herein"; to apply the "Standard Medical Order"; and for "any and all other relief that may be necessary and proper whether prayed for herein or not."

The trial court granted appellant's request as to the Standard Medical Order except for the requirement that appellant continue to maintain a policy of hospitalization and medical insurance on Jacy. We do not think appellant was prejudiced by remaining in the same position in regards to providing medical insurance as before. We therefore affirm the chancellor's holding

on this point.

In regard to appellant's child support obligation, the chancellor granted judgment in the amount of $2,160.00 because the amount ordered by the Court previously was $450; there was no court order reducing that amount; and child support becomes a judgment as it is accrued. The chancellor stated that he was relying on the statutory provision that child support payments are reduced to judgment as they accrue and become due. *See Burnett* v. *Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993), applying Ark. Code Ann. §§ 9-12-314(b)(c) (Repl. 1991) and 9-14-234(a)(b) (Repl. 1991). These statutes provide that any decree, judgment, or order which contains a provision for payment of child support shall be a final judgment as to any installment or payment of money which has accrued. *See Roark* v. *Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991). *See also Jerry* v. *Jerry*, 235 Ark. 589, 361 S.W.2d 92 (1962) (a father cannot, on his own volition, reduce his child support payment when one of his children turns eighteen).

Because the appellant reduced his child support payments when Jacy became 18 without filing a motion to modify child support, the chancellor held that the court could not retroactively reduce the appellee's child support arrearages which had become final judgments. However, Act 326 of 1993 [codified as Ark. Code Ann. § 9-14-237 (Repl. 1993)] became effective August 13, 1993, and provides:

> (a)(1) An obligor's duty to pay child support for a child shall automatically terminate by operation of law when the child reaches eighteen (18) years of age or should have graduated from high school, whichever is later, or when the child is emancipated by a court of competent jurisdiction, marries, or dies, unless the court order for child support specifically extends child support after such circumstances.

Section 9-14-237(b)(1) and (2) further provide:

> (b)(1) If the obligor has additional child support obligations after the duty to pay support for a child terminates, the court shall reassess the remaining obligations using the family support chart pursuant to § 9-12-

312(a)(2).

> (2) In the event a review is requested, the court shall apply the family support chart for the remaining number of children from the date of the termination of the duty, subject to any changed circumstances, which shall be noted in writing by the court.

But it is presumed that all legislation is intended to act prospectively, and statutes are to be construed as having only a prospective operation unless the purpose and intention of the legislature to give them a retroactive effect is expressly declared or necessarily implied from the language used. *Chism* v. *Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958). Looking at Act 326, we find no express language that the act is intended to operate retroactively. Nor is there an emergency clause. Therefore, we cannot say the legislature intended for that Act to operate retroactively.

Jacy turned eighteen on July 5, 1992. Appellant did not file a motion to modify child support, therefore appellant's child support obligation continued. However, under Act 326 appellant's child support obligation for Jacy terminated by operation of law on August 13, 1993, the effective date of the Act, and the chancellor erred in awarding child support arrearage for Jacy beyond that date. Pursuant to § 9-14-237(b)(1) and (2) quoted above, the chancellor should reassess the appellant's support obligation for the two younger children using the family support chart for the period beginning August 13, 1993, the effective termination date of his duty to pay support for Jacy.

We therefore affirm the chancellor's order in part but reverse the finding on arrearage and remand on this issue for entry of an order in keeping with this opinion.

PITTMAN and ROBBINS, JJ., agree.

HARTFORD FIRE INSURANCE COMPANY and NSL, Inc. *v.* CAROLINA CASUALTY INSURANCE COMPANY, William E. Stanley, and Lubin Wesley Capps

CA 94-1248 914 S.W.2d 324

Court of Appeals of Arkansas
Division II
Opinion delivered February 7, 1996

Anderson & Kilpatrick, by: *Mariam T. Hopkins*, for appellants.

Crisp, Jordan & Boyd, L.L.P., by: *J. David Crisp* and *Randall D. Goodwin*, for appellee Carolina Cas. Ins. Co.

JOHN F. STROUD, JR., Judge. Hartford Fire Insurance Company and NSL, Inc., appeal from a declaratory judgment in favor of appellees, Carolina Casualty Insurance Company, William E. Stanley, and Lubin Wesley Capps.

William E. Stanley is a truck driver who owns and operates his own tractor and trailer. Stanley leased his tractor and trailer to NSL, Inc., an interstate motor carrier licensed by the Interstate Commerce Commission (ICC). Under the terms of the lease, Stanley operated his tractor and trailer as a carrier in interstate commerce under NSL's ICC authority and displayed the placard of NSL. NSL provided Stanley with public liability insurance on the tractor and trailer through a policy issued by Hartford Fire Insurance Company. As required under the lease terms, Stanley maintained a public liability insurance policy on the tractor through Carolina Casualty Insurance Company which provided coverage when the tractor was not operated in the service of NSL.

On May 1 and 2, 1990, Stanley hauled a load of steel on behalf of NSL from Portage, Indiana, to a location in Muskogee, Oklahoma. During his trip from Portage to Muskogee, Stanley noticed that his trailer had a problem with the equalizer valve affecting his airbag leveling system. After unloading the steel in Muskogee, Stanley contacted NSL's dispatcher for instructions on his next load and was told to proceed to Russellville, Arkansas, and to call upon arrival for load information. Stanley complied with the instructions.

Upon his arrival in Russellville, Stanley took the truck and trailer to Russellville Truck Center for repairs. Lubin Wesley Capps, a mechanic at Russellville Truck Center, made the repairs while the trailer was still attached to the tractor. Capps was allegedly injured when Stanley started the tractor while Capps was underneath the trailer performing repairs. Capps filed suit against Stanley and NSL in the Circuit Court of Conway County, Arkansas, alleging that he is entitled to damages for injuries received as a result of Stanley's negligence.

Stanley hired Jeff Mobley to represent him in the Conway County suit. He made a demand to Hartford to provide him a defense and indemnification in the Conway County suit pursuant to the liability insurance policy procured by NSL, but Hart-

ford refused. Stanley also made a demand to Carolina to provide him a defense and indemnification in the Conway County suit pursuant to the liability policy issued to him. Carolina provided Stanley a defense under a full reservation of rights and commenced this action seeking a declaratory judgment that the Carolina insurance policy does not provide coverage for the Capps accident and that Carolina has no duty to defend or indemnify Stanley in the Conway County suit. Hartford and NSL intervened seeking a declaration that the Hartford policy does not apply because Stanley was not under dispatch or in the business of NSL at the time of the accident.

The trial court ruled that Carolina has no duty to defend or indemnify Stanley in the Conway County suit because two separate exclusions apply. The court found that coverage is excluded under the policy for all accidents occurring when a trailer is attached to the tractor. As an alternate and independent basis for its decision, the trial court found that Stanley was using the tractor and trailer in the business of NSL at the time of the accident and that the Carolina policy excludes coverage whenever the truck is being used in the business or under the direction of any person or organization to whom the truck is rented or leased. The trial court also found that the Hartford policy provided coverage for Stanley and ordered Hartford to defend Stanley in the Conway County suit, to indemnify Stanley for any sums for which he is ultimately held liable up to the policy limits, and to pay all reasonable attorney's fees previously incurred by both Carolina and Jeff Mobley in defending the suit by Capps.

Hartford and NSL appeal the judgment asserting that the trial court erred in finding that the Hartford policy applied and that the Carolina policy did not. Hartford also appeals the trial court's award of attorney's fees to both Mobley and Carolina. Neither Stanley nor Capps has appealed the judgment in favor of Carolina.

We first consider Hartford's contention that the trial court erred in finding that its policy afforded coverage for this accident. Appellants did not abstract any exclusions that would contravene the trial court's finding that the Hartford policy provided coverage. In fact, the only portions of the Hartford insurance policy abstracted are those that afford coverage. It is well-

settled in this state that the record on appeal is confined to that which is abstracted. *Mahan* v. *Hall*, 320 Ark. 473, 897 S.W.2d 571 (1995). Thus, on the record before us, we cannot conclude that the trial court erred in finding that the Hartford policy afforded coverage for this accident.

Thus, only two issues remain: (1) whether the trial court erred in holding that the policy issued by Carolina excluded coverage for the Capps accident; and (2) whether the trial court erred in ordering Hartford to reimburse Carolina for expenses it incurred in defending Stanley and to reimburse Stanley for attorney's fees incurred when Stanley hired an independent attorney to defend him in the Conway County lawsuit. We hold that the trial court was correct in finding that the Carolina policy excluded coverage for the Capps accident but remand the case to the trial court to conduct a hearing to determine the amount of attorney's fees for which Hartford is liable.

On the first remaining issue, appellants argue that the trial court erred in ruling that the Carolina policy excluded coverage of the Capps accident. A clause in the Carolina policy contains the following exclusions:

> It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, Property Damage Liability, Uninsured Motorist Coverage and Personal Injury Protection Coverage does not apply:
>
> . . . .
>
> (c) while the truck is being used in the business or under the direction of any person or organization to whom the truck is rented or leased;
>
> (d) while a trailer or semi-trailer is attached to any truck described above.

Appellants argue that part (d) is ambiguous and is not effective to preclude coverage in this case. They also argue that part (c) does not apply because the truck was not being used in the business of NSL at the time of the accident.

The initial determination of whether a contract is ambiguous rests with the court, and when a contract is unambig-

uous, its construction is a question of law for the court. *Rowland* v. *Faulkenbury*, 47 Ark. App. 12, 883 S.W.2d 848 (1994). If there is doubt or uncertainty as to the meaning of an insurance policy, and it is fairly susceptible to two interpretations, one favorable to the insured and one favorable to the insurer, the former must be adopted. *Arkansas Farm Bureau Ins. Fed'n* v. *Ryman*, 309 Ark. 283, 831 S.W.2d 133 (1992). The provisions contained in an insurance policy must be construed most strongly against the insurance company that prepared it, and if a reasonable construction may be given to the contract which would justify recovery, it is the duty of the court to do so. *Id.* However, when the terms of an insurance contract are not ambiguous, it is unnecessary to resort to the rules of construction, 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. *Arkansas Blue Cross & Blue Shield* v. *Foerster*, 38 Ark. App. 228, 832 S.W.2d 280 (1992).

The trial court found that "[p]rovision (d) of the endorsement for Non-Trucking Use (Limited) (Bobtail) to the Carolina policy is clear and unambiguous." We agree with this finding. Appellants' assertion that "truck described above" creates an ambiguity is simply not supported by a review of the contract. The exclusionary provision must be read in light of the entire policy and the whole policy construed so that all of its parts harmonize if that is at all possible. *See Pate* v. *U.S. Fidelity & Guar. Co.*, 14 Ark. App. 133, 685 S.W.2d 530 (1985). When the various provisions of the Carolina policy are read as a whole, we hold that the exclusion relied upon by the appellees and the trial court is clear and unambiguous. The exclusion applies whenever a trailer is attached to the tractor insured under the policy.

It was admitted by all parties that the trailer was attached to the tractor at the time the accident occurred. Therefore, the Carolina policy excludes coverage for the accident. Because we hold that coverage was excluded by the Carolina policy under provision (d) of the exclusionary clause set forth above, we need not address appellant's argument with respect to the exclusion under subsection (c).

Appellant's last point is that the trial court erred in order-

ing Hartford to reimburse both Carolina and Stanley for attorney's fees incurred in the Conway County lawsuit. They assert that it was error for the court to order them to reimburse Carolina because it neither pled nor proved a claim for indemnification. They also contend that it was error for the trial court to order them to reimburse Stanley for amounts he paid to Jeff Mobley because he was being afforded a defense by Carolina. We disagree with both contentions and affirm the trial court's holding.

Even though Carolina did not specifically request reimbursement of the attorney's fees it had expended on behalf of Stanley, ample evidence was introduced by the litigants for the trial court to treat the issue as being tried by the express or implied consent of the parties. The trial court found that the Hartford policy obligated Hartford to defend Stanley in the Conway County suit, and Hartford has not presented any evidence or convincing arguments for reversal of that finding. Under Arkansas Rule of Civil Procedure 15(b), issues tried by the implied or express consent of the parties must be treated in all respects as if they had been raised by the pleadings. Thus, it was not error for the trial court to treat the issue as having been properly raised.

The trial court found that, under the terms of the policy, "Hartford has a duty to pay all reasonable attorney fees previously incurred in defending Stanley in the Conway County suit, including the attorney's fees of Jeff Mobley." Appellants contend that there is no authority under Arkansas law which would require it to pay two sets of attorney's fees for defending the underlying suit. However, Hartford concedes that the insured is entitled to recover a reasonable attorney's fee when an insurance company owes a defense but has denied coverage and refused to provide a defense. Whether Hartford is liable for both the attorney's fees paid by Carolina and those incurred by Stanley depends on whether the fees incurred were reasonable.

Certainly, it would be error for the trial court to require Hartford to pay two sets of attorney's fees if one attorney would have sufficed. The trial court should award Jeff Mobley's fees for services deemed necessary before a defense was afforded by Carolina. There is insufficient evidence in the record

for us to determine whether the trial court made a determination as to which portion of the attorney's fees incurred was reasonable. Therefore, we must remand for further proceedings consistent with this opinion.

Appellee Carolina Casualty Insurance Company has also filed a motion for reimbursement of the cost of preparing a supplemental abstract in this case pursuant to Ark. Sup. Ct. R. 4-2(b). We agree that a portion of the supplemental abstract was necessary to remedy deficiencies in the appellant's abstract. Accordingly, we award Carolina $400.

Affirmed in part; remanded in part.

COOPER and GRIFFEN, JJ., agree.

STUCCO, INC. *v.* Donald ROSE and Second Injury Fund

CA 94-1283 914 S.W.2d 767

Court of Appeals of Arkansas
En Banc
Opinion delivered February 7, 1996

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *James A. Arnold II* and *E. Diane Graham*, for appellant.

Lawrence W. Fitting, P.A., for appellee Donald Rose.

Terry Pence, for appellee Second Injury Fund.

BRUCE T. BULLION, Special Judge. The claimant in this workers' compensation case, Donald Rose, sustained a work-related injury on June 26, 1990, that resulted in an anatomical impairment of thirteen percent to the body as a whole. As a result of the combined effects of this compensable injury and a preexisting disability or impairment, the claimant was rendered permanently totally disabled. The appellant accepted the claim as compensable, as did the Second Injury Fund, but a dispute arose concerning the rate at which the claimant's thirteen percent should be paid, i.e., whether the permanent disability for the first 58.5 weeks (corresponding to the thirteen percent anatomical rating) should be paid at the permanent partial disability rate of $169.59 or at the permanent total disability rate of $226.11. The appellant took the position that, as employer, it was responsible only for paying the first 58.5 weeks at the permanent partial disability rate, and that the Second Injury Fund was liable not only for all payments beyond the 58.5-week period, but also for the difference between the permanent partial disability rate and the permanent total rate during the 58.5-week period the employer was responsible for paying weekly benefits attributable to the thirteen percent anatomical impairment rating. The Commission held that the appellant employer must pay at the permanent total amount for the 58.5-week period attributable to the thirteen percent rating, and that the Second Injury Fund's liability did not begin until the 58.5 weeks is paid out. In addition, the Commission found that the Second Injury Fund did not controvert its liability for permanent total disability benefits. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in holding it responsible for the difference between the claimant's permanent total and permanent partial disability rates, and that the Commission therefore also erred in awarding attorney's fees based on the appellant's controversion of that amount. On cross-appeal, the claimant contends that the Commission erred in finding that the Second Injury Fund did not controvert its liability for permanent total disability benefits. We affirm in all respects.

We first address the appellant's contention that the Commission erred in finding it liable for paying benefits for a period attributable to the thirteen percent anatomical impairment rating

at the permanent total rate, rather than at the permanent partial rate. The appellant's argument is based on its reading of Ark. Code Ann. § 11-9-525 (1987), which in pertinent part provides that:

> (a)(1) The Second Injury Trust Fund established in this chapter is a special fund designed to insure that an employer employing a handicapped worker will not, in the event the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment.
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> (2) The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined.
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> . . .
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> (b)(3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment.
>
> . . .
>
> (b)(5) If the previous disability or impairment whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself. However, if the compensation for which the employer at the time of the last

> injury is liable is less than the compensation provided in 11-9-501 - 11-9-506 for permanent total disability, then, in addition to the compensation for which the employer is liable and after the completion of payment of compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under 11-9-501 - 11-9-506 out of the Second Injury Trust Fund.

The question presented in the case at bar is one of first impression. The appellant contends that the statutory language recited above is unambiguous and clearly provides that an employer should pay only at the permanent partial rate, arguing that a contrary construction would result in the employer being held liable for a percentage of the employee's total disability. We do not agree that the statute is unambiguous in this regard. Although it does clearly provide that the employer will be liable for the actual anatomical impairment resulting from the last injury, the issue in the case at bar is not what percentage of the claimant's disability is to be paid by the employer, but is instead the rate at which that percentage is to be paid. As the appellant concedes in his brief, the statute is silent on the question of the rate to be paid.

Furthermore, we think that limitation of an employer's liability to the permanent partial rate is inconsistent with the general statutory scheme concerning payment of benefits where Second Injury Fund liability is involved. The statute explicitly provides that the employee is to be "fully protected," and we view this language as requiring that an employee who is rendered permanently totally disabled should receive benefits at the permanent total rate. Were the employer to pay at the permanent partial rate, "full protection" of the injured employee could be accomplished only through co-payments by the Second Injury Fund during the period of the employer's liability, or additional payments by the Fund during the Fund's period of liability. However, the statute makes no provision for co-payments by the Fund during the period of the employer's liability, but instead expressly provides that payments by the Fund are to begin only "after the completion of payment of compensation by the employer." Ark. Code Ann. § 11-9-525(b)(5). Moreover, additional payments by the Fund during the Fund's period of

liability would run afoul of the statutory maximum limits imposed on compensation payments. *See generally*, Ark. Code Ann. § 11-9-501 (Supp. 1993). Finally, we must, in construing statutes relating to the Second Injury Fund, interpret them strictly in light of the limited and restricted nature of the Fund and the need to ensure its solvency. *Second Injury Fund* v. *Riceland Foods, Inc.*, 17 Ark. App. 104, 704 S.W.2d 635 (1986). Given these considerations, we hold that the Commission did not err in concluding that the employer was required under Ark. Code Ann. § 11-9-525 to pay at the permanent total rate for the period attributable to the degree of anatomical impairment resulting from the last injury.

The appellant next contends that the Commission erred in awarding attorney's fees based on the appellant's controversion of the difference between the claimant's permanent partial disability rate and his permanent total disability rate. Insofar as this issue was contingent on the success of the appellant's initial argument, we need not address it.

On cross-appeal, the claimant contends that the Commission erred in finding that the Second Injury Fund did not controvert his entitlement to permanent total disability benefits. We do not agree. Whether or not a claim is controverted is a question of fact for the Commission to resolve, and its finding on this issue will not be reversed unless there is no substantial evidence to support it or it is clear that there has been a gross abuse of discretion. *New Hampshire Insurance Co.* v. *Logan*, 13 Ark. App. 116, 680 S.W.2d 720 (1984). In the case at bar, as the Commission noted, a relatively short time elapsed before the Fund admitted liability and its responsibility to pay permanent total disability benefits after the 58.5 weeks attributable to the employer's thirteen percent were paid. The mere fact that the Fund engages in investigation prior to admitting liability on a claim does not require a finding of controversion and, on this record, we cannot say the Commission erred in finding that the Fund had not controverted the claim. *See Buckner* v. *Sparks Regional Center*, 32 Ark. App. 5, 794 S.W.2d 623 (1990).

Affirmed on appeal, affirmed on cross-appeal.

JENNINGS, C.J., agrees.

MAYFIELD, J., concurs.

PITTMAN, ROBBINS and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, concurring. The parties in this case agree that the employee was injured on June 26, 1990; that he had a pre-existing disability or impairment at the time of the injury; and that the pre-existing disability or impairment when combined with the disability or impairment resulting from the injury of June 26, 1990, rendered the employee totally and permanently disabled.

It was stipulated that the injured employee's compensation rate for permanent total disability was $226.11 per week and $169.59 per week for permanent partial disability. The difference in this weekly rate is caused by the provision in Ark. Code Ann. § 11-9-501(d)(1) (1987) which provides that if an employee's total disability rate for an injury would be $205.35 per week or greater, then the maximum permanent partial disability will be 75 percent of the total disability rate. Thus, 75 percent of $226.11 is $169.59. It was also stipulated that the employee's injury of June 26, 1990, resulted in a 13 percent anatomical disability to the body as a whole. Therefore, under Ark. Code Ann. § 11-9-522(a) (1987), the 13 percent disability would be apportioned to the 450 weeks fixed by the statute as the value of the body as a whole, and the compensation for this permanent partial disability would be paid by the employer for 58.5 weeks.

However, because the employee had a pre-existing disability or impairment which, when combined with the disability caused by the injury of June 26, 1990, produced a greater disability than would have resulted form the June 1990 injury alone, the Second Injury Fund is liable for all the disability in excess of the 13 percent anatomical disability caused by the June 1990 injury.

But there is a question as to whether the employer at the time of the June 1990 injury should pay compensation for the 58.5 weeks at the $226.11 weekly rate or whether it should pay only $169.59 per week for that period with the Second Injury Fund paying the difference between that amount and the $226.11 to which the employee is entitled from and after his

injury of June 26, 1990.

I concur in the majority opinion in this case and write only to record my specific disagreement with any inference in the dissenting opinion that the vote of the majority to affirm the Commission was based solely upon our concern for the "solvency of the Second Injury Fund."

While that is not the issue in this case, and neither the Commission nor the majority opinion is grounded on that premise, the point is properly considered in construing the statutory liability of the Second Injury Fund. In the case of *Second Injury Fund* v. *McCarver*, 17 Ark. App. 101, 704 S.W.2d 639 (1986), this court pointed out that in *Arkansas Worker's Compensation Commission* v. *Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950), the Arkansas Supreme Court said that the solvency of the Second Injury Fund requires that the statutory provisions concerning its liability be strictly complied with. We also pointed out that Ark. Stat. Ann. § 81-1348(a) (Supp. 1985), now Ark. Code Ann. § 11-9-301(f) (Supp. 1995), provides that if after July 1, 1983, the balance in the Fund becomes insufficient to meet its obligations, payments shall be suspended until the Fund is able to meet those obligations and, in no event shall there be a reverter of responsibility to the employer or carrier.

In *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 8, 746 S.W.2d 539, 543 (1988), the Arkansas Supreme Court pointed out that it had affirmed our *McCarver* case, which had explained the *Sandy* case, and our supreme court said, "we recognize that it has previously been emphasized that the Second Injury Fund is a limited and restricted fund and that the statute is to be strictly complied with, lest the Fund be exposed to liability in every workers' compensation case."

I also point out that the Commission in the present case noted that we have said that the purpose of the Second Injury Fund is not to provide a "windfall" to those employers who hire handicapped people. *See Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985).

The majority opinion in the present case very clearly and logically reaches a conclusion that affirms the Commission, and I agree with it. However, because of the continuous effort that is

made to expose the Second Injury Fund to liability far beyond, in my opinion, its intended and beneficial purpose, I do not want the above points to be overlooked.

JUDITH ROGERS, Judge, dissenting. I respectfully dissent from the opinion of the court that under Ark. Code Ann. § 11-9-525 an employer is required to pay permanent partial anatomical impairment benefits at a permanent total rate.

Arkansas Code Annotated § 11-9-525 provides in part:

> (a)(1) The Second Injury Trust Fund established in this chapter is a special fund designed to insure that an employer employing a handicapped worker *will not*, in the event the worker suffers an injury on the job, *be held liable for a greater disability or impairment than actually occurred while the worker was in his employment.*
>
> (2) The *employee is to be fully protected* in that the *Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined.*
>
> . . .
>
> (b)(5) If the previous disability or impairment, whether from compensable injury or otherwise, and the last injury together result in *permanent total disability*, the employer at the time of the last injury *shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself.* However, if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in §§ 11-9-501 - 11-9-506 *for permanent total disability*, then, in addition to the compensation for which the employer is liable and after the completion of payment of compensation by the employer, the *employee shall be paid the remainder of the compensation that would be due for permanent total disability under §§ 11-9-501 - 11-9-506 out of the Second Injury Trust Fund.* (Emphasis added.)

Arkansas Code Annotated § 11-9-501 provides for the payment of permanent total disability benefits and sets the maxi-

mums for those payments. It also provides that "[c]ompensation payable to an injured employee for permanent partial disability, including scheduled permanent injuries *(the permanent partial disability rate)*, which results from an injury" shall not exceed sixty-six and two-thirds percent of the employee's average weekly wage.

The first step in interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. When interpreting an act, it is permissible to examine its title; parts of statutes relating to the same subject matter must be read in the light of each other. *Farnsworth* v. *White County*, 39 Ark. App. 98, 839 S.W.2d 229 (1992). Also, in interpreting a statute and attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the matter. *Osmose Wood Preserving* v. *Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992).

A clear reading of the statutes involved reveals that the employer shall not be held liable for a greater disability or impairment than actually occurred while the worker was in his employment. The opinion of the court, in disregard of the clear statutory language of Ark. Code Ann. § 11-9-525, has imposed liability on the employer for a greater degree of disability than was actually incurred by the employee by requiring the employer to pay permanent partial disability at a permanent total rate.

Although this is a case of first impression, the issue in this case is addressed by Ark. Code Ann. § 11-9-525(b)(5). That section provides that "if compensation for which the employer at the time of the last injury is liable is less than the compensation provided in [§ 11-9-501] for permanent total disability, then, in addition to the compensation for which the employer is liable and after the completion of payment of compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under [§ 11-9-501] out of the Second Injury Trust Fund."

Here, the claimant was injured and sustained a 13% anatomical impairment while in the employment of appellant. After

the previous disability was combined with the last injury, it was established that the claimant was totally disabled. Appellant paid the 13% anatomical impairment rating at a permanent partial rate of $169.59 for 58.5 weeks as required. Under a fair reading of these statutes that is the full extent of the appellant's liability. The employee was entitled to permanent total disability benefits for those 58.5 weeks; however, as the statute requires, appellant was only liable for permanent partial disability benefits. In this situation, the employer was liable for less than what the employee was entitled to receive under § 11-9-501 for permanent total disability. Therefore, as the statute clearly reads, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under § 11-9-501 out of the Second Injury Trust Fund.

The opinion of the court states that "limitation of an employer's liability to the permanent partial rate is inconsistent with the general statutory scheme concerning payment of benefits where Second Injury Fund liability is involved." I disagree.

The limitation of an employer's liability to the permanent partial rate is in keeping with the general statutory scheme and more specifically with the particular statute in question. The statute involved specifically limits the employer's liability and in the same breath protects the employee through the Second Injury Fund.

In interpreting statutes we are to give words their plain and ordinary meaning, and the decision reached by the court is a departure from the unambiguous language of Ark. Code Ann. § 11-9-525. The court's decision imposes liability upon the employer that the Arkansas General Assembly did not intend an employer of a previously injured worker to bear by requiring that employer, who is only responsible for paying the permanent partial disability benefits attributable to the worker's injury while in its service, to pay for *permanent total disability*. This result will neither protect injured workers from being denied employment by willing employers, nor will it insure those employers that their commendable efforts to provide work for previously-injured workers will not be penalized in the event of a subsequent injury. The language of the statute explicitly states that the Second Injury Fund is established to "*insure that an*

employer employing a handicapped worker will not, in the event the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment . . . ."

Contrary to the suggestion by those who voted to affirm the Commission, the crucial concern of the legislation is to protect injured workers and their employers from economic hardship through job discrimination and increased exposure to the financial consequences of subsequent injuries, respectively. If the solvency of the Second Injury Fund is to become the paramount aim to be served by this legislation, one would think that the General Assembly is both able and willing to say so, and to do it in vastly different language from that found in the statute before us. This court should decline the invitation to reach a result different from that dictated by the plain language of the statute which places concern for injured workers and the businesses that employ them above concerns about the solvency of a Fund created to protect those very persons.

I have also re-examined the statute and the cases cited by the concurring opinion. I do not find that the cases cited by that opinion establish a public policy to protect the Second Injury Fund at the expense of the injured worker.

ROBBINS and PITTMAN, JJ., join in this opinion.

PLANTERS BANK & TRUST COMPANY and MAP Farms, Inc. *v.* Thomas C. SMITH, Jr., and Margerie Smith, a/k/a Margie Smith

CA 95-1156 914 S.W.2d 765

Supreme Court of Arkansas
Opinion delivered February 7, 1996

Frank Morledge, for appellants.

James Baxter Sharp III, for appellees.

PER CURIAM. Appellants have filed a motion for certification to the Arkansas Supreme Court. They contend that the reporter's notes to Rule 15(b) of Arkansas Rules of Civil Procedure contain an error. Appellants also allege that the chancellor below erred in allowing an amendment to conform the pleadings to the proof during trial after an objection to the proof was made.

Arkansas Rule of Civil Procedure 15(b) states in part:

> (b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them

> to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion.

The reporter's notes to Rule 15(b) include the following:

> 2. Section (b) is identical to FRCP 15(b). It follows prior Arkansas law by permitting amendments to conform to the proof adduced at the trial. This rule goes somewhat further, however, by more or less making it mandatory that pleadings be amended to conform to the proof *where there has been objection to such proof. Metropolitan Life Ins. Co.* v. *Fugate*, 313 F.2d 788 (C.C.A. 5th, 1963): *Bradford Audio Corp.* v. *Pious*, 329 F.2d 67 (C.C.A. 2d, 1968). (Emphasis added.)

Appellants contend that the word "no" should precede the word "objection" in the phrase "where there has been objection to such proof." Rule 15(b) does seem to require amendment of the pleadings where no objection is made by the other party, but it clearly grants the court discretion in allowing amendments to the pleadings when an objection is made to the evidence as not being within the pleadings. The reporter's notes, as they now read, seem to mandate such amendments under the circumstance when the Rule gives the court discretion in allowing the amendment. The alleged error would seem to be further substantiated by the citation of two federal cases at the end of the note indicating that objections to the proof were made, but no objections to the proof were made in those cases on these grounds. The notes also say Rule 15(b) of Arkansas Rule of Civil Procedure is identical to FRCP 15(b), but it is not.

■ The Arkansas Rules of Civil Procedure were adopted by the supreme court pursuant to Act 38 of 1973 and pursuant to the Court's constitutional and inherent power to regulate procedure in the courts. *In re: Rules of Civil Procedure*, 264 Ark. 964 (1978). The power to adopt the rules is well-established and grounded in constitutional and statutory authority as well as the Court's inherent authority. *Weidrick* v. *Arnold*, 310 Ark. 138,

835 S.W.2d 843 (1992).

Since adopting the rules, the Court has often amended the reporter's notes by per curiam opinions. *See, e.g., In re: Recommendations of the Ark. Sup. Ct. Comm. on Civ. Practice*, 315 Ark. 744 (1993); *In re: Changes to the Ark. Rules of Civ. P.*, 307 Ark. 583 (1991); *In re: Amendments to the Rules of Civ. P.*, 283 Ark. 541, 671 S.W.2d XCII (1984); *In re: Amendments to the Rules of Civ. P.*, 279 Ark. 470, 651 S.W.2d 63 (1983).

Appellants have not shown that they suffered prejudice as a result of the alleged error in the notes. Appellants contend in their motion only that trial courts around the state rely upon the notes to Rule 15(b) and that the trial court below erroneously allowed an amendment to conform the pleadings to the proof after timely objection was made. They have not asserted in their motion or their memorandum of authorities that the chancellor relied upon the reporter's notes in making his ruling. This case does not involve the interpretation or construction of Rule 15(b); therefore, there is no need for certification under Ark. Sup. Ct. R. 1-2(3).

We do, however, agree with appellants that correction of the notes lies within the jurisdiction of the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 1-2(d), and we suggest the court consider an amendment of the notes by per curiam opinion.

Motion denied.

PITTMAN, J., not participating.

COOPER and GRIFFEN, J.J., would grant motion to certify.

Fred HARVILL, et al. *v.* Geneva BEVANS

CA 94-604 914 S.W.2d 784

Court of Appeals of Arkansas
Division II
Opinion delivered February 14, 1996

Josh E. McHughes, for appellants.

Davidson Law Firm, by: *Skip Davidson* and *Stephen L. Gershnes*, for appellee.

JUDITH ROGERS, Judge. Appellants Fred Harvill, Paul Wayne Poe, Burt Carroll Westerman, and Party Tyme Club, Inc., appeal from a judgment in favor of appellee, Geneva Bevans, in an unlawful detainer action. Appellants raise three issues for reversal of the trial court's decision, while appellee raises one issue on cross-appeal. Finding no merit in any of the arguments presented, we affirm on both direct and cross-appeal.

The following facts are not in dispute. At various times in 1991, appellee made loans totalling $90,000 to appellant Fred Harvill and Josh McHughes for the construction of a building on the property which is the subject of this action. Since construction, the building was occupied by appellant Party Tyme Club, Inc. Appellant Harvill and McHughes gave a quitclaim deed for the property to appellee and her now deceased husband to secure payment of the loans. However, appellant Harvill was unable to obtain financing for the payment of the loans. To assist Harvill and to recover the monies she had loaned, appellee arranged to borrow $95,000 from National Bank of Arkansas. From the loan proceeds, appellee recovered the $90,000 she had loaned. Appellee also advanced them $2,500 at Harvill's request and paid the expenses associated with obtaining the loan. Thereafter, appellee and her late husband agreed to sell the property to appellants Harvill, Poe and Westerman for the sum of $95,000. To this end, the parties entered into a purchase contract on December 10, 1991, and the appellants executed a real estate installment note in favor of appellee and her husband in the amount of $95,000, to be paid at the rate of $1,500 a month. With appellants' written consent, appellee then made an assignment of the contract and note to National Bank. Under this arrangement, payments due from appellants were made directly

to the bank, which in turn applied the payments to the loan it had made to appellee and her husband.

The purchase agreement for the sale of the land contained a provision which authorized the appellee to rescind the contract in the event of default in payment for a period of thirty days or upon appellants' failure to pay taxes, assessments or insurance on the property when due. As of October 15, 1993, appellants were in default with respect to payments due for August and September of that year. Appellee then gave written notice to appellants of rescission of the contract, and she made demand for the immediate possession of the property. Appellants refused to vacate the premises, and in November 1993 appellants tendered three payments totalling $4,500 to the bank. The bank returned the payments at appellee's request. Appellee then filed this suit in unlawful detainer.

The trial of this matter was held on February 15, 1994. By order of February 17, the trial court found that appellee was entitled to immediate possession of the property and entered judgment in favor of appellee in the amount of $10,500 in unpaid rent, as reduced by sums held in the registry of the court. In so ordering, the trial court denied appellants' motion to dismiss in which it was alleged that the bank was the real party in interest because of the assignment made by appellee of the purchase contract and installment note. The court also denied appellee's request for treble damages. This appeal followed.

The primary focus of appellants' arguments on appeal is their contention that the trial court erred in denying their motion to dismiss. Appellants insist on appeal, as they did below, that the bank is the real party in interest due to appellee's assignment of the purchase contract and note, and that the appellee thus lacked standing to bring the action. While appellants devote much of their brief referring to decisions supportive of the view that the assignee alone is entitled to sue, their reliance on those decisions is misplaced in this particular case because the bank ratified the acts of appellee in declaring a default and in filing the lawsuit.

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. Subsection (a) of the rule, however, further

provides that:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification or commencement of the action by, or joinder of, the real party in interest; *and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.*

(Emphasis supplied.) In ruling on the motion to dismiss, the trial court had before it a document executed on behalf of the bank entitled "Ratification and Release of Assignment." The document reflects that the bank released the assignment to appellee and states that the bank "ratifies the actions of the [appellee] in October 1993 in declaring the purchase contract to be forfeited and further ratifies the act of the [appellee] in beginning this unlawful detainer suit." This case falls directly within the purview of Rule 17. *See McMaster* v. *McIlroy Bank,* 9 Ark. App. 124, 654 S.W.2d 591 (1983). Therefore, we cannot conclude that the trial court erred in finding that the bank's ratification cured any alleged defect in the parties.

Alternatively, appellants ask us to consider the bank as being appellee's agent and to reverse on a finding that appellee is bound by the bank's acceptance of late payments made in November 1993. In this regard, appellants contend that no breach of contract occurred since the bank accepted the payments. There are two reasons this argument must fail. First, there is nothing in the abstract to support appellants' contention that the bank "accepted" the payments. To the contrary, the record reflects that the payments were returned to appellants by the bank. Secondly, our review of the abstract does not disclose that this argument was raised or ruled upon by the trial court. It is fundamental that the record on appeal is confined to that which is abstracted. *Mahan* v. *Hall,* 320 Ark. 473, 897 S.W.2d 571 (1995). Failure to abstract information pertinent to an issue precludes this court from considering the issue on appeal. *See Edwards* v. *State,* 321 Ark. 610, 906 S.W.2d 310 (1995).

On cross-appeal, appellee contends that the trial court erred in disallowing treble damages as set forth in Ark. Code

Ann. § 18-60-309 (1987). Appellee points out that appellants did not vacate the property when demand was made and that appellants did not surrender the property until February 20, 1994, when ordered to do so by the court. Appellee argues that "the trial court lacked the discretion to refuse to award the statutorily required treble damages." Appellee misunderstands the requirements of the law. Before such liability can be imposed, there must be a finding of willful or wrongful holding over. *Anthes* v. *Thompson*, 28 Ark. App. 304, 773 S.W.2d 846 (1989); *see also Heral* v. *Smith*, 33 Ark. App. 143, 803 S.W.2d 938 (1991). Appellee makes no argument characterizing appellants' failure to vacate as wrongful. Appellants maintain that their actions were justified because of their belief that the bank was the real party in interest and their reliance on the bank not having declared a default. Under the circumstances, we cannot say that the trial court's decision is clearly erroneous.

Affirmed.

COOPER and ROBBINS, JJ., agree.

Bruce BARNARD *v.* B & M CONSTRUCTION

CA 95-247 915 S.W.2d 296

Court of Appeals of Arkansas
Division II
Opinion delivered February 14, 1996

Lane, Muse, Arman & Pullen, by: *R. Keith Arman*, for appellant.

Anderson & Kilpatrick, by: *Michael P. Vanderford*, for appellee.

JOHN F. STROUD, JR., Judge. Bruce Barnard was employed as a construction worker by B & M Construction Company on February 10, 1992, when he fell from a steel beam onto a concrete floor, striking his head. He suffered a closed head injury and had headaches and double vision. B & M Construction accepted the claim as compensable and paid temporary total disability and medical benefits. At a hearing before the administrative law judge, Mr. Barnard contended that he was entitled to a physical impairment rating due to loss of vision. The law judge denied and dismissed the claim. After conducting a de novo review, the Workers' Compensation Commission

affirmed and adopted the decision of the administrative law judge. We affirm the denial of the claim.

The claimant raises one point on appeal, stating that he has shown by substantial evidence that he has sustained permanent disability as a result of his admittedly compensable injury. This is not the standard by which we review cases when the Commission has denied a claim. Where, as here, the Commission denies a claim because the claimant has failed to show entitlement by a preponderance of the evidence, the substantial evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Brantley* v. *Tyson Foods, Inc.*, 48 Ark. App. 27, 887 S.W.2d 543 (1994). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). On appeal, we are required to view the evidence in the light most favorable to the findings and give the testimony its strongest probative force in favor of the Commission's action. *Tyson Foods, Inc.* v. *Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

The evidence, which includes testimony by the claimant as well as medical testimony and records, shows that the claimant reported headaches and vision problems after the accident. The claimant stated that he continued to have double vision when viewing objects up to four and one-half feet away. Dr. Michael Brodsky followed the claimant at Arkansas Children's Hospital Eye Clinic. Dr. Brodsky diagnosed the claimant's vision problem as convergence insufficiency and prescribed reading glasses with prisms incorporated into them in order to see objects close-up and use his eyes together to avoid double vision.

In support of his claim for permanent disability, the claimant refers to his need to wear two pairs of glasses to see properly. He points to the testimony of ophthalmologist Dr. Thomas R. Wallace that a change of glasses would be required for switching from close to distant work, such as when leaving close-up work at a bench to walk across a room. The claimant concludes that he can no longer do construction work because he cannot walk while wearing the prism glasses which he must wear for working with a screwdriver or hammer and nails. The

claimant states, however, that he has a riding lawnmower, a push mower, and a leaf mower; that he is able to do lawn work; and that he is able to drive a car.

The medical evidence includes conflicting reports concerning the claimant's fields of vision. Dr. Wallace, in determining the claimant's impairment rating, referred to testing the visual fields. His report of March 15, 1994, states:

> I have calculated Mr. Barnard's disability based on my interpretation of *Guide to the Evaluation of Permanent Impairment*, Third Edition Revised. . . .
>
> Right eye appears to be his worse [sic]. He has 20/20 vision in that eye for no central vision loss. His visual field loss is approximately 47%. This is an inferior hemianopia and according to the above mentioned book this entitles him to an addition 10% of loss, so his visual field loss in the right eye is 47% plus 10% or 57%. Combining this with the 57% loss of the right eye using the combined value chart shows a 100% loss in the right eye.
>
> The left eye has no loss of central vision. He has lost 10% visual field with an extra 5% because he has lost an inferior quadrant yielding 15% loss of visual field. Combining these on the combined value chart yields 16%.
>
> When you combine the impairment in the worse eye (right) 100% and the better eye (left) 16% and . . . an impairment of the visual system of 38%. . . this shows an impairment of the whole person of 36%.

The claimant's visual fields were also tested by Dr. George Schroeder, an ophthalmologist, and Dr. John Stuckey, an optometrist. In a letter of June 13, 1994, optometrist Dr. Thomas H. Gulley compares their test results to those which Dr. Wallace obtained. Dr. Gulley states in his letter:

> These fields were done on the same type of instrument and the same threshold levels as at Dr. Tom Wallace's office. As you can see, the results are somewhat different and on both tests, it states there is low patient reliability.

In a letter dated July 21, 1994, Dr. Gulley evaluates the claimant's corrected vision and refers to the subjective nature of

the testing:

> This is in response to [respondents'] questions. Bruce Barnard has corrected vision of 20/20 in both eyes. In other words, while wearing his glasses his vision is normal.
>
> The disability rating given by Dr. Tom Wallace is based on the threshold test which is used to determine any deficit in Mr. Barnard's field of vision. Dr. Wallace did the test on two occasions and the results were different in each instance. I sent Mr. Barnard to Drs. Stuckey and Schroeder on June 9, 1994, to have that test performed. The results of the test performed by Dr. Stuckey and Schroeder are different than those done by Dr. Wallace. And it states on the test form that there is low patient reliability on all the tests. The validity of these tests is based on the answers given by Mr. Barnard. Because the three tests done are all different, none can be said to be a reliable test of Mr. Barnard's field of vision. In my opinion, from the results of this test, it would be difficult to rate Mr. Barnard with any permanent impairment as a result of the on-the-job injury.

The impairment rating given by Dr. Wallace does not address the claimant's vision as corrected with glasses. Arkansas Code Annotated § 11-9-521(1987) addresses compensation for scheduled permanent injuries. Subsection (c) states, "In all cases of permanent loss of vision, the use of corrective lenses may be taken into consideration in evaluating the extent of loss of vision." Dr. Gulley stated that the claimant's corrected vision was normal.

The Commission found that the claimant had not sustained his burden of proof by a preponderance of the credible evidence of record, and found that the claimant had not sustained any permanent disability as a result of his admittedly compensable injury. The Commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of any conflicts in the medical evidence is a question of fact for the Commission. *Bartlett* v. *Mead Containerboard*, 47 Ark. App. 181, 888 S.W.2d 314 (1994). 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. *Jackson* v. *Circle T. Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995). We conclude that the findings of the Commission are supported by substantial evidence.

Affirmed.

COOPER and GRIFFEN, JJ., agree.

Curtis EARP *v.* BENTON FIRE DEPARTMENT, et al.

CA 94-1255 914 S.W.2d 781

Court of Appeals of Arkansas
Division II
Opinion delivered February 14, 1996

Ogles Law Firm, P.A., by: *John Ogles*, for appellant.

McGlinchey Stafford Lange, by: *Carolyn B. Witherspoon* and *Abraham Bogoslavsky*, for appellees.

JOHN F. STROUD, JR., Judge. Appellant in this case, Curtis Earp, was retired from the Benton Fire Department in 1989 and was awarded fifty percent of his salary in disability benefits. He later unsuccessfully sought an increase in retirement benefits

from the appellees, the Benton Fire Department Pension and Relief Fund Board (Board) and the Benton Fire Department. In January 1994, appellant filed a complaint in circuit court, alleging that he was totally disabled from inhalation and exposure and thus was entitled to sixty-five percent of his salary in benefits. Appellant relied on Ark. Code Ann. § 24-11-819(a)(1) and (a)(2)(B)(i) (Repl. 1992), which provides that the Board may retire any firefighter who becomes totally and permanently incapacitated for any suitable duty as an employee as a result of injury or disease, and award sixty-five percent of his salary in benefits for an injury incurred in the line of duty. Fifty percent of the salary is awarded if the injury or disease was not work related. Ark. Code Ann. § 24-11-819(a)(2)(A) (Repl. 1992).

The appellees filed a motion to dismiss, stating that the court lacked subject matter jurisdiction due to appellant's failure to timely appeal from the 1989 retirement award. Appellant responded that the Board heard his request for an increase in August 1993, and failed to issue a decision or notify him of its decision. The circuit court granted the motion to dismiss. We affirm the dismissal of appellant's complaint.

Before considering the merits of appellant's arguments, the procedural manner in which this case was decided by the trial court must be addressed. There is no mention by the trial court that it considered the motion to dismiss as a motion for summary judgment; we agree, however, with appellees that the trial court considered matters outside the pleadings, effectively converting the motion to one for summary judgment.

A review of the record shows that in April 1994, appellant filed an affidavit stating that he and his attorney appeared before the Board in August 1991 on his request for an increase in benefits. The Board informed him that his request would be considered and that he would be notified of the Board's decision. Appellant further stated that in July 1993, the Board requested that he be evaluated by a certain physician. The attorney's affidavit averred that he and appellant had met with the Board. Also included in the record is the physician's evaluation finding that appellant appeared to be "reasonably stable with no major complaints." The physician stated that appellant denied having any respiratory distress and that a physical examination showed

that appellant's pulmonary functions were "completely normal." The physician concluded that appellant showed "no evidence whatsoever of residual injury or damage."

Three letters were attached to appellees' motion to strike the affidavits. In a letter to appellant's attorney in February 1992, the Board's attorney stated that information submitted by appellant had been considered and that the Board concluded that "there is a significant question on whether [appellant] made a timely appeal" and that in any event, the medical evidence submitted supported the award made in 1989. In a letter written in June 1993, appellant's attorney asked the Board to reconsider. The Board responded that the initial determination of benefits was supported by the medical evidence and that any reconsideration would be untimely. The circuit court granted the motion to dismiss, "[b]ased upon the pleadings submitted by the parties, as well as the information contained in the letter briefs submitted by the parties."

As noted above, there were numerous matters outside the pleadings presented to the trial court. If matters outside the pleadings are presented and not excluded by the court, the motion to dismiss will be treated as one for summary judgment. *Rankin* v. *Farmers Tractor & Equip. Co.*, 319 Ark. 26, 30, 888 S.W.2d 657 (1994); *Centennial Valley Ranch Management, Inc.* v. *Agri-Tech Ltd. Partnership*, 38 Ark. App. 177, 182, 832 S.W.2d 259 (1992). Thus, we ordinarily would examine the record to determine if there is any genuine issue of fact. Ark. R. Civ. P. 56(c). Normally, on a summary judgment appeal, the evidence is viewed most favorably for the party resisting the motion and any doubts and inferences are resolved against the moving party. In a case where the parties agree on the facts, as here, that rule is inapplicable, and we simply determine whether the appellee was entitled to judgment as a matter of law. *Doe* v. *Central Arkansas Transit*, 50 Ark. App. 132, 136, 900 S.W.2d 582 (1995).

Appellant first argues that his appeal to the circuit court was not untimely. An appeal to the circuit court from a Board decision must be filed within thirty days of the Board's judgment. Ark. Code Ann. § 24-11-815 (Repl. 1992); Inferior Ct. R. 9(a). It is not disputed that appellant failed to timely appeal

the Board's 1989 decision. It is appellant's contention, however, that his appeal from the Board's failure to adjust his benefits is timely because the Board failed to comply with Ark. Code Ann. § 25-15-210 (Repl. 1992), which provides that, pursuant to an administrative adjudication, the agency's final decision shall be in writing, shall include findings of fact and conclusions of law, and shall be served on the parties.

In assessing the timeliness of the appeal, the circuit court obviously was concerned with the issue of whether the Board granted reconsideration of appellant's disability benefits. The court was also concerned with whether the Board held a hearing on the merits, and then failed to comply with § 25-15-210. As noted earlier, the effective date of the Board's decision sets the time for filing an appeal.

In *McCarty* v. *Board of Trustees*, 45 Ark. App. 102, 872 S.W.2d 74 (1994), a case cited in the circuit court's order, we addressed an appeal from a decision of the Board of Trustees of the Little Rock Police Pension and Relief Fund. The appellant in that case failed to appeal from a 1988 decision denying her retirement benefits. The Board of Trustees reconsidered her application but again denied the benefits. In reversing the second denial of benefits, the court rejected the Board of Trustees' argument on appeal that, because the appellant did not appeal from the 1988 decision, that decision was *res judicata*, and appellant could not relitigate her claim. We found that nothing in the Administrative Procedure Act that provides that an agency cannot reconsider its own decision. 45 Ark. App. at 118. We also quoted the following language from *North Hills Memorial Gardens* v. *Simpson*, 238 Ark. 184, 381 S.W.2d 462 (1964):

> It is first contended by the applicant that the board's original denial of Rest Hill's application for a permit is *res judicata*. It is true that when an administrative board acts judicially or quasi judicially its decision may be *res judicata* in a second proceeding involving the same question. We are not convinced, however, that all the technical rules that make up the common-law doctrine of *res judicata* should apply with equal force to administrative proceedings.

45 Ark. App. at 118 (internal citations omitted). We approved

the following language from *Hall* v. *City of Seattle*, 602 P.2d 366, 369 (Wash. App. 1979): "Where through fraud, mistake, or misconception of facts the commissioner enters an order which he promptly recognizes may be in error, there is no good reason why, on discovering the error, he should not, after due and prompt notice to the interested parties, correct it."
45 Ark. App. at 119. We concluded:

> Here, the Board made a mistake or misconception of facts and applied standards to the appellant's application that were not in force at the time. Upon discovering that mistake or misconception, the Board reconsidered its decision. We think that was proper and its May of 1988 decision did not prevent its reconsideration of the application in April of 1990.

45 Ark. App. at 119.

In the case at bar, it is obvious that the circuit court found that the Board's actions were not tantamount to a reopening of the issue of appellant's retirement benefits. We agree with that determination. If appellant presented any information about, or evidence of, a work-related injury to the Board, it is not included in the record. Neither does the record contain any medical information provided by appellant to support a reopening. The physician's report obtained by the Board states that appellant had a "[h]istory of inhalation injury in 1986 with no evidence whatsoever of residual injury or damage." Appellant failed to present compelling medical evidence that would warrant a reopening of the issue. In addition, appellant did not present evidence of fraud, mistake, or misconception of facts that would have supported a reopening of the earlier claim. We find that the Board declined to grant reconsideration and that because there was no adjudication on the merits, the Board was not required to enter a formal order. Neither did the Board waive its *res judicata* defense. In its letters to appellant, the Board continued to maintain that his appeal was untimely.

Pursuant to our determination that the Board declined to grant reconsideration of the benefits, we need not address appellant's second argument, which is that the circuit court erred in finding that the Board's denial of an increase in his benefits was supported by the evidence.

Finally, appellant argues that if a dismissal was proper, it should have been without prejudice. We do not agree. The timely filing of a notice of appeal is jurisdictional. *Tracor/MBA* v. *Artissue Flowers*, 41 Ark. App. 186, 189, 850 S.W.2d 30 (1993). Appellant failed to file a timely notice of appeal, the Board's decision setting appellant's benefits became final, and the circuit court was without authority to review the case. A dismissal with prejudice therefore was correct.

Affirmed.

COOPER and GRIFFEN, JJ., agree.

HARVEST FOODS and St. Paul Fire and Marine Insurance Co. *v.* Alan WASHAM

CA 95-188 914 S.W.2d 776

Court of Appeals of Arkansas
Division II
Opinion delivered February 14, 1996
[Petition for Rehearing denied April 3, 1996.]

Anderson & Kilpatrick, by: *Joseph E. Kilpatrick, Jr.*, and *Frances E. Scroggins*, for appellants.

The Whetstone Law Firm. P.A., by: *Robert H. Montgomery*, for appellee.

WENDELL L. GRIFFEN, Judge. Harvest Foods and St. Paul Fire and Marine Insurance Company, its workers' compensation

insurance carrier, have appealed the January 11, 1995, decision by the Workers' Compensation Commission that upheld an award of temporary total disability benefits to Alan Washam for the period beginning June 8, 1992, and continuing "to a date yet to be determined." Appellants argue that there is no substantial evidence to support a finding that appellee remained in his healing period after May 4, 1993, so as to be entitled to continued temporary total disability benefits. They also challenge the Commission's decision awarding Washam a second maximum attorney's fee for the temporary total benefits, as well as the decision to impose the twenty-percent penalty prescribed by Ark. Code Ann. §11-9-802(c) (Supp. 1995), because they failed to pay the temporary total disability benefits that the Commission originally awarded on April 2, 1993, when it affirmed and adopted the December 18, 1992, decision of the administrative law judge. After reviewing the evidence according to the substantial evidence standard that applies to workers' compensation appeals, we conclude that the Commission's decision concerning the appellee's entitlement to temporary total disability benefits is supported by substantial evidence. We also conclude that the Commission properly imposed the twenty-percent penalty prescribed by the statute, and that it made the correct decision in making a second award of maximum attorney's fees to the appellee when the appellants continued to challenge his entitlement to temporary total disability benefits that had been previously awarded. Therefore, we affirm.

This workers' compensation claim was initially controverted on the appellee's claim that he sustained a compensable injury on or about June 5, 1992, when he lifted a box of bleach while working as a warehouseman for the appellant employer, Harvest Foods. An administrative law judge heard evidence on the compensability allegation, and rendered a decision on December 18, 1992, in which appellee was awarded temporary total disability benefits for his compensable back injury from June 8, 1992, "to a date yet to be determined," plus the cost of reasonably necessary medical treatment and attorney's fees. Appellants appealed that award to the Full Commission, and the April 2, 1993, decision affirming and adopting the award rendered by the administrative law judge resulted. In their appeal to the Full Commission, appellants specifically challenged the award of temporary

total disability benefits from June 8, 1992, to a future date to be determined. Appellants neither appealed the Commission's April 2, 1993, decision awarding the benefits nor paid the benefits. Therefore, appellee obtained a second hearing on January 11, 1994, to address the unpaid benefits that were awarded plus the twenty-percent penalty prescribed by Ark. Code Ann. §11-9-802(c), medical benefits, and attorney's fees. The administrative law judge ruled that appellee remained in his healing period based on the testimony of Dr. F. Richard Jordan, the attending neurosurgeon, and imposed the twenty-percent penalty. Appellants appealed a second time to the Commission, arguing that appellee was not still in his healing period so as to be entitled to continued temporary total disability benefits. They also contend that they were not liable for the twenty-percent penalty because the original award of benefits to a date yet to be determined was not an award, and that appellee was not entitled to a second award of attorney's fees. The Commission rejected appellants' arguments on all fronts, and this appeal followed.

We first address appellants' argument that the Commission committed error by ruling that appellee has been temporarily totally disabled since June 8, 1992. This argument requires us to review the record to determine (a) whether there is substantial evidence to support the Commission's determination that appellee has not reached the end of his healing period as that term is defined at Ark. Code Ann. §11-9-102(13) (Supp. 1995), and, if so, then (b) whether there is substantial evidence to support the Commission's determination that appellee is totally incapacitated from earning wages on account of the compensable injury pursuant to the standard enunciated in *Arkansas State Highway and Transportation Department* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Our review is limited first to determining whether the Commission correctly decided this case within the meaning of the term "healing period," and then to determining whether there is substantial evidence to support the result reached by the Commission. It is established Arkansas law that on appellate review, the duty of our court is to review questions of law only. We may modify, reverse, remand for rehearing, or set aside the order or award of the Commission only upon the grounds stated at Ark. Code Ann. §11-9-711(b)(4) (1987), which states:

> The court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:
>
> (A) That the commission acted without or in excess of its powers;
>
> (B) That the order or award was procured by fraud;
>
> (C) That the facts found by the commission do not support the order or award;
>
> (D) That the order or award was not supported by substantial evidence of record.

Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether this Court might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. If reasonable minds could reach the result shown by the Commission's decision, we must affirm the decision. *Bradley* v. *Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

Arkansas Code Annotated §11-9-102(13) (Supp. 1995)[1] defines "healing period" as that period for healing of an injury resulting from an accident. In *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), our court observed that the healing period continues until the employee is as far restored as the permanent character of his injury will permit, and we added that, ". . .if the underlying condition causing the disability has become stable and if nothing . . . in the way of treatment will improve that condition, the healing period has ended. . . . The determination when the healing period has

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[1] The definition remained the same when the Workers' Compensation law was amended in 1993, although the amendments resulted in re-numbering the provision defining "healing period" from Ark. Code Ann. §11-9-102(6) (1987) to Ark. Code Ann. §11-9-102(13) (Supp. 1995).

ended is a factual determination that is to be made by the Commission. If that determination is supported by substantial evidence, it must be affirmed on appeal." *Id.* at 4 Ark. App. 131-132, citations omitted.

In this case, the appellee suffered a back injury that his attending doctor diagnosed as spondylolysis (a fracture of the pars interarticularis or bridging bone between the vertebrae), and spondylolisthesis (defined as slippage in alignment of the vertebrae which can occur when the pars interarticularis is fractured). Dr. Jordan, the attending neurosurgeon, testified that appellee needed a spinal fusion to correct the injury, but that he would not be a suitable candidate for the surgery until he stopped smoking. It is undisputed that appellee did not stop smoking, and appellants emphasize this point in arguing that the healing period had ended and appellee's condition had improved as much as it was going to improve on or before May 4, 1993. The Commission was certainly entitled to agree; yet, it was also entitled to agree, based upon the evidence before it, that appellee's condition would be improved by additional treatment. Specifically, the Commission received evidence that appellants refused to provide recommended medical treatment and services to appellee. Dr. Jordan indicated in his September 13, 1993, report to counsel for appellee that approval to obtain a polypropylene body jacket prior to surgery was still pending, and it does not appear that appellants gave that approval despite Dr. Jordan's uncontradicted opinion that appellee benefitted by wearing a back brace that had been prescribed. In short, there was evidence before the Commission to support the conclusion that the appellee's back condition would benefit from further treatment (back surgery and/or the body jacket) that appellants refused to provide. The Commission concluded that this evidence demonstrated that the appellee had not reached the end of his healing period. Under our substantial evidence standard of review, we find no error in that determination.

Appellants also argue that the Commission erred by finding that the appellee remained entitled to temporary total disability benefits from June 8, 1992, to a date yet to be determined. The Commission made this determination in its April 2, 1993, opinion. Appellants did not appeal that award within thirty days as required by Ark. Code Ann. §11-9-711(b)(1),

which states that a Workers' Compensation Commission award shall become final unless appealed within thirty days from its receipt. We, therefore, do not review the challenge to the award of benefits from June 8, 1992, to a date yet to be determined because that decision by the Commission is res judicata. *See Tuberville* v. *International Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986).

Appellants challenge the twenty-percent penalty and award of a second attorney's fee for controversion, and assert that because they were unsure when and how to pay the temporary total disability benefits awarded to a "date to be determined," they cannot be deemed to have failed to pay the award. This argument is unpersuasive for several reasons. First, the Commission clearly awarded temporary total disability benefits to the appellee at the rate of $241.93 per week from June 8, 1992, to a date yet to be determined, and appellants were ordered to comply with the award made by the administrative law judge which the Commission adopted and affirmed in its April 2, 1993, decision. Appellants took no appeal. There is nothing in the record to support appellants' argument that they did not understand the award when it was rendered or at any other time. The record is clear, however, that appellants have paid none of the temporary total disability benefits that were awarded more than two years ago. Arkansas Code Annotated §11-9-802 (c) provides for a twenty-percent penalty on disability installments unpaid more than fifteen days after becoming due. We have long held that failure to begin paying benefits within the statutory period gives rise to the twenty-percent penalty laid out in the statute. *Smith's Store* v. *Kirker*, 6 Ark. App. 222, 639 S.W.2d 751 (1982); *Ark. Hwy. And Transp. Dep't* v. *Godwin*, 270 Ark. 743 (Ark. App. 1980), 606 S.W.2d 127 (1980); *Mohawk Tire & Rubber Co.* v. *Brider*, 259 Ark. 728, 536 S.W.2d 126 (1976). Because appellants offer no proof that the payments were made, their argument against imposition of the penalty is without merit.

Indemnity benefits for temporary disability serve a vital purpose within the overall scheme of worker's compensation legislation by providing subsistence income to an injured worker who is incapacitated and healing from a compensable injury. Before the advent of workers' compensation, an injured worker

had to prove that an injury was caused by the employment and resulted from fault by the employer but through no fault of the worker, a co-worker, or third party. Also, the worker had to go without income in the meantime. By providing the injured worker with a reasonable percentage of the average weekly wage as an indemnity benefit during the time of temporary incapacity in compensable cases, the workers' compensation scheme worked to right a social wrong.

In this case, appellee had to litigate the compensability of the June 1992 injury before he was initially determined entitled to temporary total benefits in December 1992. He then litigated the case before the Full Commission which affirmed and adopted the original award in its April 2, 1993, decision, nearly ten months after the injury occurred. Appellants never appealed the award, but refused to pay it in flagrant violation of the statute. Moreover, they did not claim that the appellee had ended his healing period until he obtained the January 11, 1994, hearing before the law judge concerning the unpaid benefits. If any case warranted the statutory penalty imposed by the Commission, this one does.

The appellee was forced, in the second round of litigation, to again demonstrate to the Commission that he is entitled to temporary total disability benefits. A maxim of worker's compensation law is that when the Commission finds that a case has been controverted, in whole or in part, the Commission shall direct the payment of legal fees by the employer or carrier in addition to the compensation awarded. Arkansas Code Annotated §11-9-715 (b) (Supp. 1995), *Tyson Foods, Inc.* v. *Fatherree*, 16 Ark. App. 41, 696 S.W.2d 782 (1985). Direct proof of controversion is where the appellee must incur legal expenses to defend his disability benefits award on appeal. *See Aluminum Co. of America* v. *Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976); *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 43 Ark. App. 79, 861 S.W.2d 114, (1993). One of the purposes of the statute and case law is to put the economic burden of litigation on the party that makes litigation necessary by controverting the claim. *Prier Brass* v. *Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988). In this second round of litigation, appellants seek relief from this court after refusing for months to pay the award that they refused to appeal on the merits.

The temporary total disability award was adopted by the Commission on April 2, 1993, and would have been payable no later than fifteen days after it had become final (thirty days from the date it was received). When the parties appeared before the Commission on January 11, 1995, twenty-one months later, appellants had not paid any part of the award. They apparently continue to refuse to pay any part of the award some thirty-two months after it was issued. The Commission had, therefore, ample justification for imposing the statutory penalty and attorney's fees where there was uncontradicted proof that the appellants had failed to make any payment for more than twenty-one months after it was rendered. Given the undisputed proof of nonpayment and the plain proof that the appellee has been forced to re-litigate his entitlement to temporary total disability benefits, imposition of the twenty-percent penalty for nonpayment and the award of attorney's fees was not erroneous under any analysis.

Affirmed.

COOPER and STROUD, JJ., agree.

Katie M. BRADFORD *v.* Darrell BRADFORD

CA 94-1313 915 S.W.2d 723

Court of Appeals of Arkansas
Division III
Opinion delivered February 21, 1996

[redacted]

[redacted]

Boyd A. Tackett, Jr., for appellant.

Hoyt Thomas, for appellee.

JOHN MAUZY PITTMAN, Judge. Katie Bradford has appealed from an order of the Van Buren County Chancery Court allowing her son, appellee, Darrell Bradford, to intervene in his parents' divorce action. In this order, the chancellor granted appellee specific performance of an oral contract whereby his parents agreed to convey a parcel of real property to him. On appeal, appellant argues that the chancellor erred in allowing appellee to intervene in the divorce case and in granting specific performance of the agreement. We affirm the chancellor's decision in all respects.

In 1992, appellant and her husband, Emmitt Bradford, verbally agreed to sell appellee a thirty-eight-acre parcel of land adjoining their home for $20,000.00. Appellee paid his parents in full, took possession of the land, and built a shed and a larger building on the property. While the property was being surveyed prior to the execution of the deed, appellee got married. Appellant strongly objected to this marriage and changed her mind about conveying the property to appellee. In order to avoid further conflict, appellee accepted the return of his $20,000.00.

The discord within the family did not abate, however, and appellant sued Emmitt for divorce in August 1993. In December 1993, appellant was granted a divorce. The chancellor, however, specifically provided in the divorce decree that all issues pertaining to the property interests of the parties were reserved for a separate hearing to be held in the near future.

On January 7, 1994, appellee filed a "petition" with the chancery court in the divorce action in which he stated that his father was willing to convey the land but that appellant had refused to do so. Appellee stated that he had obtained appraisals of the two buildings that he had constructed on the property and that their total value was $12,543.00. Appellee requested the chancellor to order his parents to sell him the property as they had agreed or award him the value of the improvements. Appellee did not file a separate motion for leave to intervene.

In response to appellee's petition, appellant argued that appellee was not a party to this case and did not have standing to obtain relief. She admitted that the parties had refunded the $20,000.00 to appellee.

The property issues were tried to the court on March 1, 1994. Appellant pointed out that appellee had not yet been granted leave to intervene. Over appellant's objection, the chancellor allowed appellee to remain in the courtroom during the hearing.

Appellant testified that appellee had built the small shed on the property before there was any discussion of conveyance. She stated that she had eventually agreed to deed the thirty-eight acres to appellee and had had it surveyed for that purpose. She also admitted that appellee had paid her and her husband $20,000.00. She stated that she had refused to go through with the sale because she did not approve of appellee's marriage.

Emmitt testified that appellee had bulldozed roads, built two buildings, and cut timber on the property and had paid $20,000.00 for the land. He stated that he had agreed to give appellee his money back to make peace and that he agreed with appellee's petition for conveyance of the property.

Appellee testified that he had begun building the shed before the parties reached the agreement to sell him the property and had constructed the bigger building after he paid his parents the $20,000.00.

At the conclusion of the hearing, the chancellor stated:

> I don't really like a situation of an individual not having an attorney, because it increases the possibility of reversal and things not being done right. I do appreciate and understand this is a family situation, and I also do appreciate that — how if another lawsuit got started, then it could throw a monkey wrench in the gears of getting this thing resolved, and even a bad decision is better than no decision . . . and lingering in limbo forever, so I'm going to construe the pleadings liberally and go ahead and affect Mr. Darrell Bradford's petition as a petition for intervention. I'm going to conform the proof to the pleadings. I'm going to construe his request as a demand for specific per-

> formance in an intervention — a formal intervention, and I'm going to grant his request for specific performance. I don't know what more evidence or indicia of partial performance there could be, and Miss Bradford openly testified that the only reason it wasn't consummated was just an act of defiance on her part. And, they, back before any of these pressures were on them, negotiated and came to the conclusion that it was worth twenty thousand dollars ($20,000). . . . They need to go ahead and finish their bargain.

In the order entered April 28, 1994, the chancellor found that appellee had taken possession of the property, had paid the full purchase price of $20,000.00, and had made all improvements thereon. The chancellor granted appellee's petition for specific performance of the agreement and ordered that, upon appellee's payment of $20,000.00, a deed be delivered to him. In this order, the chancellor also directed that all of appellant's and Emmitt's marital personal and real property be sold at public auction. Appellant filed her notice of appeal on April 29, 1994.

On June 30, 1994, appellant filed a motion under Ark. R. Civ. P. 60(b) to correct the decree. She requested the chancellor to find that the oral agreement to convey the property violated the statute of frauds. This motion was not granted.

For her first point on appeal, appellant argues that, even though appellee filed his petition pro se, he was still required to conform to the Rules of Civil Procedure. In response, appellee states that he is in agreement with this principle. It is true that all litigants, including those who proceed pro se, must conform to the rules of procedure, or else demonstrate good cause for not doing so. *Arnold & Arnold* v. *Williams*, 315 Ark. 632, 870 S.W.2d 365 (1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 489 (1994).

In her second point, appellant argues that the chancellor erred in allowing appellee to intervene without strictly complying with the "mandatory requirements" of Ark. R. Civ. P. 24. Appellant argues that appellee was required to file a separate motion for intervention in addition to his petition for specific performance and that his failure to do so requires reversal.

We note that appellant did not articulate this argument before the trial court. Although she argued that appellee had not yet been allowed to intervene, she did not argue that his petition was inadequate under Rule 24. This court has stated that it will not consider arguments on appeal that were not fully developed at the trial level. *First Nat'l Bank* v. *Adair*, 42 Ark. App. 84, 854 S.W.2d 358 (1993).

In any event, we would find no error on the facts of this case. It is true that, ordinarily, there must be pleadings in support of the relief awarded by the court. *See Bachus* v. *Bachus*, 216 Ark. 802, 227 S.W.2d 439 (1950). However, appellant has cited no case in which it was held that, even though a sufficient claim for relief was filed, it was necessarily error to grant intervention if a document styled "motion to intervene" was not filed. Arkansas Rule of Civil Procedure 8(f) provides that all pleadings shall be liberally construed so as to do substantial justice. Rule 1 of the Arkansas Rules of Civil Procedure provides that the rules shall be construed "to secure the just, speedy and inexpensive determination of every action." This was expressed in *Employers National Insurance Co.* v. *Grantors*, 313 Ark. 645, 652, 855 S.W.2d 936, 940 (1993), as follows: "The objective of our rules of procedure is the orderly and sufficient resolution of disputes."

Rule 24 of the Arkansas Rules of Civil Procedure provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense

> and the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

It is true that Rule 24(c) requires a party seeking intervention to state in a separate pleading the claim or defense to be advanced. *See Schacht* v. *Garner*, 281 Ark. 45, 661 S.W.2d 361 (1983). However, we believe that appellee adequately complied with that rule by clearly setting forth his claim for relief within the context of this divorce action. In *National Security Fire & Casualty Co.* v. *Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985), this court held that pleadings are for the purpose of informing all the parties what the issues are and, when there is no surprise or substantial prejudice, the court can always and often does treat the pleadings as amended to conform to the proof. " 'Defects in pleadings are to be disregarded unless they substantially affect the rights of the adverse party.' " *Id.* at 220, 686 S.W.2d at 810 (quoting *Miller* v. *Hardwick*, 267 Ark. 841, 843, 591 S.W.2d 659, 660 (Ark. App. 1980)). Here, it was clear to appellant that appellee sought to intervene and that he sought specific performance of the contract. Clearly, she suffered no prejudice from the chancellor's decision to allow appellee to intervene nearly two months before the parties' property interests were to be decided.

Additionally, the chancellor stated that he would conform the pleadings with the proof and treat appellee's pleading as if he had formally moved to intervene. The chancellor has broad discretion in allowing or denying amendments to the pleadings. *See Thompson* v. *Dunn*, 319 Ark. 6, 889 S.W.2d 31 (1994); *Cawood* v. *Smith*, 310 Ark. 619, 839 S.W.2d 208 (1992). We cannot conclude that the chancellor abused his discretion in allowing appellee to intervene, even though he did not file two separate pleadings in seeking to do so.

In her second point on appeal, appellant also argues that she was not properly served by appellee under Arkansas Rule of Civil Procedure 5(b). This argument was not raised below; therefore, we will not decide it. We have held many times that we will not consider issues raised for the first time on appeal. *Finn* v. *State*, 36 Ark. App. 89, 819 S.W.2d 25 (1991); *Cox* v. *Bishop*, 28 Ark. App. 210, 772 S.W.2d 358 (1989). *See also Brown* v. *Minor*, 305 Ark. 556, 810 S.W.2d 334 (1991).

In her third point on appeal, appellant argues that appellee had no grounds to intervene under Rule 24(a), which provides for intervention of right, or under Rule 24(b), which provides for permissive intervention. We reject this argument because appellee has satisfied the three requirements that an applicant must meet in order to intervene as a matter of right: (1) that he has a recognized interest in the subject matter of the primary litigation; (2) that his interest might be impaired by the disposition of the suit; and (3) that his interest is not adequately represented by existing parties. *Billabong Prods., Inc.* v. *Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983). In *UHS of Arkansas, Inc.* v. *City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988), the court stated that an applicant must establish not only a sufficient interest, but also that the disposition of the action may, as a practical matter, impair or impede an ability to protect one's interest and that the interest is not adequately represented by the existing parties. In *Billabong Products, Inc.* v. *Orange City Bank*, *supra*, the court stated: "Generally, if the one seeking intervention will be left with his right to pursue his own independent remedy against the parties, regardless of the outcome of the pending case, then he has no interest that needs protecting by intervention of right." 278 Ark. at 208-09, 644 S.W.2d at 595. *Accord Midland Dev., Inc.* v. *Pine Truss, Inc.*, 24 Ark. App. 132, 750 S.W.2d 62 (1988). In *Schacht* v. *Garner*, *supra*, the supreme court stated that intervention as a matter of right cannot be denied, but intervention by permission is discretionary, the denial of which will only be reversed if that discretion is abused. *See also Vandiver* v. *Washington County*, 274 Ark. 561, 628 S.W.2d 1 (1982).

Clearly, appellee had an interest in the real property of his parents that was not adequately represented by either of his parents in their divorce proceeding. It is also apparent that

appellee's interest in the property would be impaired by the public auction of his parents' property following their divorce. If the thirty-eight-acre parcel of land had been sold at public auction, appellee would not have been left with a remedy against his parents. Therefore, appellee adequately demonstrated that he was entitled to intervene as a matter of right. Additionally, even if appellee's intervention could only be characterized as permissive, the chancellor did not abuse his discretion in allowing him to intervene.

Appellant argues in her fourth point on appeal that the chancellor erred in allowing appellee to intervene in an untimely fashion. Timeliness under Rule 24(a) is a matter lying within the discretion of the trial court and will not be subject to reversal absent abuse of that discretion. *Carton* v. *Missouri-Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993); *Employers Nat'l Ins. Co.* v. *Grantors, supra*; *Cupples Farms Partnership* v. *Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992); *Polnac-Hartman & Assocs.* v. *First Nat'l Bank*, 292 Ark. 501, 731 S.W.2d 202 (1987); *Bank of Quitman* v. *Phillips*, 270 Ark. 53, 603 S.W.2d 450 (Ark. App. 1980). Timeliness is to be determined from all of the circumstances. *Cupples Farms Partnership* v. *Forrest City Prod. Credit Ass'n, supra.* The factors that the trial court should consider in such a decision are: (1) how far the proceedings have progressed; (2) any prejudice to other parties caused by the delay; and (3) the reason for the delay. *Id.* Rule 24 does not state a specific time limit for timely intervention. *See Arkansas Best Corp.* v. *General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994). When there are "unusual and compelling" circumstances, intervention may be permitted even after a final judgment has been entered. *Id.*

Appellant argues that appellee's petition was filed after the entry of final judgment. This is incorrect. Even though the chancellor granted the parties a divorce in December 1993, he specifically reserved the determination of their property interests for a later hearing, which was held almost two months after appellee sought to intervene in the action. We hold that the chancellor did not abuse his discretion in refusing to find appellee's petition to be untimely.

For her fifth point on appeal, appellant argues that the par-

ties' oral agreement violated the statute of frauds. Again, this argument was not raised before the entry of the decree. In fact, appellant waited to raise this argument until two months after she had filed her only notice of appeal. We therefore need not address this issue.

Affirmed.

ROGERS, J., agrees.

ROBBINS, J., concurs.

Sam DEAN, Jr. *v.* COLONIA UNDERWRITERS INSURANCE COMPANY, State Farm Insurance Company, and Entergy Benefits Plus Medical Plan

CA 94-1420 915 S.W.2d 728

Court of Appeals of Arkansas
Division II
Opinion delivered February 21, 1996

Etoch Law Firm, by: *Mike J. Etoch*, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Brian Allen*

Brown and *Richard N. Watts*, for appellee State Farm Insurance Company.

Michael G. Thompson and *Tucker Raney*, for appellee Entergy Benefits Plus Medical Plan.

JAMES R. COOPER, Judge. The appellant, Sam Dean, Jr., appeals a judgment of the Phillips County Circuit Court that awarded the appellees State Farm Insurance Company (State Farm) and Entergy Benefits Plus Plan (Entergy) an equal division of the remaining $16,500.00 settlement paid by appellee Colonia Underwriters Insurance Company (Colonia). For reversal, the appellant argues that: (1) State Farm does not have a right to subrogation under Arkansas law; and (2) Entergy does not have a right to subrogation under its reimbursement agreement. We affirm the award to State Farm and the award to Entergy is affirmed as modified.

In March 1992, the appellant was involved in an automobile accident when Edward Nolan struck appellant while Nolan was attempting to outrun the police. The appellant suffered severe injuries to his spine as a result of the accident, incurred medical bills in excess of $35,000.00, and was determined to be totally disabled by the Social Security Administration and his employer, Entergy. The vehicle Nolan was driving was insured by appellee Colonia. Colonia tendered its $25,000.00 policy limits to the clerk of the court, and the appellant filed a declaratory judgment action, requesting that the court find that appellees State Farm and Entergy were not entitled to any subrogation from these benefits. State Farm answered and claimed it was entitled by statute and its policy language to recover the medical benefits and loss of income payments it had paid to appellant. Entergy answered and counterclaimed, asserting its right of subrogation for medical benefits and disability benefits paid by it. Attached to appellee Entergy's counterclaim was a "Reimbursement Agreement" signed by the appellant that provided:

> In consideration of the receipt from the Aetna Life Insurance Company (hereafter called Aetna) by me, on my behalf or on behalf of any of my covered family members) of benefit payments provided under the employee benefit plan established by my employer, I agree for myself and for any other injured covered family member to whom or

> for whom such payments were made, and such family member(s) (or the legally authorized representative if such family member is legally incapacitated) by signing this agreement [appellant] also agree(s) to reimburse Aetna for all such payments in the event of recovery from any third person legally responsible for said injuries, whether by suit, settlement or otherwise, but only to the extent that the net amount of such recovery is attributable to hospital, surgical or other health or medical expenses paid under the plan. I (We) also agree that a lien shall exist in favor of Aetna upon all sums of money recovered in connection with such injuries to the extent of the benefit payments paid under the plan.

In September 1993, appellee State Farm moved for summary judgment. In its motion, State Farm claimed that it had a statutory and contractual right to recover the sum of $12,280.00 paid to appellant under its medical payments and lost income coverages of its policy and that there is no material fact in dispute. Appellee Entergy filed a cross-motion for summary judgment. It contended that there were no material issues of fact in dispute and that it had paid appellant $25,361.00 from its medical plan as a result of appellant's accident, which entitled it to subrogation. In opposition to the appellees' motions for summary judgment, the appellant claimed that he was entitled to the entire $25,000.00 because no medical or lost wages were included in that payment and, therefore, he would not be receiving a double recovery. Attached to the appellant's brief were the affidavits of Gene Raff and Michael Easley, trial attorneys, who each stated that, after reviewing appellees' case, it was their opinion that appellant's damages exceeded $250,000.00.

On March 7, 1994, the court handed down its letter opinion, holding that appellees State Farm and Entergy were entitled to recover in equal proportions from Colonia's settlement less the costs of collection. In a letter written to the appellant's attorney, the court stated:

> The Court is of the opinion that it cannot determine what part, if any, of the $25,000.00 paid by Colonia was for medicals and loss of income and what part was for pain and suffering and mental anguish without either a

> stipulation by the parties or some sort of evidence from which the Court could make a finding. If the parties will submit either a stipulation or some evidence the Court will make some finding.

An evidentiary hearing was held on June 23, 1994, at which time exhibits were presented to the court that showed the amounts paid by appellees State Farm and Entergy on the appellant's behalf and also itemized the appellant's medical bills and lost wages.

A final order was entered by the court on October 6, 1994. In that order, the court found that $16,500.00 remained of Colonia's $25,000.00 payment after deduction for court costs and attorney's fees. The court then concluded: "The remaining $16,500.00, although allocated one-third for medical, one-third for loss of earnings, and one-third for pain and suffering and bodily injury, is to be divided equally between State Farm Insurance and Entergy Benefit Plus Plan."

The appellant first contends that the trial court erred in finding that State Farm has a right of subrogation under Arkansas law. Although the appellant acknowledges in his brief that "[i]t is uncontested that the State Farm policy contains a reimbursement agreement should Sam Dean, Jr., recover from a third party which he did," he nevertheless, contends that, since he has not been made whole as a result of this settlement nor has he been reimbursed for any medical payments or loss of earnings by the settlement, State Farm is not entitled to be reimbursed for the medical or lost earnings it paid to him.

We note that the trial court apportioned the $16,500.00 net recovery to one-third medical benefits, one-third loss of earnings, and one-third pain and suffering and bodily injury. Therefore, appellant's statement that the Colonia settlement did not include any reimbursement for medical payment or lost earnings is incorrect.

In his brief, the appellant states that his pain and suffering far exceeds the $25,000.00 recovery and should be paid first before any part is allocated for medical benefits and loss of earnings. However, he has not cited any authority for this proposition. 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, 32, 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 appellant has not abstracted any evidence to show the trial court's allocation of his recovery is clearly against the preponderance of the evidence. The appellant claims that the affidavits attached to his brief in response to appellees' summary judgment motions state that, in the affiants' opinions, the $25,000.00 should not include reimbursement for medical benefits or lost wages. However, he has not included these portions of the affidavits in his abstract. It is the appellant's burden to abstract the record to demonstrate error, and the appellate court will not go to the record to determine whether reversible error occurred. *Couch* v. *First State Bank*, 49 Ark. App. 102, 104, 898 S.W.2d 57 (1995).

On this record, we cannot say that the appellant has come forward with any evidence to show the allocation by the court is clearly erroneous.

The appellant correctly contends that he has not been made whole as a result of his recovery against Colonia. Nevertheless, State Farm is still entitled to pursue its subrogation claim. The State Farm policy provides: "We are subrogated to the extent of our payment to the proceeds of any settlement the insured person recovers from any party liable for the bodily injury." The clear language of this agreement does not restrict State Farm's subrogation rights only in the event appellant recovers medical benefits or lost wages. Nor does Ark. Code Ann. § 23-89-207 (Repl. 1992) contain such a restriction. Subsection (a) of this section provides: "Whenever a recipient of § 23-89-202(1) and (2) benefits recovers in tort for injury, either by settlement or judgment, the insurer paying the benefits has a right of reimbursement and credit out of the tort recovery or settlement, less the cost of collection as defined." No restrictions have been placed on this statutory language, which has been in effect since its passage in 1973. It is uncontested that State Farm's payments to appellant of medical benefits and lost wages were pursuant to Section 23-89-202.

An argument similar to the appellant's was made by the appellant in *Higginbotham* v. *Arkansas Blue Cross and Blue Shield*, 312 Ark. 199, 849 S.W.2d 464 (1993). In that case, the appellant was seriously injured in an automobile accident. The other driver was insured by State Farm, and State Farm paid the appellant its policy limits of $25,000.00 in return for a release executed by the appellant. The appellee, who carried medical insurance on the appellant, paid his medical bills totalling $11,482.08 and subsequently made demand on the appellant for reimbursement of the benefits it had paid, relying on the subrogation clause in its insurance policy: "The plan shall be subrogated and shall succeed to such covered person's right of recovery against any third party to the full extent of the value of any such benefits or services furnished or payments made or credits extended." 312 Ark. at 200. The appellant, however, refused the appellee's demand, asserting that the appellee was not entitled to subrogation until the appellant had received sufficient sums of money to be "made whole." Although the trial court found that the $25,000.00 did not fully compensate the appellant for his injuries, it held that the right of subrogation provided in the insurance contract applies regardless of whether the covered individual is fully compensated in his settlement with the tortfeasor's insurance company. In affirming the trial court's decision, the Supreme Court held:

> Although we attribute considerable merit to the opposing approach, we believe on balance the policy language must govern. The clause is clear; the words are unambiguous:
>
> > In the event *any benefits* or services *of any kind* are furnished to you or payment made or credit extended to or on behalf of any covered person for a physical condition or *injury caused by a third party or* for which a third party may be liable, the Plan *shall be subrogated* and shall succeed to such covered person's rights of recovery against any such third party *to the full extent of the value of any such benefits* or services furnished or payments made or credits extended. [Our emphasis.]
>
> We are not overlooking our own case, *Shelter*

Mutual Insurance Company v. *Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992), decided after these briefs were filed but discussed in oral argument. The decision contains this comment:

> Although we have no criticism of the cases cited by Bough, the rule limiting the insurer's rights to subrogation in those cases is not applicable to the facts here. The equitable nature of subrogation is granted an insurer to prevent the insured from receiving a double recovery. Thus, while the general rule is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss, the insurer should not be precluded from employing its right of subrogation when the insured has been fully compensated and is in a position where the insured will recover twice for some of his or her damages. That is the situation here.

But the fact remains that we have not previously addressed the issue here presented, nor were we doing so in *Bough*. The primary holding of that case concerned whether Shelter had properly made underinsured motorist benefits available to its insureds, Nancy and Robert King, whose vehicle Bough was driving when the loss occurred. A secondary issue was whether Shelter was prejudiced by Bough's full release of the third party tort-feasor and his carrier without notice to Shelter. Thus, the excerpt from Bough was dictum.

It may be those equitable principles on which Higginbotham relies are appropriate to the doctrine of subrogation by operation of law, a right broadly recognized in the law irrespective of whether there is a provision in the policy itself, but not where, as here, the right is one of conventional subrogation, that is, subrogation by express agreement between the insured and the insurer. *See* 44 Am. Jur. 2d *Insurance* at 783 (1982).

Higginbotham v. *Arkansas Blue Cross and Blue Shield*, 312 Ark. at 202-03.

The appellant argues in the case at bar that the deci-

sion in *Higginbotham* should not be applied because that case was a 4-3 decision and Justice Brown concurred in that decision, stating:

> Based on the record before us, it is impossible to tell what State Farm's liability benefit of $25,000 involved. Presumably it was liability coverage for bodily injury only. Blue Cross should only recover by subrogation to the extent that there has been double recovery by the insured for the same damages covered by Blue Cross. Had the appellant shown that part of the State Farm benefits were for damages other than for medical treatment, I would disallow subrogation for the non-medical portion of the benefits paid for public policy reasons. However, that was not done, perhaps because the parties understood that the liability coverage only went to bodily injury. For that reason I concur with the opinion.

312 Ark. at 204. The appellant again argues that State Farm is not entitled to subrogation out of any of the recovery because he was not reimbursed for medicals or loss of earnings out of the $25,000.00 settlement. However, as we previously stated, the appellant's assertion of facts is clearly contrary to the trial court's order that allocated one-third of the recovery to medical benefits and one-third to loss of earnings. Furthermore, we are without authority to overrule decisions made by the Supreme Court. *See Roark* v. *State*, 46 Ark. App. 49, 55, 876 S.W.2d 596 (1994); *Leach* v. *State*, 38 Ark. App. 117, 130, 831 S.W.2d 615 (1992); *Huckabee* v. *State*, 30 Ark. App. 82, 86, 785 S.W.2d 223 (1990).

Next, the appellant argues that Entergy does not have a right to subrogation under its reimbursement agreement. In support of his argument, the appellant relies on the Reimbursement Agreement drafted by Entergy and signed by the appellant, which states:

> [B]y signing this agreement, [appellant] also agree(s) to reimburse Aetna for all such payments in the event of recovery from suit, settlement or otherwise, but only to the extent that the net amount of such recovery is attributable to hospital, surgical or other health or medical expenses paid under the plan.

The appellant argues that the clear language of the Reimbursement Agreement provides that Entergy can only recover out of third-party benefits to the extent that the net amount of the recovery is attributable to health or medical expenses under the plan. We agree. In this case, the trial court allocated $5,500.00 of the recovery as medical benefits. Therefore, under the clear language of the Reimbursement Agreement, the trial court erred in allowing Entergy to share equally in the $5,500.00 award for loss of wages and the $5,500.00 award for pain and suffering and bodily injury.

Appellee Entergy tendered two arguments in response to the appellant's argument; however, Entergy's first response was stricken by this court on May 3, 1995, and Entergy has not challenged that ruling. The appellee's second argument is that, under Arkansas law, it has a right to subrogation under its plan. Entergy then cites the case of *Storey* v. *Arkansas Blue Cross/Blue Shield, Inc.*, 17 Ark. App. 112, 114-15, 704 S.W.2d 176 (1986), for the proposition that a party cannot accept the benefits under a contract and, at the same time, avoid his obligations under such agreement. Entergy argues that, because the appellant accepted the benefits under its medical plan, he must now reimburse Entergy according to the obligation.

While we agree that Entergy is entitled to a subrogation in accordance with the clear language of its plan, the subrogation clause in its plan is fairly restrictive. It provides:

> If a member or a covered dependent is injured as a result of actions of a third party, the plan shall be entitled to recover all benefits paid hereunder *for expenses incurred in the treatment of such injury* from the member or covered dependent upon the settlement of any claim against a third party or upon a judgment in favor of the member or covered dependent in case of a lawsuit.

Although the specific language of this plan entitles Entergy to be subrogated for the medical payments it paid on behalf of the appellant, we do not think this language would allow Entergy reimbursement for the disability benefits it paid appellant or allow it to seek reimbursement from the lost wages or pain and suffering award. Moreover, the specific language of the Reimbursement Agreement executed by the parties in July 1992 over-

rides the general provision in the plan. Because the trial court found that only $5,500.00 of the Colonia benefits were for medical payments, the $8,250.00 award to Entergy must be reversed.

Entergy has not cross-appealed its award of only half of the $5,500.00 medical benefits nor claimed it was entitled to a larger portion. Therefore, we order that the $8,250.00 award to Entergy be modified and reduced to $2,750.00, which is one-half of the medical benefits that appellant received from Colonia. This Court has the power to divide two causes of action in a circuit judgment, so long as it is not dividing a single jury verdict. *Crookham & Vessels, Inc.* v. *Larry Moyer Trucking, Inc.*, 16 Ark. App. 214, 218-19, 699 S.W.2d 414 (1985).

Affirmed as modified.

STROUD and GRIFFEN, JJ., agree.

Gene INGRAM *v.* CENTURY 21 CALDWELL REALTY

CA 95-189 915 S.W.2d 308

Court of Appeals of Arkansas
En Banc
Opinion delivered February 21, 1996

Wooten & Slagle, P.A., by: *Richard L. Slagle*, for appellant.

Hobbs, Garnett, Naramore & Strause, by: *Ronald G. Naramore*, for appellee.

JAMES R. COOPER, Judge. The appellant in this contract case entered into an employment agreement in January 1988 to act as managing broker for the appellee realty. The term of the agreement was "for as long as gross commission annually exceeds that of 1987." At all times after execution of the agreement, the appellee had commissions exceeding those earned in 1987. The appellant was terminated in September 1991 because the business was experiencing severe financial problems. The appellant filed suit against the appellee realty for money damages arising out of an alleged breach of the employment contract. After a bench trial, the circuit judge found that the appellant was terminated for legitimate and proper cause, and entered judgment for the appellee. From that decision, comes this appeal.

For reversal, the appellant contends that the circuit judge erred in admitting parol evidence to determine what cause would justify termination under the contract, and in finding that the

appellant was discharged for legitimate and proper cause. We find no error, and we affirm.

Over the appellant's objection, the president of the appellee agency, Carol Caldwell, was permitted to testify regarding her understanding of the reasons that would permit the appellant's termination after 1988 pursuant to the employment contract. The appellant argues that the admission of parol evidence was erroneous because the agreement was not ambiguous with regard to the grounds for termination. Although parol evidence is admissible only if an ambiguity exists, *Singh* v. *Riley's, Inc.*, 46 Ark. App. 223, 878 S.W.2d 422 (1994), the initial determination of the existence of an ambiguity rests with the court.[1] *Minerva Enterprises* v. *Bituminous Casualty Corp.*, 312 Ark. 128, 851 S.W.2d 403 (1993). In the case at bar, the agreement was ambiguous with respect to the circumstances under which the appellant could be terminated after 1988. The contract expressly provided that it would in no case be terminable in less than one year (i.e., during 1988) except in the case of gross mismanagement by appellant. Clearly, then, the contract envisioned that some degree of incompetence or neglect of duty would provide grounds for termination. The failure to specify the degree of mismanagement that would justify termination after 1988 rendered the agreement ambiguous.[2] Consequently,

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[1] The dissenting opinion makes much of the absence of an explicit determination by the trial court that the agreement was ambiguous. However, it clearly appears from the record that the trial judge overruled the objection and allowed testimony concerning the intent of the parties into evidence. Had the appellant desired an express statement of the trial court's conclusion concerning the ambiguity of the agreement, he could have requested one pursuant to Ark. R. Civ. P. 52(a). Our review of the record discloses no such request. We will therefore indulge the long-standing presumption that the trial court acted properly and made the findings necessary to support its judgment. *See Kindrick* v. *Capps*, 196 Ark. 1169, 121 S.W.2d 515 (1938); *see generally First National Bank* v. *Higginbotham Funeral Service, Inc.*, 36 Ark. App. 65, 818 S.W.2d 583 (1991) (Cracraft, J., dissenting).

[2] The dissenting judge argues that the agreement is not ambiguous because, by its terms, the appellant could be terminated only for failure to act in good faith in protecting the assets and reputation of the corporation. The fallacy of this view appears on the face of the agreement, which expressly permits termination during 1988 for gross mismanagement. While the essence of "good faith" is honesty of intention and best efforts, *see McEwen* v. *Everett*, 6 Ark. App. 32, 637 S.W.2d 617 (1982); *Black's Law Dictionary* 822 (4th ed. 1968), "mismanagement" encompasses poor performance or incompetence

the circuit judge did not err in admitting parol evidence to resolve it. *See Minerva Enterprises, supra.*

The appellant next contends that the circuit judge erred in finding that he was terminated for good cause. The findings of fact of a circuit judge sitting as a jury will not be set aside on appeal unless they are clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(b). There was evidence that the appellant was responsible for the fiscal management of the office and that he had introduced a number of new expenses in the year preceding his termination. For example, he had procured additional insurance, engaged new referral services, enlarged the office telephone system, placed out-of-state advertisements, obtained an 800 number, and purchased a fax machine. These additional expenses contributed to a fiscal crisis when, during the first quarter of 1991, the gross commissions totalled only $8,000. The record shows that, immediately prior to the appellant's termination, the business was in such serious financial distress that the sum of the bills which needed to be paid at once exceeded the amount of available cash by a wide margin. Utilities had threatened to shut off service and advertisers were refusing to take listings.

By its terms, the employment agreement required the appellant to perform the duties of a broker and manager and to act in good faith in protecting the assets and reputation of the corporation. We think it significant that, in the midst of this financial emergency, the appellant intentionally misrepresented the situation to his employer. By his own testimony, the appellant did not accurately report the extent of the fiscal crisis but instead "exaggerated to try to get her attention." We think this misrepresentation was material because it was his employer's perception of the firm's financial distress which prompted the

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without regard to the actor's intent. *See Webster's New Collegiate Dictionary* 729 (1973). The distinction between these terms is elementary.

Although neither term is nebulous, ambiguity may arise by means other than indistinctness or uncertainty of meaning; for example, ambiguity may also result where the clear wording of conflicting clauses seem to indicate inconsistent results. *See, e.g., Williams* v. *City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985); *Smith* v. *Smith*, 229 Ark. 579, 317 S.W.2d 275 (1958). The ambiguity of the agreement in the case at bar is of the latter sort.

appellant's termination. Given this evidence of bad faith on the part of the appellant, we cannot say that the trial court clearly erred in finding he was terminated for legitimate and proper cause.

Affirmed.

PITTMAN, ROGERS, and STROUD, JJ., agree.

GRIFFEN, J., dissents.

ROBBINS, J., not participating.

WENDELL L. GRIFFEN, Judge, dissenting. I disagree with the result reached by the majority in this case and the reasoning employed in reaching it. The result is obtained by disregarding the parol evidence rule and the related principles that govern the interpretation of parties' intent to written agreements. That error is compounded by the lack of evidentiary support for the conclusion reached by the trial judge that the appellant was terminated for failing to "act in good faith in protecting the assets and reputation of" the firm that employed him.

The trial judge permitted appellant and Carol Caldwell, president of Century 21 Caldwell Realty, to testify about their understanding concerning the grounds upon which appellant could be terminated from the post of Principal Broker and General Manager for the firm under his written employment agreement dated January 18, 1988. Appellant made timely objections to that testimony[1], and argues on his appeal that the trial court committed reversible error by admitting it because the written employment agreement was not ambiguous about the terms for his termination. The trial court overruled appellant's objections and ultimately entered judgment for appellee. The court con-

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[1] The challenged testimony was abduced during questions posed by counsel for appellee to appellant during cross-examination and to Carol Caldwell while on direct examination. The question posed to appellant was: "[t]urning back to the contract between you and Ms. Caldwell and Ms. Courtney, which is Plaintiff's Exhibit No. 1, at the time you signed that contract, what did you understand the reasons to be for which you could be terminated?" (Appellant's abstract, p. 32). The question posed to Caldwell was: "[u]nder the terms of this contract—and let me hand it back to you again—under the terms of this contract, what did you understand the reasons why Mr. Ingram could be terminated after 1988?" (Appellant's abstract, p. 56).

cluded that the contract called for appellant to be employed for a specific time, that he could only be discharged for cause, and that he was terminated for "legitimate and proper cause."

The pertinent provisions of the written agreement state:

> Gene Ingram agrees to act as Principal Broker and General Manager of Century 21 Accredited Realty. He agrees to perform the duties and assume the responsibilities usually expected of that position. *He will act in good faith in protecting the assets and reputation of that corporation.*
>
> . . . .
>
> *The term of this agreement shall be for as long as gross commission annually exceed that of 1987. In no case will this agreement terminate in less than one year, except in the case of gross mis-management [sic] by Broker. . . .*

(Emphasis added).

The trial court allowed parol testimony from appellant and Caldwell despite appellant's objections that there had been no ruling that the contract was ambiguous. The findings contained in the opinion letter issued by the trial judge do not mention ambiguity at all. Indeed, the record is void of any conclusion that the contract is ambiguous concerning the grounds on which appellant could be terminated. Instead, the trial judge specified in his opinion letter that the agreement between the parties not only allowed for appellant's discharge if annual gross commissions would fall below the 1987 baseline, but also required that appellant act in good faith to protect the assets and reputation of the firm.[2] These were the very terms that the parties wrote into

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[2] In his opinion letter to the parties, the trial judge first discussed his reasons for finding that appellant was not, as appellee had argued, an employee at will, but rather was an employee hired for a specific term. Paragraphs 4 and 5 of the opinion letter pertain to the grounds for termination and state:

> 4. The next question then presented is for what "cause" can the Plaintiff [appellant] be discharged. The Plaintiff contends the only "cause" set forth in the agreement is, if the annual gross commissions fall below that of 1987. However, *the agreement does not state that as the only cause for discharge.*
>
> 5. *The agreement itself requires the Plaintiff to perform the duties of and assume the responsibilities usually expected of a principal broker and general manager, and requires him to act in good faith in protecting the assets and*

their agreement.

Arkansas law clearly holds that parol evidence is admissible only if an ambiguity exists in a written agreement. Absent ambiguity concerning a term within a written contract, it is reversible error to permit parol evidence in order to explain the meaning of contractual terms. *See Minerva Enter., Inc.* v. *Bituminous Casualty Corp.*, 312 Ark. 128, 851 S.W.2d 403 (1993); *Pizza Hut of America, Inc.* v. *West Gen. Ins. Co.*, 36 Ark. App. 16, 816 S.W.2d 638 (1991). In this case, the trial court made no finding that the agreement between the parties was ambiguous about the grounds for appellant's termination. The agreement specified the term of his employment and the performance expected of him. Therefore, appellant's objections to the testimony abduced from him during cross-examination and from Caldwell on direct examination should have been sustained. The agreement plainly states what the parties intended regarding the term of appellant's employment and what performance would be considered grounds for his termination, so extrinsic proof from the parties about what they understood the grounds for termination to be was improperly admitted into evidence.

In the words of the majority, the "failure to specify the degree of mismanagement that would justify termination after 1988 gave rise to an ambiguity" in the parties' agreement. To the contrary, the explicit wording of the agreement is clear. The parties agreed that appellant would "perform the duties and assume the responsibilities usually expected" of a Principal Broker and General Manager, and added that he "will act in good faith in protecting the assets and reputation of [the] corporation." These words are not unclear or subject to a double meaning, nor do they fail to specify the degree of management expected of appellant in his work. A failure to "act in good faith in protect-

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> *reputation of that corporation. In this Court's view, failure to abide by these conditions would constitute cause for discharge.*

(Emphasis added).

Contrary to the view of the majority, the trial court did not find "that the agreement was ambiguous with respect to the circumstances under which the appellant could be terminated after 1988." To the contrary, the trial court failed to make any ruling about ambiguity or whether the challenged testimony fell outside the parol evidence rule for some other reason.

ing the assets and reputation of that corporation" is anything but a nebulous phrase demanding parol evidence to explain its meaning.[3] Even though appellee disagrees with appellant about whether his performance met the clear standard stated in their agreement, that disagreement requires proof of how appellant has failed to act in good faith in protecting the assets and reputation of the firm. The parties certainly could not deny knowing that this performance standard was in their agreement, even if they had financial incentive to disagree about what it meant.

In *Singh* v. *Riley's Inc.*, 46 Ark. App. 223, 878 S.W.2d 422 (1994), this court held that it was reversible error for a trial judge to receive parol evidence to determine the meaning of the term "cause" concerning the severance pay provision of an employment agreement, because the agreement provision was not ambiguous. Like the trial judge in *Singh*, the majority in this case has erroneously based its decision on the self-serving statements of a party seeking to avoid the obligations imposed by its bargain. Despite clear evidence in the agreement that it would extend as long as gross commissions exceeded the 1987 level, appellee argued that the appellant was an employee at will rather than an employee hired for a specific term. And despite explicit wording that the appellant exercise good faith in performing his duties, the appellee claimed that the agreement was ambiguous concerning the grounds for his termination.

The undisputed proof was that the firm's gross commissions exceeded the 1987 level, on an annual basis, from the time that appellant began work until he was discharged on September 8,

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[3] "Good faith" has acquired a distinct legal meaning in the law of contracts. Most often, the term is implied in a contract for the sale of goods as required in Uniform Commercial Code. *Adams v. First State Bank*, 300 Ark. 235, 778 S.W.2d 611 (1989) (confirming the "honesty in fact" U.C.C. definition). A trustee is held to a good faith duty of acting "honestly" and with "undivided loyalty."*Riegler* v. *Riegler*, 262 Ark. 70, 553 S.W.2d 37 (1977). Moreover, the Eighth Circuit and the Arkansas Supreme Court has held an implied covenant of "good faith and fair dealing" present in every employment relationship. *Smith* v. *American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991).

These cases show that good faith embodies, at minimum, a sense of honesty and fairness in the performance of a contractual duty. Whether the term is implied or, as here, express, the legal meaning does not change. Appellant's conduct in this case in no way suggests dishonesty, unfaithfulness, or unfairness toward his employer.

1991, when, as Caldwell testified during cross-examination, she decided that she could not afford to continue paying him under their agreement due to the financial straits facing the firm. Appellee argues that appellant failed to fulfill the contractual duty to act in good faith to protect the firm's assets and reputation, and asserts that the firm's financial woes in 1991 amounted to proof that appellant failed to act in good faith to protect the firm's assets and reputation. However, proof of financial difficulties is not evidence that the assets and reputation of the business had been jeopardized, or that appellant had failed to exercise good faith to protect them. The only financial factor affecting appellant's employment under the terms of the employment agreement was that the firm's gross commissions exceed the 1987 level. At minimum, before the trial court could have found that appellant had failed to act in good faith in protecting the assets and reputation of the firm, there should have been some proof about how appellant's alleged non-feasance had affected the firm's *assets and reputation*, not cash flow. The proof at trial was that the firm faced bills that exceeded available cash when Caldwell decided to discharge appellant. There was no proof that the bills resulted from non-feasance by appellant, that the bills should not have been incurred, or that appellant failed to bring the firm's financial situation to Caldwell's attention. In fact, the proof was to the contrary. Caldwell and appellant testified that appellant repeatedly attempted to discuss the firm's finances with her. Caldwell routinely avoided taking actions to remedy the firm's situation except for the decision to discharge appellant upon the advice of an official with Century 21 who counseled her that firing appellant would allow the firm to show a profit because it would not have to pay appellant's salary.

When the trial court decided that appellant had failed to comply with the provision in his employment agreement requiring him to exercise good faith in protecting the assets and reputation of the firm, it had before it no proof about the value of the firm. There was no proof showing what assets belonged to the firm, or their value at any material time. There was no proof that the unspecified and unvalued assets had been jeopardized. There was no proof regarding the firm's reputation before appellant was hired, during the time that he worked as the firm's Principal Broker and General Manager, or at the time that he

was discharged, let alone any proof that the firm's reputation had been jeopardized by anything that appellant had done or failed to do. In short, there was no evidence that appellant had failed to act in good faith in protecting the assets and reputation of the firm. As Sherlock Holmes said:

> It is a capital mistake to theorise before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.[4]

This case demonstrates the truth of Holmes's logic. Appellee's theory, endorsed by the trial court and now affirmed by the majority, for terminating its written agreement with appellant—that he failed to act in good faith in protecting the assets and reputation of the firm despite the plain evidence that the firm showed a profit during the year that he was terminated—is not proven merely by showing that the firm experienced short-term financial difficulties in 1991. Appellant testified that the real estate market in Hot Springs suffered a decline in the early months of 1991 because of concern about the Persian Gulf War underway at the time. That testimony was uncontradicted. Caldwell testified that the only reason she terminated appellant's employment was that she could not afford him. That is far different from saying that she fired appellant because he failed to act in good faith in protecting the assets and reputation of the firm.

In view of Caldwell's confession that she fired appellant to avoid the cost of his salary, and without possessing proof of the firm's assets and reputation, the trial court had no factual basis for finding that appellant had failed to act in good faith. This was not a matter of weighing conflicting evidence. There was no evidence to weigh. Appellant did not deny that the firm experienced financial difficulties during 1991. In fact, he testified that he repeatedly tried to induce Caldwell to take some action that would provide relief from the problems, and that Caldwell appeared uninclined to do so.

Perhaps the most telling evidence that the trial result produced a "capital mistake" was Caldwell's undisputed testimony.

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[4] A. Conan Doyle, *Adventures of Sherlock Holmes: A Scandal in Bohemia* 3.

After she fired appellant, admitting to him that a primary reason for his dismissal was his high salary, she offered to continue his employment as an agent rather than a manager. If, as appellee argues and the trial court found, appellant had failed to act in good faith in protecting the assets and reputation of the corporation, it is beyond all reason to believe that the firm would want to employ him in any capacity. Nevertheless, Caldwell testified that she tried to convince appellant to accept employment as an agent. This would have meant different work, to be sure, but it also would have meant less compensation for appellant.[5] The employment agreement provided that appellant would earn ten percent of the first $16,000 received in gross commissions each month, and fifteen percent of additional gross commissions. His compensation was to be fifteen percent of all additional commission income during any year that the firm exceeded $200,000 in gross commissions. The uncontradicted proof at trial was that the firm had increased its gross sales each year between 1988 and 1990, and that 1990 gross sales totalled $276,333. There was also uncontradicted proof that Caldwell had been advised by Chad Kumpe, regional director for Century 21, that the money that could have been her profit was being paid to appellant to manage the firm. Interestingly, appellant was terminated immediately after Kumpe gave Caldwell the advice encouraging Caldwell to pocket appellant's compensation as her profit. As owner of the firm, that was her prerogative. But no court of law should reason that she could do so with impunity, insulated from the legal obligation to pay damages to appellant for breaching the

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[5] The record shows that gross sales for the firm were $158,213 in 1988, $178,009 in 1989, $276,333 in 1990, $196,313 in 1991 (the year that he was fired), $438,450 in 1992, and that gross commissions in 1993 totaled $605,000. From January through August 1994, gross commissions totaled $451,600. "Commissions" and "sales" appear to be synonymous in the record. Although the firm had gross commissions in 1991 which exceeded those of 1987 (the financial performance standard that the parties wrote into the employment agreement), appellant was terminated despite the plain evidence that the firm had produced higher revenues under his management than it had ever enjoyed. The uncontradicted proof was that appellant had increased the sales force and caused the firm to acquire new equipment in 1990, and that he had earned a substantial income under his employment agreement based upon 1990 sales. Terminating him permitted appellee to pocket his salary during a lean period, and when the lean period ended the firm's owners could continue to pocket what they otherwise would have owed appellant based on the increased revenues that his management efforts had helped to make possible.

contract that she made with him, especially when that contract did not obligate appellant to maintain a profit at any time, for any amount, or over any period of time.

Whether this kind of agreement appears unsound or even foolish is immaterial. The law of contract does not exist to guarantee that competent parties will not enter unprofitable or unsound transactions that are otherwise enforceable. It does exist, however, to ensure that when parties make valid agreements they will be enforced by courts of competent jurisdiction despite the suspicions of the courts that the parties could have done a better job crafting their deals. In the law of contracts, justice means that parties will have their explicit and valid agreements enforced or pay damages for dishonoring them. It does not mean that courts will redraft contracts through *post hoc* analysis by judges who substitute their judgment about what the parties should have or might have intended (had they known the future), in place of the plain terms that the parties negotiated. What a promisor or a promisee might have intended had they known how the effect of their contract terms would unfold over time is irrelevant to the inquiry. This notion of justice may seem rough, but its virtue is that parties to written agreements will trust courts to enforce the plain terms of their agreements, no matter whose ox may be gored.

In this case, the agreement is clear and unambiguous about appellant's employment term and the performance expected from him. The agreement is equally clear that he would be paid a specified percentage of gross monthly commissions *no matter what else happened, including if the firm did not earn a profit or faced dire financial straits.* After all, appellant agreed to be an employee for a set compensation, not a partner or shareholder in the firm. He was entitled to the compensation prescribed in his employment agreement just as any employee is entitled to be paid for his or her labor whether the employer is making a profit or not. Appellant must wonder now about the justice of a system of contract law that permits his former employer to induce him to enter that agreement, pocket the commissions from his efforts as manager, terminate him without proof of any lack of good faith by him in protecting the assets and reputation of the firm, and then go scot free without paying a penny in damages for breaking the agreement it negotiated with him.

For these reasons, I cannot join the decision to affirm the judgment entered below. This case was fully developed at trial, and appellant is entitled to recover damages for the breach of his agreement by appellee. There is no need to remand for a new trial. *See Follett* v. *Jones*, 252 Ark. 950, 481 S.W.2d 713 (1972). Therefore, I would reverse the judgment and remand the case to the trial court with instructions that judgment be entered for appellant based on the proof of the damages that he sustained due to the unwarranted termination of his employment agreement.

Jeff JENKINS, d/b/a Asher Wrecker Service *v.* CITY OF LITTLE ROCK

CA 95-67 915 S.W.2d 298

Court of Appeals of Arkansas
Division III
Opinion delivered February 21, 1996
[Petition for rehearing denied June 12, 1996.*]

* MAYFIELD, J., would grant.

The Cortinez Law Firm, P.A., by: *Robert S. Tschiemer* and *Robert R. Cortinez*, for appellant.

Thomas M. Carpenter, Little Rock City Att'y and *Paul D. White*, Ass't City Att'y, for appellee.

JOHN B. ROBBINS, Judge. On June 8, 1992, appellant Jeff Jenkins, d/b/a Asher Wrecker Service, filed an action against the City of Little Rock for breach of contract. After a hearing, the circuit court granted the city's motion for summary judgment. Specifically, the circuit court found that appellant's claim was barred by the statute of limitations. Appellant now seeks reversal, arguing that the trial court erred in applying a three-year, rather than a five-year, limitations period. We find no error and affirm.

Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Arkansas Blue Cross and Blue Shield* v. *Hicky*, 50 Ark. App. 173, 900 S.W.2d 598 (1995). All proof submitted must be considered in the light most favorable to the non-moving party, and any doubts or inferences must be resolved against the moving party. *Wozniak* v. *Colonial Ins. Co.*, 46 Ark. App. 331, 885 S.W.2d 902 (1994). On appeal, we determine whether the evidence presented by the movant leaves a material question of fact unanswered. *Bellanca* v. *Arkansas Power and Light Co.*, 316 Ark. 80, 870 S.W.2d 735 (1994).

The evidence in the instant case shows that in April 1987 the City of Little Rock published a request for bids for the rendition of towing and vehicle-storage services to the city. Among

the bids received was one submitted by Jeff Jenkins, owner of Asher Wrecker Service. After reviewing all bids, the city's Board of Directors adopted a resolution authorizing the City Manager to award a contract to Asher Wrecker Service. This resolution was adopted on June 2, 1987, at which time appellant began towing for the city.

A dispute arose over, what appellant now characterizes as, additional terms that were being imposed by the City of Little Rock, and on June 8, 1987, appellant withdrew his bid. Routh Wrecker Service was then awarded the contract. On June 8, 1992 (exactly five years after the alleged breach), appellant filed this action against the City of Little Rock.

In granting the city's motion for summary judgment, the trial court noted that the parties never entered into a written agreement and that, at most, only an oral contract existed. The trial court then cited Ark. Code Ann. § 16-56-105 (1987), which provides in pertinent part:

> 16-56-105. ACTIONS WITH LIMITATION OF THREE YEARS.
>
> The following actions shall be commenced within three (3) years after the cause of action accrues:
>
> (1) All actions founded upon any contract, obligation, or liability not under seal and not in writing, excepting such as are brought upon the judgment or decree of some court of record of the United States or of this or some other state[.]. . .

Pursuant to this statute, appellant's action was held to be time-barred.

For reversal, appellant contends that the trial court erred in finding that no written contract existed, and that the applicable statute of limitations should have been five years, as provided by Ark. Code Ann. § 16-56-111 (1987). Specifically, appellant argues that his signed bid to perform services constituted an offer, and that the City of Little Rock accepted this offer in writing when it adopted a resolution awarding the contract to Asher Wrecker Services.

We find no error in the trial court's determination that

no genuine issues of material fact existed and that the City of Little Rock was entitled to judgment as a matter of law. The contents of the city's written resolution are not in dispute. The resolution states:

> In compliance with Section 2-44 of the Code of Ordinances of the City of Little Rock, the City Manager is hereby authorized to award a contract for the granting of a franchise to operate a wrecker service within the City of Little Rock to Asher Wrecker Service.

A plain reading of the above resolution indicates that the city had not contractually bound itself in writing. Rather, it only authorized the City Manager to award a contract to Asher Wrecker Service. There is no evidence, nor is it contended, that the City Manager signed a written contract with Asher Wrecker Service as authorized by the resolution. Therefore, if the parties were contractually bound at all, it was pursuant to an oral contract. Appellant's attempt to bring an action five years later was barred by the applicable three-year statute of limitations.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

HAWKINS CONSTRUCTION *v.* Richard MAXELL and Second Injury Fund

CA 94-1378 915 S.W.2d 302

Court of Appeals of Arkansas
En Banc
Opinion delivered February 21, 1996

Bethell, Callaway, Robertson, Beasley & Cowan, by: *John R. Beasley*, for appellant.

Thompson & Llewellyn, P.A., by: *James M. Llewellyn, Jr.*, for appellees.

MELVIN MAYFIELD, Judge. Hawkins Construction Company has appealed a decision of the Worker's Compensation Commission which affirmed the administrative law judge's decision and adopted his findings of fact and conclusions of law. The law judge held appellant liable for appellee's medical expenses, temporary total disability from January 11, 1993, through June 27, 1993, permanent partial disability of 10 percent to the body as a whole, and wage loss benefits of 10 percent. The law judge

also found that the Second Injury Fund was not liable for the wage loss disability because all of appellee's permanent disability was the result of the last injury alone.

Richard Maxell, the appellee, testified that he was 27 years old, had a tenth-grade education, and had done manual labor all his working years. He said he received his first back injury in November 1990 while working at a service station at Waldron, Arkansas. He said he bent over to pick up a split-rimmed tire to pull the wheel out and "slipped something" in his back. He worked for another week before going to the doctor. He was then seen by two orthopedic surgeons who took turns coming to Waldron to see patients. Their diagnosis was a slipped disc, and he was treated with physical therapy. He filed a workers' compensation claim, but his employer did not have enough employees to be covered by the Act.

Maxell then went to work doing carpentry for American Construction. He said they did remodeling and there was some bending and lifting involved. However, it was not very heavy and he did not have any trouble with his back. After approximately nine months he was laid off.

A couple of months later Maxell went to work for appellant. He said his back did not bother him again until November of 1992 when he was doing iron work while building a school. He was lifting an I-beam and felt a "real sharp" pain in his lower back and into his legs. It hurt worse than his previous injury but he was able to continue working until sometime in January 1993, when he was on a roof attempting to prize a bundle of tin out of his way and the prize pole broke. This caused him to slip and he almost fell off of the roof but caught himself. He said that incident made his back a whole lot worse.

Maxell went to the doctor the next day after this injury. The doctor gave him muscle relaxers and pain pills and took him off work. When Maxell returned to the doctor two weeks later he was referred to a surgeon. Surgery was performed on March 24, 1993, and Maxell had a normal recovery. However, he testified that he had been unable to work since the surgery because of the doctor's restriction on bending and lifting.

Maxell also testified that he was in a head-on automobile

collision in July 1993. He was going about 35 miles an hour on a country road when he entered a curve. An oncoming car was over in his lane and hit him head-on. Maxell said he had his seat-belt fastened, and the accident only made him sore.

Maxell admitted that since his surgery he had done some deer hunting but that he has never hunted turkey, before or after the surgery. He also said he has no dogs and does not buy dog food; he had operated a backhoe a few times but not for money; and he does not operate a bush-hog.

On appeal the points relied upon are set out as follows:

I. Did Maxell suffer a compensable injury while working for Hawkins?

II. If Maxell suffered a compensable injury while working for Hawkins, is the Second Injury Fund responsible for wage loss disability benefits?

III. If Maxell suffered a compensable injury while working for Hawkins, is Hawkins responsible for all the claimant's permanent impairment rating?

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark 489, 579 S.W.2d 360 (1979). The weight and credibility of the evidence is exclusively within the province of the Commission. *Morrow* v. *Mulberry Lumber*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Even if a preponderance of the evidence might indicate a contrary result, we will affirm if reasonable minds could reach the conclusion of the Commission. *Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987).

Appellant's first argument is that any injuries which occurred while working for appellant amounted to a recurrence

of the injury he received in 1990 while working at the service station. However, the Commission found that the injuries sustained while working for appellant amounted to an aggravation—not a recurrence. In *Pinkston* v. *General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990), we reviewed the distinction between a recurrence of a previous injury and an aggravation. We stated:

> In *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983), this court considered the distinction between a recurrence and an aggravation in the context of which of two compensation carriers, if either, had liability. We concluded:
>
> > [I]n all of our cases in which a second period of medical complications follows an acknowledged compensable injury we have 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 complication 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.

30 Ark. App. at 50, 782 S.W.2d at 377. *See also Curry* v. *Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). In the instant case, following the law as explained in *Bearden Lumber Co.* v. *Bond*, *supra*, appellant would be liable for the aggravation of the old injury, and we think there is clearly substantial evidence to support the Commission's finding to that effect.

But appellant then argues that if Maxell did suffer a new injury, or an aggravation of his old injury, the Second Injury Fund is liable for his wage-loss disability. The law controlling this second point is found in *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), where the Arkansas Supreme Court stated:

> It is clear that liability of the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his

> present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

295 Ark. at 5, 746 S.W.2d at 539. In *Arkansas Transportation Department* v. *McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993), we summarized the prerequisites that *Mid-State* said were necessary for Second Injury Fund liability as follows:

> In order for the Second Injury Fund to have liability, three prerequisites must be met: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury, the employee must have had a permanent partial disability or impairment; and (3) the disability or impairment must combine with the recent compensable injury to produce the current disability status. *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988); Ark. Code Ann. § 11-9-525(b)(3) (1987). If the more recent injury alone would have caused the claimant's current disability status, the Second Injury Fund has no liability. In other words, the prior condition must combine with the compensable injury "to produce a disability greater than that which 'would have resulted from the last injury, considered alone and of itself.' " *Id.* at 9, 746 S.W.2d at 543 (quoting Ark. Code Ann. § 11-9-525(b)(3)).

41 Ark. App. at 4, 846 S.W.2d at 672.

In the *McWilliams* case, the Commission found that the claimant's pre-existing impairment did not combine with his most recent injury to produce his current disability status, and we said there was substantial evidence to support that holding. Also in the instant case, the Commission found that Maxell's pre-existing disability or impairment and his most recent injury did not combine to produce a greater disability than would have been caused by the last injury when considered alone. As previously noted, we do not reverse the findings of fact made by the Commission if they are supported by substantial evidence, and the Commission determines the weight of the evidence and the credibility of the witnesses.

We think there is substantial evidence to support the Commission's finding in this case. Dr. Michael Standefer, the Fort Smith neurosurgeon who performed Maxell's 1993 surgery, testified by deposition that he had compared the radiographic studies conducted in 1991 and the studies done in 1993. He found the disc protrusion in both studies to be in the same location, and he said the disc material he removed in the 1993 surgery was the same material that was extruded by the November 1990 injury. He said that the permanent impairment of Maxell, based on the March 12, 1991, MR scan, would be 7 percent. The doctor also testified, based upon the history he was given, that since Maxell had made a nice recovery from his 1990 injury and had gone back to work, "apparently something" happened on his job with the appellant Hawkins that resulted in the need of surgery. And he stated that "as a result of his recent surgery, his permanent impairment rating is felt to be 10%." The doctor also said that he had no indication that Maxell had any significant back problem in the past, other than back pain, and he "would not have anticipated a high likelihood" of Maxell's developing a surgical problem. The impairment rating given by a doctor is, of course, merely an aid to the Commission which has the duty of translating the testimony into findings of fact. *See Bearden Lumber Co.* v. *Bond*, *supra*, 7 Ark. App. at 74, 644 S.W.2d at 326. *See also Harris Cattle Co.* v. *Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974), where the Arkansas Supreme Court explained that medical evidence is not essential in every workers' compensation case and that the Commission has the right to draw a reasonable inference from all the evidence before it.

There is evidence here that although Maxell sustained an injury in 1990, he had no surgery, he returned to the work force doing manual labor, and he had no problem doing his work until his injury more than two years later while working for the appellant. Under a similar situation, we said:

> However, the Commission found that the appellant's fall from the staircase was so severe that it alone would be sufficient to produce the appellant's permanent and total disability status. In light of the evidence that the appellant obtained excellent results from his prior surgeries and was able to return to work without limitations following them,

> we cannot say that the Commission erred in so finding.

Bussell v. *Georgia-Pacific Corp.*, 48 Ark. App. 131, 135, 891 S.W.2d 75, 77 (1995). We do not think the Commission erred in the case at bar.

Appellant's third point is that it should not be liable for all of Maxell's permanent-impairment rating. Appellant suggests under this point that Maxell's disability benefits should be apportioned by letting it pay only 3 percent of the amount due — leaving the other 7 percent unpaid and uncollectible. The case relied upon, *Aetna Insurance Co.* v. *Dunlap*, 16 Ark. App. 51, 696 S.W.2d 771 (1985), and the cases cited by it, reveal that the concept of apportionment applies to the cumulative effect of successive injuries in the same employment covered by two or more insurance carriers or to the cumulative effect of injuries suffered in the employment of two or more employers. Even if the apportionment rule has application here, the Commission has found that the effect of the injury which occurred while Maxell was employed by the appellant caused all of his disability. In *Tri State Ins. Co.* v. *Employer's Mutual Liability Ins. Co.*, 254 Ark. 944, 955, 497 S.W.2d 39, 46 (1973), the court said that under our workers' compensation law the issue of apportionment is a matter for factual determination by the Commission. As we have indicated, we think there is substantial evidence to support the Commission's decision in this case.

Affirmed.

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

PITTMAN and ROBBINS, JJ., dissent.

BULLION, Special Judge, dissents.

COOPER, J., not participating.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent from that part of the prevailing opinion that affirms the Commission's decision that the Second Injury Fund bears no liability in this case. In my judgment, the Commission's opinion, as well as that of the prevailing judges, flies in the face of the Arkansas Supreme Court's decision in *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

In order for the Second Injury Fund to have liability, three prerequisites must be met: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury, the employee must have had a permanent partial disability *or impairment*; and (3) the disability *or impairment* must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction Co.* v. *Second Injury Fund*, *supra*; Ark. Code Ann. § 11-9-525(b)(3) (1987). Here, the Commission determined that the appellant employer successfully established the first two prongs of the above test. However, the Commission concluded that the third prong had not been established because the claimant returned to work without restrictions after the 1990 injury that initially caused his disc protrusion; the claimant's condition was apparently asymptomatic prior to the 1992 on-the-job injury; and surgery did not become necessary until after the last injury. In effect, then, the Commission held that it would not find that a prior impairment and a work-related injury had combined to produce one's current disability status unless and until there was proof that the pre-existing impairment, alone, had resulted in some disability. This was wrong.

In *Mid-State Construction Co.*, *supra*, the supreme court went to great lengths to correct an error that was consistently being made by the court of appeals. Several decisions of this court had held that, to meet the second prong of the test to determine Second Injury Fund liability, a claimant's pre-existing condition must have involved a loss of earning capacity. In *Mid-State Construction Co.*, the supreme court overruled those cases so holding. The court pointed out that the term "disability" is, in fact, defined to involve a loss of earning capacity. However, the court very clearly held that a prior "impairment" need not have been causing any loss of earning capacity.

Where, as here, the Commission denies relief on grounds that the party with the burden of proof has failed to sustain that burden, we should affirm under the substantial evidence standard of review only if the Commission's opinion displays a substantial basis for the denial of relief. *See Bussell* v. *Georgia-Pacific Corp.*, 48 Ark. App. 131, 891 S.W.2d 75 (1995); *Marcoe* v. *Bell International*, 48 Ark. App. 33, 888 S.W.2d 663 (1994); *Bryan* v. *Best Western/Coachman's Inn*, 47 Ark. App. 75, 885

S.W.2d 28 (1994). The only bases stated by the Commission for the denial of relief to the employer in this case revolve around the claimant's ability to work without surgery or restrictions after the 1990 injury and the fact that he was relatively asymptomatic until the 1992 work-related injury. By focusing exclusively on the claimant's physical abilities and/or lack of disabilities prior to the 1992 injury, the Commission has effectively made prior loss of earning capacity a prerequisite to Fund liability. In other words, the Commission has read into the third prong of the test and made determinative the very condition that the supreme court in *Mid-State Construction Co.* stated was not required. This would have the effect of rendering the holding in *Mid-State Construction Co.* void.

ROBBINS, J., and BULLION, Special Judge, join in this dissent.

Sherman RUCKER *v.* Phil Price, DIRECTOR, and Townsends of Arkansas, Inc.

E 94-223 915 S.W.2d 315

Court of Appeals of Arkansas
En Banc
Opinion delivered February 21, 1996

Appellant, pro se.

Allan Pruitt, for appellees.

JUDITH ROGERS, Judge. The Board of Review affirmed and adopted the decision of the Appeal Tribunal disqualifying appellant, Sherman Rucker, from receiving unemployment compensation benefits based on a finding that he was discharged for misconduct connected with the work. In this unbriefed appeal, the issue before us is whether the Board's decision is supported by substantial evidence. We hold that it is so supported, and affirm.

Appellant was employed by Townsends of Arkansas, Inc. In October of 1990, Townsends implemented a chemical substance and alcohol abuse policy with the goal of establishing a drug-free workplace. When appellant was hired in April of 1991, he signed a consent form agreeing to abide by the terms and conditions of the policy. Townsends' policy did not provide for random drug testing; however, testing was required of applicants seeking employment and of employees who were reasonably suspected of being under the influence of illegal drugs, controlled chemical substances and alcohol. Testing was also required of employees who were injured on the job, when the injury required treatment by a physician. The policy contained a listing of prohibited substances and set out levels of those substances, and alcohol, which would not be permitted. The policy called for the automatic termination of an employee whose test yielded such a positive result, although employees were given the opportunity for a second test, at their own expense.

Appellant worked as a trainer in the wing department. On June 1, 1994, a Wednesday, he sliced his hand with a knife while cutting a cardboard box. Seven stitches were required to repair the injury. On the day of the accident, appellant submitted a urine sample for testing. He was fired, effective June 7, 1994, for failing to pass the test. It was said that the test revealed

a positive result for a non-prescription, controlled substance. However, in keeping with the company's policy of confidentiality, the particular drug was not named. Appellant did not request a second test.

Appellant testified of his awareness of the drug policy, including the provision calling for automatic termination should he fail a drug test following a work-related injury. He denied that he had taken any drugs on the day of the accident, but he said that he had "smoked a joint" during the Memorial Day weekend.

On this evidence, the Board ruled that appellant was discharged for misconduct connected with the work, finding that he had violated a company rule and that his conduct was in disregard of his employer's interest. The Board, declined, however, to deny benefits under Ark. Code Ann. § 11-10-514(b) (Supp. 1993), which provides for further disqualification for reporting to work under the influence of intoxicants, including controlled substances.

On appeal, the findings of facts of the Board of Review are conclusive if they are supported by substantial evidence. *Perdrix-Wang* v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Our review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Arkansas Code Annotated § 11-10-514(a) (Supp. 1993) provides that an individual shall be disqualified for benefits if he is discharged for misconduct in connection with the work. "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has the right to expect; and, (4) disregard of the employee's duties and obligations to his employer. *George's Inc.* v. *Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). There is an element of intent associated with a determination of misconduct. Mere good faith errors in

judgment or discretion and unsatisfactory conduct are not considered misconduct unless they are of such a degree of recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of the employer's interest. *Id.* Whether an employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question for the Board to decide. *Id.*

At the hearing, appellant argued that he should not be penalized for his off-duty conduct. At first blush, such an argument brings to mind our decision in *Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). In *Feagin*, we recognized that misconduct *in connection with the work* can occur while an employee is off duty. There, a teacher was fired after criminal charges had been filed against her for the possession of a controlled substance, which had been found in her home. In affirming the Board's finding of misconduct, we adopted a three-part test for determining whether an employee's off-duty conduct will be considered misconduct in connection with the work. First, there must exist a nexus between the employee's work and his or her off-duty activities. Second, it must be shown that the off-duty activities resulted in harm to the employer's interests. And third, the off-duty conduct must be violative of some code of behavior contracted between the employer and employee, and the employee's conduct must be done with the intent or knowledge that the employer's interests would suffer.

The decision in *Feagin* v. *Everett*, *id.*, however, does not govern our review of the instant case. We have recognized that misconduct may also be found for the intentional violation of an employer's rules. In *Grace Drilling Co.* v. *Director*, 31 Ark. App. 81, 790 S.W.2d 907 (1990), the employer had developed a safety program which included drug testing on a random basis. The policy prohibited employees from having "any detectable level of alcohol, drugs, or controlled substances, or any combination thereof, in the body." The employee was discharged after failing a drug test. The Board of Review awarded unemployment compensation benefits. We reversed, holding that the employee's actions constituted misconduct in connection with the work in that the employee's positive test result represented a deliberate violation of the employer's rules, as well as a willful disregard of the standard of behavior which the employer had a

right to expect. More recently, we decided the case of *George's Inc.* v. *Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). The employer in that case had also adopted a drug policy, and the employee was fired after testing positive for a detectable amount of a controlled substance which had not been prescribed to him. We disagreed with the Board's conclusion that the employer's drug policy was not reasonable[1], and we held that the employee was discharged for the violation of the employer's rules. We remanded for the Board to make a finding of fact as to whether the employee's violation of the employer's rule was intentional, since the Board had not addressed that pivotal issue.

In reviewing this case, we are guided by the decisions in *Grace Drilling Co.* v. *Director*, *supra*, and *George's Inc.* v. *Director*, *supra*. We conclude that appellant was not discharged for off-duty conduct, but that he was terminated pursuant to the employer's policy requiring the discharge of any employee who tested positively for drugs in excess of the designated tolerance levels. As appellant's conduct was in violation of the employer's rules, we hold that he was discharged for misconduct in connection with the work. Noting that appellant had agreed to be bound by the policy and that he was thus aware of its terms and the ramifications for failing a test, the Board found that appellant's conduct was intentional. We cannot say that the Board's decision of disqualification is not supported by substantial evidence.

Affirmed.

BULLION, S.J., agrees.

MAYFIELD and ROBBINS, JJ., dissent.

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[1] In *Grace Drilling Co.* v. *Director*, *supra*, we observed that it was not unreasonable for the employer to implement a drug policy given the dangerous nature of employer's business. In *George's Inc.* v. *Director*, *supra*, we stated that a prerequisite to finding misconduct for the violation of an employer's rule is that the rule be "reasonable." The record in this case contains no evidence describing Townsends' business or appellant's job duties. In sum, no argument was made below challenging the reasonableness of Townsends' drug policy. We thus do not consider this question as being within the realm of contested issues, and thus we can offer no opinion on the matter. This court does not consider issues raised for the first time on appeal. *Perdrix-Wang* v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

COOPER, J., not participating.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to affirm the decision of the Board of Review in this case. The Board found that the decision of the Appeal Tribunal was "correct, both as to findings of fact and conclusions of law," and stated: "That decision is hereby adopted as the decision of the Board of Review." Therefore, we must focus on the decision of the Appeal Tribunal, the gist of which is found in the following paragraphs.

> The claimant admits that he smoked marijuana approximately two days before the test was given. He argues that the employer has no right to determine what an employee can or cannot do on his own time. *However, the law does give the employer the right to implement a drug and alcohol policy and to discharge an employee who fails to observe the policy.* The claimant testified that he was aware of the policy, and was aware that he would be discharged if he tested positive. He admits he knew this before he chose to use a controlled substance. While an employer may not have the right to dictate an employee's personal life, the employer does have the right to take action against the employee when his personal life is carried over into his employment. The claimant knew the possible consequences of his actions, and chose to take that risk. He lost. His actions indicate an intentional disregard for the employer's interests. Therefore, the claimant was discharged for misconduct in connection with the work.
>
> The employer failed to indicate to what extent the claimant tested positive. As a result, the Tribunal can not reach a determination as to whether or not the claimant reported while under the influence. Although the claimant admits that he smoked marijuana approximately two days before the test, this does not establish the extent of the influence when he reported to work. Ark. Code Ann. § 11-10-514(b) disqualifies a claimant for a longer period if the employee reports to work under the influence. In this case, the evidence does not support such a finding. That section of law does not indicate that the mere use of narcotics should lead to the greater disqualification.

> *Therefore, the claimant was discharged for misconduct, but not on account of reporting to work while under the influence of a controlled substance.*

(Emphasis added.)

It is important to note that the last sentence in the second paragraph actually finds that the appellant was not discharged for misconduct "on account of reporting to work under the influence of a controlled substance." Therefore, the denial of unemployment benefits to appellant is based solely on findings made in the first paragraph, and one of those findings would allow an employer to discharge an employee who uses a controlled substance while *not at work* and who *does not report to work* under the influence of such substance.

This point was specifically raised by the appellant who told the referee at the Appeal Tribunal hearing that he had "smoked a joint during the Memorial Weekend" but also said, "I don't feel that should have anything to do with my job though." The referee, however, thought differently and said in her findings in the first paragraph quoted above: "However, the law does give the employer the right to implement a drug and alcohol policy and to discharge an employee who fails to observe the policy."

In the first place, taken in its compete and unlimited sense, this statement is wrong. No authority is cited by the referee, by the Board, or by the majority opinion to support this statement in its complete and unlimited sense. It is true that in June of 1994, when appellant was tested positive for a controlled substance, Ark. Code Ann. § 11-10-514(b) (Supp. 1995) was in effect and provided that an employee shall be disqualified for unemployment benefits if he is discharged for misconduct for "reporting for work while under the influence of . . . a controlled substance, or willful violation of the rules or customs of the employer pertaining to the safety of fellow employees or company property . . . ." But the Appeal Tribunal specifically found that the appellant *did not report to work under the influence* of a controlled substance. So, that provision does not apply here.

I will discuss later the provision about the willful violation of the rules or customs of the employer, but now I want to finish the point that the Appeal Tribunal erred in making the unquali-

fied statement that the law gives an employer the right to implement a drug policy and discharge an employee who violates it. Of course, the employer has such a right if we put aside the consequences of such action as it relates to the entitlement of unemployment benefits. An employee can be fired, but such employee will be entitled to unemployment benefits unless we factor into that statement some conditions or limitations.

The majority opinion does not attempt to support the referee's unlimited and unconditional statement that the employee has the right to adopt a drug policy and discharge an employee who fails to observe it, but does cite *George's Inc.* v. *Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995), which held that such a policy was reasonable in that case. However, that opinion, in its opening paragraph, states that the appellant there argued that the Board of Review's finding that the drug policy in that case was unreasonable was not supported by substantial evidence. This court agreed that the Board was wrong in finding the policy unreasonable in that case. But that is not the issue now under discussion. At this point, I am discussing the finding of the Appeal Tribunal, adopted by the Board of Review, which stated *without qualification* that "the law does give the employer the right to implement a drug and alcohol policy and to discharge an employee who fails to observe the policy." I contend that this finding is wrong if it means that this finding alone will disqualify an employee from receiving unemployment benefits. The law simply does not give an employer such an unlimited right.

Moreover, the fact that an employee agrees to such a policy does not waive the employee's right to unemployment compensation. This is true for the simple reason that the Arkansas Employment Security Law so provides. Ark. Code Ann. § 11-10-107(a) (1987) clearly states that "Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void."

Therefore, I think the Board was clearly wrong in holding that this decision of the Appeal Tribunal was "correct, both as to the findings of fact and conclusions of law."

I now return to that part of Ark. Code Ann. § 11-10-514(b) (Supp. 1995) which provides that an employee shall be disqualified for unemployment benefits if he is discharged for a "willful

violation of the rules or customs of the employer pertaining to the safety of fellow employees or company property." It should be noted that this is a very narrow provision, and it does not appear to be relied upon to support the majority opinion. As I read the majority opinion, it relies upon Ark. Code Ann. § 11-10-514(a) (Supp. 1995) (both the 1993 and 1995 supplements contain the same provisions as far as section 11-10-514 is concerned). The provision in subsection (b) that states "or willful violation of the rules or customs of the employer pertaining to the safety of fellow employees or company property" may relate to *reporting for work* under the influence of "intoxicants including a controlled substance," and in that case it has no relevance here because the Appellee Tribunal found that the evidence did not support a finding that the appellant reported to work while under the influence of a controlled substance.

However, if this provision includes an employee who reports to work — not under the influence of intoxicants or a controlled substance but, as applied to this case, in such a condition that he tests positive for a controlled substance in willful violation of a rule or custom of the employer pertaining to the safety of fellow employees or company property — then we must focus upon the rule as it applies to the "safety" of the fellow employees and company property. Thus, the Appeal Tribunal's findings, adopted by the Board, that "the law does give the employer the right to implement a drug and alcohol policy and to discharge an employee who fails to observe the policy" is not sufficient to deny benefits to the appellant in this case because the finding does not reach the safety issue, and there is no evidence in the record on that point.

At this point, however, I want to discuss the application of both Ark. Code Ann. § 11-10-514(a) and (b) to this case. Of course, it is subsection (a) that is relied upon by the majority, but both subsections are properly considered together at this point. And in that connection, I note that there is a finding by the Appeal Tribunal that does come close to being a correct statement of the law and which relates to the appellant's contention that the "joint" he smoked "during the Memorial Weekend . . . should not have anything to do with my job." This statement, which appears in the first paragraph quoted at the beginning of this dissent is as follows:

> While an employer may not have the right to dictate an employee's personal life, the employer does have the right to take action against the employee when his personal life is carried over into his employment.

Although I do not think this is an exact statement of the law, it is close enough for us to reach the real issue in the case — which I submit the majority has failed to do.

The case of *Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983), is cited by the majority in response to appellant's argument that "he should not be penalized for his off-duty conduct," but the majority rejects its application to the instant case by stating that it "does not govern our review of the instant case." The apparent rationale for this conclusion is the next statement — "we have recognized that misconduct may also be found for the intentional violation of an employer's rules," and *Grace Drilling Co.* v. *Director*, 31 Ark. App. 81, 790 S.W.2d 907 (1990), is cited in support of this last statement.

This reference to the *Feagin* and *Grace Drilling* cases clearly demonstrates the failure of the majority to understand that the law does not allow an employer to simply adopt a rule and provide that the failure of an employee to observe that rule will disqualify the employee from receiving unemployment benefits. The Arkansas Employment Security Law must agree that a violation of that rule will disqualify an employee from receiving unemployment benefits. The law in this regard is clear. In *Hodges* v. *Everett*, 2 Ark. App. 125, 127, 617 S.W.2d 29, 31 (1981), in reversing the denial of unemployment benefits, we said:

> It may well be that the employer is justified in having a rule making any employee engaging in a fight subject to discharge, but the existence of such rule does not necessarily mean that the discharged employee is guilty of misconduct within the meaning of the Arkansas Employment Security Law.

This is also the general rule. *See* 76 Am. Jur. 2d *Unemployment Compensation* § 81 at 845 (1992), stating that "the effect of a violation by an employee of a rule relating to employment, warranting the withholding of unemployment compensation benefits

on the basis of misconduct, must be determined not by the employer's rules, but by the provisions of the statute itself."

However, *Feagin* and *Grace Drilling* are cases where the Arkansas Unemployment Security Law was in agreement with the denial of unemployment benefits to employees who were fired for the violation of an employer's rule.

In *Feagin* the court affirmed the Board of Review's denial of unemployment compensation to a school teacher who was discharged because law enforcement officers found drug paraphernalia, marijuana, and hash oil in a house where the teacher and her husband lived. In discussing what would constitute misconduct in connection with an employee's work (under what is now Ark. Code Ann. § 11-10-514) when the claimant was off-duty, we said that case was one of first impression. Relying on the Washington Supreme Court case of *Nelson* v. *Employment Security Department*, 98 Wash. 2d 370, 655 P.2d 242 (1982), we adopted a four-prong test that required that the employee's conduct must (1) have a nexus with her work; (2) result in some harm to the employer's interest; (3) be conduct violative of some code of at least an implied contract of behavior; and (4) done with the intent or knowledge that the employer's interest would suffer. We found that those elements were present in *Feagin* and affirmed the denial of benefits. Of interest, in connection with the present case, is the testimony in *Feagin* of the school superintendent that even though the drugs and drug paraphernalia were found in the teacher's house — something away from the school and concerned with her off-duty activities — he thought this would hinder the teacher's effectiveness and meet the provision in the school policy manual that allowed dismissal for undesirable personal traits.

No such evidence exists in the instant case. Actually, the evidence in this case does not clearly reveal the business in which the employer was engaged. There is in evidence a document entitled "Chemical Substance and Alcohol Abuse Policy." The "policy" statement set out in that document states that a violation of "this rule" occurs by "Reporting to work or for Company business, and in a condition not conducive for work due to the use of drugs or alcohol. . . ." The employer's adopted "Chemical Substance and Alcohol Abuse Policy" is stated to be: "In order

to have a safe and efficient work environment and to comply with the Federal Drug-Free Workplace Act (Title 41 USCA 701-707). . . ." And it adds that "Reporting to work or for Company business, in a condition not conducive for work due to the use of drugs or alcohol is prohibited. . . ."

The specific situation to which the employer's policy was applied here is explained as follows:

> Mr. Rucker was cutting a cardboard box and stated that the blade slipped and he cut himself. The incident was in a nature which caused Mr. Rucker three separate injuries for the same accident.

There is no explanation of the "three separate injuries for the same accident" statement unless it is disclosed by this statement that follows: "Mr. Rucker was sent for medical attention (seven stitches) and drug testing."

And the only indication of the nature of the employer's business was given by Larry King, who testified as the employer's representative, and said that the appellant "was in the wing department" and that "I assume the wing department is, could arrange [sic] anywhere from grading wings, cutting wings to support department for the wings, which means collecting packing material, boxes, etc." The appellant testified that his job was "basically a trainer." And his statement filed with the agency in making his claim for benefits states that his job and duties were "To set up the department so it would be ready for 2nd shift employee [sic] to start work. (Trainer)."

Thus, it seems clear to me that the evidence here will not support the rationale under which the *Feagin* case was decided and the majority opinion is correct in stating that it "does not govern our review in the instant case." But the majority is inconsistent by then citing the *Grace Drilling* case to support the majority's statement that "we have recognized that misconduct may also be found for the violation of an employer's rules." Just as *Feagin* could properly find, under the evidence there, that the teacher's off-duty activities constituted misconduct because it affected her on-duty work, the *Grace Drilling* case could properly find, under the evidence there, that testing positive for drugs when reporting for work affected the employee's on-duty work

because the testing policy was "initiated due to the high accident rate and risk factors relating to the nature of the drilling business and the desire to ensure the safety of the drilling crews." *See* 31 Ark. App. at 84, 790 S.W.2d at 908. The rationale in both cases is found in the effect that off-duty conduct has on the employee's work.

Therefore, it comes as no surprise to find that Ark. Code Ann. § 11-10-514 (Supp. 1995) provides that an employee who is discharged from work is disqualified for unemployment benefits *if* the discharge is for misconduct *in connection with the work.* That is the point, and there are no exceptions. And that is the rationale of both *Feagin* and *Grace Drilling*. Although *Grace Drilling* is factually more like the instant case — the off-duty use of drugs caused the positive test — the issue is the same. However, because of evidence about the "high accident rate and the risk factors relating to the drilling business" the safety of the drilling crews in *Grace Drilling* supported the decision that failing the drug test was misconduct. Here, there is no evidence that there was a safety problem that would support such a decision.

As indicated above, the only evidence here to explain why the testing policy was adopted is contained in the policy itself: "In order to have a safe and efficient work environment and to comply with the Federal Drug-Free Workplace Act (Title 41 USCA 701-707)." Section 701 of that Act provides that contractors with the federal government must (except for services of a limited value) meet the Act's requirement for a drug-free workplace. *See Robinson* v. *Department of Employment Security*, 637 N.E.2d 631 (Ill. App. 1994) (policy adopted because it "was mandatory to retain government contracts"). But there is no evidence that the employer here did any business with the federal government.

In *George's Inc.* v. *Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995), this court determined that the employer's drug policy was reasonable but remanded the case to the Board of Review for it to determine if the employee intentionally or deliberately violated that policy. I think the real issue is not whether the policy is reasonable but whether a violation of the policy constitutes misconduct in connection with the work. There is, how-

ever, an element of the reasonableness question involved in the real issue. However, even the question of the reasonableness of the employer's policy in this case is avoided by the majority opinion's footnote that says that issue was not raised below. If the *pro se* appellant's statement at the Appeal Tribunal hearing that he did not "feel" that the "joint" he smoked during the Memorial Weekend "should have anything to do with my job" did not raise the issue here, I do not see how a *pro se* appellant has any real chance of ever reversing a decision of the Board of Review.

I dissent.

ROBBINS, J., joins in this dissent.

Bernadette BLACK *v.* STATE of Arkansas

CA 95-179 915 S.W.2d 300

Court of Appeals of Arkansas
Division II
Opinion delivered February 21, 1996

William R. Simpson, Jr., Public Defender, and *Julie B. Jackson*, Deputy Public Defender, by: *Stephen W. Parker*, Deputy Public Defender.

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

WENDELL L. GRIFFEN, Judge. Bernadette Black appeals

the order of involuntary commitment entered by the Pulaski County Probate Court on December 6, 1994. After hearing testimony from Tracy Petty, a member of the appellant's treatment team, and from appellant, the probate judge ordered appellant to undergo an additional period of treatment for her mental illness at the Little Rock Community Mental Health Center "or other appropriate facility." This appeal followed. The record does not indicate that a stay was obtained to suspend enforcement of the order entered by the probate judge. Thus, the 180-day period of treatment would have ended by June 1995, as is argued by the appellee in its brief urging that the appeal is now moot.

Although appellee's mootness challenge would otherwise be dispositive of this appeal, when a case involves a public interest, or tends to become moot before litigation can run its course, or a decision might avert future litigation, appellate courts have regularly refused to permit mootness to determine the outcome. *Campbell* v. *State*, 311 Ark. 641, 846 S.W.2d 639 (1993). The involuntary commitment statute involved in this litigation provides for short-term commitment up to 180 days. Therefore, most persons committed under the statute will, like appellant, have been released before their appeals can be decided. Because the record does not contain proof pursuant to the clear and convincing evidence standard that Ark. Code Ann. §20-47-215 (Repl. 1991) prescribes for evidence at hearings seeking an additional period of involuntary admission, we are not persuaded that the mootness argument should determine the result. Sub-section (c)(3) of that statute states that the "need for additional involuntary admission shall be proven by clear and convincing evidence." The criteria for involuntary admission prescribed in Ark. Code Ann. §20-47-207(c) apply to this case.

Clear and convincing evidence, which is a higher burden of proof than preponderance, has been defined as proof so clear, direct, weighty, and convincing that the fact finder is able to come to a clear conviction, without hesitation, of the matter asserted. It is that degree of proof that will produce in the trier of fact a firm conviction respecting the allegation sought to be established. *Maxwell* v. *Carl Bierbaum, Inc.*, 48 Ark. App. 159, 893 S.W.2d 344 (1995). In *McLain* v. *McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991), we declared that clear and convincing evidence is evidence by a credible witness whose memory of

the facts about which he or she testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the truth of the facts related. *See also First Nat. Bank* v. *Rush*, 30 Ark. App. 272, 785 S.W.2d 474 (1990).

There was not "clear and convincing evidence" at the December 6, 1994, hearing before the probate court that appellant posed a clear and present danger to herself or to others. There was no proof that she had inflicted serious bodily injury to herself, had attempted suicide or other serious self-injury, or that there was any probability (let alone a reasonable probability as required by the statute) that such conduct would be repeated without extending her involuntary admission. There was no proof that appellant had engaged in recent behavior demonstrating that she lacked the capacity to care for her own welfare, and that there was reasonable probability of death, serious bodily injury, or serious physical or mental debilitation without involuntary admission. In short, there was insufficient evidence to meet the clear and convincing evidence standard applicable to this case. Instead, the probate court granted the petition to extend appellant's involuntary admission based upon the unsupported testimony of her social worker who conceded during cross-examination that appellant had been compliant with outpatient appointments and medication, and who admitted that she had not witnessed appellant threaten or harm herself or others. The social worker also admitted that appellant was able to care for herself and her personal hygiene. While the social worker testified that appellant had refused to keep a day treatment appointment at Pinnacle Pointe, she also conceded that the treatment staff had taken no action to have appellant taken into custody despite the knowledge that she was already under an involuntary commitment order. This testimony does not support the premise that appellant's treatment team viewed her condition to be life-threatening.[1]

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[1] Although this issue is not raised on appeal and, consequently, is not determinative of the result we reach, we note that none of the treatment documents appended to the record are signed by an attending psychiatrist despite the fact that a signature block for verifying the documents appears on them. Parties would be wise to ensure that proof

Before a person can be committed for mental-health treatment against her will the law demands that clear and convincing evidence, the highest standard of proof applicable to civil litigation, be presented regarding the basis for involuntary commitment. That proof was not introduced. There was proof that appellant needs mental-health treatment on a continuing basis, and the record shows that she had been involuntarily committed in the past. But on the petition for additional involuntary commitment that is the subject of this appeal, the State failed to prove by clear and convincing evidence that appellant posed a clear and present danger to herself, to others, or that she was unable to care for herself. Therefore, it was error for the probate court to grant the petition for involuntary commitment and order appellant to undergo an additional 180-day period of involuntary commitment.

We reverse and dismiss the probate order appealed from in this case, and order that the record of appellant's involuntary commitment be removed from the treatment records of the Community Mental Health Center of Little Rock. *See Campbell* v. *State*, 51 Ark. App. 147, 912 S.W.2d 446 (1995).

Reversed and dismissed.

COOPER and STROUD, JJ., agree.

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consisting of treatment records which require medical verification (or verification by some other clinical professional) comply with the verification requirement in order to be given appropriate probative weight, especially in view of the clear and convincing evidence standard in these cases.

George GUTHERIE *v.* STATE of Arkansas

CA CR 95-235 915 S.W.2d 739

Court of Appeals of Arkansas
Division II
Opinion delivered February 28, 1996

Christopher M. Jester, for appellant.

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

JOHN E. JENNINGS, Chief Judge. George Gutherie was convicted by a Craighead County jury of burglary and misdemeanor theft. He appeals from the theft conviction only, contending that the evidence was insufficient to support the conviction. We disagree and affirm.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence. *Clark*

v. *State*, 315 Ark. 602, 870 S.W.2d 372 (1994). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown* v. *State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

On February 18, 1994, Woodrow Wilson saw appellant's brother, Gerald, running out from behind Garland Platz's house. Wilson testified that he went into town to warn Platz. He testified that he told Platz that he thought appellant and his brother had "ripped him off." Garland Platz testified that after talking to Wilson he drove home and when he was about 100 yards from his house he saw appellant and his brother pulling out of his driveway. He testified that his VCR had been stolen. Platz gave Officer Terry Wicker a description of appellant's car. Wicker testified that when he stopped appellant's car, he saw a VCR in the car. Finally, appellant's brother testified that he had broken into Platz's house because appellant told him to get something so they could pawn it.

Appellant contends that the evidence was insufficient because the only testimony connecting him with the theft was that of his brother, an accomplice whose testimony had to be corroborated. Appellant was convicted of misdemeanor theft. In misdemeanor cases, the testimony of an accomplice alone is sufficient to support a conviction. Ark. Code Ann. § 16-89-111(e)(2) (1987). Appellant further argues that his brother's testimony was not credible. The issue of a witness's credibility was a matter for the jury to determine. *Carter* v. *State*, 46 Ark. App. 205, 878 S.W.2d 772 (1994). We hold that the evidence was sufficient to support the conviction.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.

Rick GANSKY *v.* HI-TECH ENGINEERING

CA 95-48 916 S.W.2d 124

Court of Appeals of Arkansas
En Banc
Opinion delivered February 28, 1996
[Petition for Rehearing denied March 27, 1996.*]

* COOPER, ROBBINS, and MAYFIELD, JJ., would grant.

Lane, Muse, Arman & Pullen, by: *Donald C. Pullen*, for appellant.

Anderson & Kilpatrick, by: *Randy P. Murphy*, for appellee.

JOHN MAUZY PITTMAN, Judge. Rick Gansky appeals from an order of the Arkansas Workers' Compensation Commission denying additional medical benefits and temporary total disability benefits for his October 31, 1992, compensable injury. Appellee paid temporary total disability benefits and medical benefits through February 22, 1993. At that time, appellee controverted the claim stating that appellant had reached the end of his healing period and that further medical treatment was not reasonable and necessary. The administrative law judge awarded additional medical benefits, including a functional capacity evaluation, and reserved the issue of temporary total disability benefits until the evaluation and follow-up treatment by Dr. Allan C. Gocio, a neurosurgeon, was completed. The Commission reversed and found that appellant did not remain in his healing period subsequent to February 22, 1993, was not entitled to additional temporary total disability benefits, and failed to prove entitlement to additional medical treatment. Appellant argues that the Commission erred by vacating the portion of the administrative law judge's opinion that reserved the issue of temporary total disability and that the Commission's denial of additional medical benefits is not supported by substantial evidence. We find no error and affirm.

When reviewing the sufficiency of the evidence to support a decision of 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 will affirm if the Commission's decision is supported by substantial evidence. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993). Moreover, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Appellant sustained a low back injury on February 13, 1990, while employed as a machinist for Advanced Machines. He was treated with physical therapy by Dr. Gocio and released to full duty work on March 27, 1990. Appellant later went to Dr. Barry Thompson, an orthopedic surgeon, and in September 1990, Dr. Thompson prescribed an MRI which revealed no evidence of herniation, but indicated early degeneration of the L3-4 disc and slight facetal hypertrophy at L5-S1. Dr. Thompson released appellant to return to work on October 1, 1990, and again examined appellant on March 20, 1991, at which time he assigned a five percent impairment rating based on degenerative changes in the lumbar spine. Dr. Gocio did not assign any permanent impairment.

From February 1991 to June 1991, appellant worked as a machinist for Arkansas Precision and Hydraulics. In June 1991, he began work as a machinist for appellee and worked until October 1992 when he incurred his compensable injury. Appellant stated that he did not experience any difficulty in performing his jobs prior to the compensable injury. Appellant stated that he sustained an injury to his lower back and neck while engaging in heavy lifting at work on October 31, 1992. Dr. Jeff Reinhart, a general practitioner, noted that there were bulging

discs at L4-5 and L5-S1, but there was no evidence of herniation. Tests at that time resulted in a diagnosis of lumbar strain. Records indicate that appellant was treated with medication and physical therapy.

Appellant stated that he attempted to return to work on January 12 and 13, 1993, and that he experienced pain in his upper back and neck. He remained off work the rest of the week. He returned to work the following Monday and left work on Wednesday to go to the emergency room complaining of cervical and lumbar pain. Appellant first saw Dr. Gocio for the October 1992 injury on January 25, 1993. A myelogram indicated appellant's lumbar region to be normal, but a cervical myelogram and post-myelogram CT scan revealed moderately severe "focal spinal stenosis related to focal small osteophyte formation at C3-4 and C4-5." There was no evidence of disc herniation. Dr. Gocio diagnosed lumbar strain and continued with conservative treatment. On January 29, 1993, Dr. Gocio ordered the continuance of physical therapy with a strengthening program and advised appellant to remain off work until February 22, 1993. Appellant stated that he had been laid off from work and expected to be released to return to work when he consulted Dr. Gocio on February 22, 1993. Appellant testified that Dr. Gocio indicated appellant had improved and because appellant had been laid off, ordered a functional capacity evaluation to determine appellant's capacity to return to work. At that time, appellee controverted the claim and appellant did not have the evaluation nor receive any further medical treatment after February 22, 1993.

Dr. Gocio's October 21, 1993, report states that he last saw appellant on February 22, 1993, and that, at that time, appellant was improving significantly from a suspected cervical strain syndrome. He found no disc herniation, and his diagnosis was cervical strain that was resolving satisfactorily with medical treatment. He stated he did not think that the injury was permanent and stated it would resolve without significant impairment or long term symptomatology.

A January 25, 1993, physical therapy report stated that, except for minimal soreness in the lumbar region, appellant's symptoms were all but alleviated. However, complaints of pain

in the neck and low back were noted. The report also indicated that "symptomatology is reducing and patient states the physical therapy is helping."

A February 25, 1993, physical therapy report states, "All physical therapy goals have been achieved and no further physical therapy visits have been scheduled. The patient is discharged at this time, but will continue his independent home exercise program."

Appellant has not attempted to work since February 22, 1993. He stated that he is able to do some housework, operate a vehicle, mow his yard with a riding mower, and stand and sit for short periods. He testified that he spends most of his time watching television. He said that he continues to have cervical and lumbar pain.

The Commission found that appellant failed to prove that further medical treatment was reasonable and necessary, and, thus, he was not entitled to additional medical benefits, that appellant suffers from a pre-existing degenerative condition and has suffered recurring back pain at least since the February 13, 1990, injury, that medical findings and appellant's complaints following the 1990 injury and 1992 injury are very similar, and that the October 1992 injury only temporarily aggravated appellant's pre-existing back condition. The Commission noted that appellant was essentially symptom-free by at least February 22, 1993, that Dr. Gocio did not believe the injury was permanent, and that the medical treatment given related to appellant's degenerative condition, not to his compensable injury. What constitutes reasonable and necessary medical treatment is a fact question for the Commission and will not be reversed on appeal if supported by substantial evidence. *Arkansas Dep't of Correction* v. *Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). We cannot say that the Commission's findings and decision to deny additional medical benefits are not supported by substantial evidence.

Appellant's second argument is that the Commission erred in vacating the administrative law judge's order which reserved the temporary total disability issue until appellant's treating physician made a final evaluation. Appellant contends that all of the medical evidence was not before the Commission and Dr.

Gocio's final evaluation was essential for the Commission to decide the issue.

The Commission vacated the administrative law judge's decision as to reservation of the issue because it found that appellant had not proven that he was entitled to further medical treatment, including the functional capacity evaluation, which was a basis upon which the administrative law judge reserved the issue. The Commission also determined that appellant's healing period ended on February 22, 1993, a factual finding that appellant does not contest on appeal.

We conclude that there is substantial evidence to support the Commission's decision denying additional medical benefits and temporary total disability benefits. Therefore, we need not address appellant's argument that it was error not to reserve the issue of temporary total disability until further medical treatment was received.

Affirmed.

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

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

MELVIN MAYFIELD, Judge, dissenting. By a three-to-three vote the decision of the Workers' Compensation Commission is affirmed in this case. In order to discuss the merits of the prevailing opinion it is necessary to know what the Commission decided. To get to that point, we can start with the admitted compensable injury sustained by the appellant on October 31, 1992.

On that day the appellant, a machinist, had been lifting steel parts weighing from 150 to 200 pounds and putting them into a lathe. He testified that "finally my back just gave out, and I ended up with pains going from my shoulders into my neck and down my back and into my legs." He went to the emergency room at St. Joseph's Hospital in Hot Springs where they made X-rays and referred him to Dr. Reinhart, the company doctor.

Dr. Reinhart's office note of November 2, 1992, states, "Mr. Gansky presents today with complaints of back pain. He injured his back on Saturday. . . . Lower back syndrome with possible disc involvement." Dr. Reinhart saw the appellant again

on November 12, and November 19, 1992. The doctor's office note on this last date states, "Patient would like to try conservative measures with physical therapy and continuation of medications and rest."

Appellant was then referred to Cleveland Smith for physical therapy, and Dr. Reinhart's office note of January 11, 1993, states that appellant returned for a follow-up visit and said he was "doing much better." The doctor's last notation states, "Start work hardening program and start work at light duty and follow-up with me in one month."

The Commission's opinion states that the appellant "apparently did return to work on January 12 or 13, 1993," but the physical therapist's notes indicate that the appellant began to experience pain in his upper back and neck on January 13, 1993; that he complained of "tingling sensations" in both arms; and that he again contacted Dr. Reinhart who subsequently referred him to a neurosurgeon, Dr. Allen Gocio.

On January 27, 1993, Dr. Gocio reported that his impression was "cervical and lumbar herniated disc with nerve root compression," but a myelogram showed only "mild focal extradural defects" and a CT scan found "no evidence of disc herniation." By a "To whom it may concern" letter, dated 1/29/93, Dr. Gocio wrote that he had advised the appellant "to remain off work until I can re-evaluate him." And on February 22, 1993, Dr. Gocio referred the appellant to the Levi Work Capacity Center for a Functional Capacity Assessment program and wrote in his notes that he would consider returning appellant to work after the evaluation. Appellant attempted to schedule the functional capacity assessment with Levi Hospital but he was notified by that hospital that the workers' compensation carrier refused to pay for it and, under those conditions, the hospital would not schedule it.

At the hearing before the administrative law judge, the appellant testified that he still was having headaches and lower back pain but that it was not as severe because he was not doing any lifting. He also stated that he had attempted to return to work several times prior to February 22, 1993, but the pain was so bad he could not continue. He testified that he takes prescription medications and Advil as needed for pain.

In a letter dated October 21, 1993, Dr. Gocio wrote in part:

> Mr. Rick Gansky was last seen by me on 02-22-93, and at this time the patient was improving significantly from a suspected cervical strain syndrome. . . . The patient was referred to the Levi Work Capacity Center for a functional capacity assessment and return to work if feasible after the functional assessment. This is the last contact that I had with the patient. I must assume he has resolved his symptomatology or sought care from another physician.

The administrative law judge held that appellant was entitled to the diagnostic studies recommended by Dr. Gocio, and any further necessary treatment, at appellee's expense. He held in abeyance all other issues.

The Commission reversed. It held that appellant suffers from recurring episodes of back pain which is associated with a preexisting degenerative condition that has been present at least since a February 14, 1990, injury which was settled by joint petition; that appellant's complaints have all been the same since the 1990 injury; and that the medical evidence regarding the 1992 injury contains findings "that are very similar" to the findings after the 1990 injury. The Commission also held that a preponderance of the evidence established that "the October 31, 1992, injury only temporarily aggravated the claimant's preexisting back condition" and that appellant was "essentially" symptom free by February 25, 1993. Since Dr. Gocio had found no permanent physical impairment, the Commission held that no further treatment was necessary for the 1992 injury.

I cannot agree with the Commission's findings. In the first place, even if the Commission is correct that this was only a "temporary aggravation" of a preexisting condition, appellant was still entitled to be treated for that condition until released by his treating physician. Although Dr. Gocio had indicated that he did not think the appellant would have any permanent impairment, the reason he ordered the physical assessment was to determine whether appellant was actually ready to return to work. Obviously, if the employer refuses to allow the injured employee to have a determination of physical ability to return to work made by the doctor the employer provides to treat the

employee, then the employee has not been released from his doctor's care. I think that appellant was at least entitled to the functional capacity assessment and, following that, an examination by Dr. Gocio to determine whether appellant could return to work.

I am authorized to state that Judges Cooper and Robbins agree with this dissent.

Robert M. MATHIS *v.* Charlene J. MATHIS

CA 94-1154 916 S.W.2d 131

Court of Appeals of Arkansas
En Banc
Opinion delivered February 28, 1996

Mashburn & Taylor, by: *Scott E. Smith* and *Bill Putman, Jr.*, for appellant.

Schrantz & Boyer, P.A., by: *Johnnie Emberton Rhoads*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Robert M. Mathis and appellee Charlene J. Mathis were married on March 18, 1983, and divorced February 11, 1994. The only pertinent dispute arising out of the divorce involved Mr. Mathis's retirement fund. Mr. Mathis worked for Southwestern Bell for twenty-eight years before retiring, and was married to Mrs. Mathis for the last eight of those years. When he retired, he received a lump sum of approximately $446,000 representing the cash value of his pension benefits and savings plan. These funds were initially deposited into a joint account with Mrs. Mathis. Within sixty days thereafter, Mr. Mathis withdrew and placed approximately $392,500 of these funds in IRAs under his individual name. At trial, Mr. Mathis contended that Mrs. Mathis was not entitled to half of these accounts, but rather was only entitled to one-half of the funds in these accounts that had accrued over the eight-year period he was working during their marriage. The trial court disagreed, finding that these accounts constituted funds held as tenants by the entirety. The trial court awarded one-half of the IRAs to Mrs. Mathis, and Mr. Mathis now appeals.

The evidence presented at trial shows that Mr. Mathis and Mrs. Mathis lived together in Oklahoma and that Mr. Mathis retired there on December 31, 1991. The couple later relocated

to Arkansas. Upon retirement, Mr. Mathis elected to receive his retirement pension benefits in a lump sum. However, in order to receive such lump sum, Mrs. Mathis was required to execute a release of her survivor rights. Mrs. Mathis signed a release to this effect, and Mr. Mathis received cash payments totaling approximately $446,000.

As each cash payment was received, Mr. Mathis placed it in bank accounts held in his and Mrs. Mathis's joint names. Later, he removed approximately $392,500 of these funds and placed the funds in three IRAs that were held solely in his name. Mr. Mathis testified that it was never his intention to give Mrs. Mathis half of these funds and that he temporarily placed the money in joint bank accounts only until he could roll it over into IRAs in his sole name. He asserted that Mrs. Mathis would not sign a release for him to receive a lump sum distribution unless the money was placed in a joint bank account. Mathis also stated that, in return for the release, he granted Mrs. Mathis a 25% survivorship interest in his IRA and purchased $100,000 worth of life insurance for her benefit.

Mrs. Mathis essentially denied that any such deal was made regarding her release of Mr. Mathis's retirement benefits. She claimed that, prior to the release, Mr. Mathis had forced her out of their home and that she was living with her mother. She stated that she really did not understand the consequences of the release and signed it only because Mr. Mathis promised that she could return home upon signing it. Mrs. Mathis testified that she would not sign the release, however, until she was assured that the money would go into a joint bank account.

For reversal, Mr. Mathis argues that the trial court erroneously concluded that his retirement funds had been held as tenants by the entirety. He asserts that he never intended to give Mrs. Mathis half of these funds and asks that we reverse the chancellor and award Mrs. Mathis only one-half of the portion of these funds that accrued during their marriage.

Ordinarily, a former spouse is entitled to only a one-half interest in any retirement benefits acquired by the other spouse during the course of the marriage. *Askins* v. *Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986). However, once property is placed in the names of persons who are husband and wife, there

is a strong presumption that the property is owned by the parties as tenants by the entirety. *Reed* v. *Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988). This presumption may be overcome only by clear and convincing evidence that one spouse did not make a gift of one-half interest to the other spouse. *Id.* Clear and convincing evidence has been defined as evidence so clear, direct, weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitance, of the matter asserted. *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). This court reviews chancery cases de novo and reverses the chancellor's findings only if they are clearly erroneous or clearly against the preponderance of the evidence. *Cuzick* v. *Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985).

The trial court determined that Mr. Mathis failed to convincingly prove that the IRA accounts, which were funded by monies withdrawn from the parties' joint accounts, did not constitute funds owned by the parties as tenants by the entirety. Both parties agree that Mr. Mathis was permitted to receive his retirement pension benefits in a lump sum only after Mrs. Mathis signed a release. There could be little doubt that, due to marital problems at the time, Mr. Mathis did not want to relinquish half of the funds. However, it appears that this is precisely what he decided to do. Mrs. Mathis told him that she would not sign the release unless he agreed to place the money into a joint tenancy account. Mr. Mathis agreed to this and exhibited an intent to split the lump sum with his wife rather than opt for the monthly payment plan. Mr. Mathis argues, in essence, that he possessed a fraudulent intent rather than a donative intent when he deposited the retirement benefits into their joint account, i.e., that he agreed to the joint tenancy solely as a ruse to obtain his wife's release. We do not believe the trial court was clearly erroneous in finding that Mr. Mathis failed to overcome, by clear and convincing evidence, the presumption imposed by law that he intended to create a true joint tenancy with Mrs. Mathis.

It is also significant that, during the several weeks between the time when the money was placed in the joint account and when Mr. Mathis withdrew the funds and placed them in the IRAs, both parties had access to, and in fact, drew on these funds. This fact, and the fact that the parties agreed that Mrs.

Mathis would execute a release in exchange for Mr. Mathis depositing the retirement funds into a joint account, distinguishes this case from *Jackson* v. *Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989). In *Jackson* the supreme court affirmed the chancellor's holding that Mrs. Jackson proved by clear and convincing evidence that she did not intend to make a gift to her husband when she deposited non-marital funds into a joint checking account. However, the court relied on the fact that, on the same day of the deposit, Mrs. Jackson wrote a check for the entire amount deposited in order to purchase property from her sister. Unlike the fact situation in the instant case, Mr. Jackson never exercised any access or control over Mrs. Jackson's funds. Moreover, Mr. Jackson did nothing to induce Mrs. Jackson to temporarily deposit the funds in a joint account. In the case at bar, it is undisputed that Mrs. Mathis would not allow Mr. Mathis to receive his lump-sum retirement pay unless he agreed to deposit it in an account bearing both of their names.

We hold that the chancellor's decision in characterizing the retirement funds as tenancy by the entirety property even after Mr. Mathis transferred the funds to the IRAs in his individual name was not clearly erroneous.

Affirmed.

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

COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I do not agree that the chancellor could reasonably conclude on the evidence before him that Mr. Mathis intended to make a gift of a full half-interest in the funds to the appellee. Although the retirement funds, following disbursement, were deposited in the parties' joint bank account and remained there for a few weeks before being transferred to an account belonging solely to the appellant, depositing nonmarital funds into a marital joint account does not necessarily render them forever funds owned by the entirety. *Jackson* v. *Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989). Instead, such action merely gives rise to a presumption that the funds are owned as tenants by the entirety, and this presumption can be overcome by clear and convincing evidence. *Id.*, *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988).

The question in the case at bar, therefore, is whether the chancellor erred in finding that the appellant failed to overcome the presumption by clear and convincing evidence.

I submit that the chancellor did err for the simple reason that the transaction which led to the funds being deposited in the joint account was so marked by adversity that no reasonable person could possibly conclude that the appellant intended to make a gift to the appellee. Here, the undisputed evidence shows that the parties were estranged prior to the transaction. The appellee's own testimony shows that she was living with her mother prior to signing the release because the appellant forced her to leave the marital home after she refused to sign the spousal release. After the release was signed, she was permitted to return to the marital home.

It was in this context of adversity and coercion that the funds were deposited into the joint account. The majority concludes that this deposit into the joint account exhibited an intent on the part of the appellant to split the lump sum with the appellee, and if depositing nonmarital funds into a joint account necessarily rendered them forever funds owned by the entirety, that conclusion would be logical. However, such a deposit does not have that effect, *see*, *Jackson* v. *Jackson*, *supra*, but instead merely gives rise to the presumption of a gift. I respectfully submit that, given the adverse, hostile, and coercive nature of the circumstances surrounding the deposit in the case at bar, the majority's conclusion that the appellant intended to make a gift to the appellee defies all logic. I, too, feel sympathy for the appellee in this case, but I believe that, on balance, we do more harm than good when we indulge such sympathies by doing violence to the law.

MAYFIELD, J., joins in this dissent.

Randy KIRBY *v.* STATE of Arkansas

CA CR 95-284 915 S.W.2d 736

Court of Appeals of Arkansas
Division III
Opinion delivered February 28, 1996

Bart E. Ziegenhorn, for appellant.

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

JOHN F. STROUD, JR., Judge. Appellant, Randy Kirby, appeals from the revocation of his suspended sentence. His sole argument on appeal is that there was insufficient evidence to support the trial court's finding that he violated the terms of his suspended sentence. We disagree and affirm.

Appellant pled guilty to forgery charges on May 29, 1991, and received a ten-year suspended sentence. On November 24, 1992, an arrest warrant was issued for the appellant charging him with robbery and battery for the stabbing of Willy Taylor. The State also filed a petition for revocation alleging that the appellant robbed Willy Taylor while armed with a deadly weapon and caused serious physical injury by means of a deadly weapon. The revocation hearing was held simultaneously with the trial. A jury acquitted appellant of both the robbery and battery charges, but the trial court found that the appellant violated the terms and conditions of his suspended sentence. The trial court revoked appellant's suspended sentence and sentenced him to a term of eight years in the Arkansas Department of Correction. On appeal, appellant argues that there was insufficient evi-

dence to support the trial court's decision to revoke his suspended sentence.

The State urges us to affirm this case pursuant to Ark. Sup. Ct. R. 4-2 because appellant failed to abstract the conditions of his suspension. It is the duty of the appellant in a criminal case to abstract such parts of the record as are material to the points to be argued in the appellant's brief. Ark. Sup. Ct. R. 4-3(g). In our review of the trial court's revocation of a suspended sentence, the conditions of suspension are a material part of the record necessary to an understanding of the questions presented. *See Bangs* v. *State*, 310 Ark. App. 235, 835 S.W.2d 294 (1992). The failure to abstract a critical document precludes this court from considering issues concerning it. *Jackson* v. *State*, 316 Ark. 509, 872 S.W.2d 400 (1994). However, as long as we can determine from a reading of the briefs and appendices the material parts necessary for an understanding of the questions at issue, we will render a decision on the merits. *Carmical* v. *Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994).

Although appellant failed to abstract the terms of his suspension, it is clear from the portion of the abstract setting forth the judge's comments and from the parties' briefs that the trial court found that appellant committed a battery which constituted a violation of the terms of his suspended sentence. Appellant does not challenge the finding that the commission of a battery is a violation of his suspended sentence. Instead, he argues that the State did not present sufficient evidence at the combined trial to show by a preponderance of the evidence that he committed a battery. Thus, the issues are sufficiently defined by the abstract and the parties' briefs for us to reach the merits of the case.

In order to revoke a suspended sentence, the trial court must find by a preponderance of the evidence that the defendant failed to comply with the conditions of his suspension, and we do not reverse that decision on appeal unless it is clearly against the preponderance of the evidence. *Alford* v. *State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991).

At the trial of this case, Willy Taylor testified that he was standing outside a club named Otto's around ten or eleven o'clock p.m. on November 20, 1992, when appellant approached

and asked whether he had any money. Mr. Taylor said that there was no one else outside Otto's at that time. He said that, when he turned to go back into the club he felt something sharp hit him in his chest, and he fell into a ditch. On cross-examination, Mr. Taylor admitted that he had been drinking the night of the battery and had poor eyesight.

Appellant testified that he did not commit the battery. He said that he was not at Otto's the night of the stabbing; instead, he claimed that he was at Black's Cafe until around eleven o'clock p.m. when he went home and slept on the couch. Testimony by Sara Kirby, appellant's mother, corroborated his testimony that he was at home asleep on the couch around eleven o'clock p.m. The jury found the appellant not guilty, but the trial court found that appellant violated one of the terms of his suspended sentence by committing a battery on Willy Taylor.

The evidence presented was circumstantial and, perhaps, inadequate for a conviction, but that quantum of evidence is not required in a revocation hearing. *Gordon* v. *State*, 269 Ark. 946, 601 S.W.2d 598 (1980). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. *Lemons* v. *State*, 310 Ark. 381, 836 S.W.2d 861 (1992). On our review of the evidence, we cannot say that this finding is clearly against the preponderance of the evidence. A determination of preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony, and, in that respect, we defer to the superior position of the trial court to make that determination. *Id.* The trial court was entitled to believe the testimony of the victim and to discount any exculpatory testimony. We hold that the evidence presented was sufficient to support the trial court's finding.

Affirmed.

MAYFIELD and NEAL, JJ., agree.

Vivian HEINRICH *v.* HARP'S FOOD STORES, INC.

CA 94-1115 915 S.W.2d 734

Court of Appeals of Arkansas
Division III
Opinion delivered February 28, 1996

The McMath Law Firm, P.A., by: *Sandy S. McMath*, for appellant.

Wright, Lindsey & Jennings, by: *Edwin L. Lowther* and *Michael D. Barnes*, for appellee.

OLLY NEAL, Judge. This is an appeal from a jury verdict in a slip and fall case in favor of appellee Harp's Food Stores, Inc. We agree with appellant that the trial court erroneously restricted the flow of discovery and reverse and remand for a new trial.

On December 7, 1990, appellant Vivian Heinrich slipped on a piece of wrapping paper in appellee's supermarket in Mountain Home and, as a result, sustained severe injuries. Appellant and her husband, Otto, subsequently filed a complaint against appellee alleging that appellee had negligently failed to monitor and keep its floors free of obstructions, failed to warn its customers about the hazardous condition of its floors, failed to have or enforce a policy of prompt attention to injured customers and failed to properly train its employees. Appellant propounded her first set of interrogatories to appellee contemporaneously with service of the original complaint.

Appellant's interrogatories, numbers 5 and 6, are the basis of much of the controversy on appeal and read in relevant part:

5. Have you since January 1, 1984, been a party in a lawsuit or other legal proceeding in which a member of the public and/or one of your employees was alleged to have slipped, tripped, stumbled and/or fallen onto the floor of one of your premises, injuring him or her self?

6. If your answer to the preceding interrogatory is yes, for each such proceeding, please state:

(a) the complete name of the party plaintiff;
(b) the complete name of his or her attorney;
(c) the date the injury occurred;
(d) the precise location and address of the store or other premises where the injury occurred;
(e) the outcome of the proceeding;
(f) if a settlement was made, the amount thereof;
(g) if a verdict or settlement was returned, or a workers' compensation award made, the amount thereof;
(h) any remedial measures that were taken by you subsequent to each incident in order to improve the safety of the premises from a recurrence of the injury complaint [sic] of.

Appellee's answer to these interrogatories included an objection to interrogatory #6 on the grounds that it was "unduly burdensome," "overly broad," and sought irrelevant information.

After receiving appellee's response to appellant's interrogatories and a copy of appellee's motion for summary judgment, appellant amended her complaint and filed her motion to compel appellee to respond fully to interrogatory #6. In addition to the counts of negligence contained in the original complaint, appellant's amended complaint alleged that Harp's had also been negligent in failing to install non-hazardous flooring in its chain of stores, failing to change its flooring surfaces after numerous customers had been injured as a result of the sub-standard flooring and failing to warn the public that the floor surfaces in its stores were hazardous. Appellant also filed a motion to compel a complete answer to plaintiff's interrogatories which was denied. Appellant's case was tried before a jury on June 29, 1994.

At the trial, appellant presented evidence including expert testimony of Carl Menyhart, Jr., a Little Rock architect employed by the Blass Firm in Little Rock. Menyhart testified that he examined the floors in eight (8) of appellee's North Arkansas stores and discovered that the prevailing material used was "generic vinyl composite" that is normally used in storage rooms and other low-traffic areas. Menyhart also stated that he examined the floors in other retail establishments in the area, conducted an independent survey of companies that manufactured floor products that are available in the state and "took note if the companies manufactured slip-resistant products." Menyhart stated his opinion was that the flooring used by appellee, in most of its stores, was unsuitable for supermarkets because typical supermarket products such as eggs, paper products, fruit and liquid detergents create a potentially dangerous situation when dropped or spilled on that type surface. At the close of the evidence, the case was submitted to the jury who returned a verdict in favor of appellee Harp's Food Stores.

The gist of appellant's first argument is that she was wrongfully denied an opportunity to prove an element of her case when the trial court denied her motion to compel. In addressing this point of error, we note that trial courts have wide discretion in all matters pertaining to discovery and we will not reverse their decisions absent abuse of that discretion which is prejudicial to the appellant. *Derrick* v. *Mexico Chiquito, Inc.*, 307 Ark. 217, 819 S.W.2d 4 (1991); *Fraser* v. *Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986).

Although we have no evidentiary rule addressing the admissibility of prior accidents or notice, the Arkansas Supreme Court has enunciated the rule that "where notice of a danger or defect is in issue, evidence of similar occurrences is admissible, but, only when it is demonstrated that the events arose out of the same or substantially similar circumstances." *Fraser* v. *Harp's Food Stores, Inc.*, 290 Ark. 187, 718 S.W.2d 92 (1986). It is well settled that proof that a defendant had or should have had knowledge of a dangerous condition is relevant under most theories of negligence. *Arkansas Power and Light Co.* v. *Johnson*, 260 Ark. 237, 538 S.W.2d 541 (1976). Accordingly, any accidents discovered by appellant or revealed by appellee in its discovery responses that arose out of the "same or substantially

similar circumstances" would have been admissible.

Although appellant investigated and turned up information that revealed that appellee's other stores had floors constructed of the "same or similar" materials, it was impossible for appellant to find out whether accidents occurring on appellee's other floors occurred in the same or similar manner without further information. Although we recognize the magnitude of the trial court's discretion in discovery matters, we have not hesitated to find an abuse of discretion where there has been an undue limitation of substantial rights of the appellant under the prevailing circumstances. *Rickett* v. *Hayes*, 251 Ark. 395, 473 S.W. 2d 446 (1971). In cases where the appellant is relegated to having to prove his claim by documents, papers and letters kept by the appellee, the scope of discovery should be broader. *Marrow* v. *State Farm Ins. Co.*, 264 Ark. 227, 570 S.W.2d 607 (1978). We consider this factor in deciding whether there has been an abuse of discretion in denying a discovery request. *Id.* The goal of discovery is to permit a litigant to obtain whatever information he may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary. *Id.* That goal was not met in this case and appellant was denied a fair trial.

Appellant's remaining argument relates to the court's refusal to allow her to present rebuttal evidence concerning prior accidents at other Harp's locations. Because of our decision on the preceding issue, that problem is not likely to present itself on retrial, and we refrain from addressing it now.

We reverse and remand this cause for retrial with instructions that the trial court make appropriate orders regarding discovery consistent with this opinion.

Reversed and remanded.

MAYFIELD and STROUD, JJ., agree.

Elizabeth PHILLIPS *v.* ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

CA 95-160 916 S.W.2d 128

Court of Appeals of Arkansas
En Banc
Opinion delivered February 28, 1996

Webb & Doerpinghaus, by: *Charles J. Doerpinghaus, Jr.*, for appellant.

Calvin Gibson, for appellee.

OLLY NEAL, Judge. Elizabeth Phillips appeals from the decision of the Arkansas Workers' Compensation Commission, alleging error in the Commission's holding that the Commission does not have jurisdiction over her complaint of sexual harassment.

Appellant began working for the Arkansas Highway and Transportation Department in 1986. In 1987 appellant was transferred to North Little Rock where she came under the supervision of Homer Blair. Appellant testified that from May 1987 to January 1991 she was sexually harassed by Homer Blair. Such harassment included being asked to have sex with Mr. Blair, on one occasion having her breast touched by Blair, and being ordered to burn several pornographic tapes at Blair's

instruction. The record contains appellant's psychological evaluation and reevaluation. There is also testimony concerning the injuries appellant claims to have suffered. Appellant filed a claim for workers' compensation because of post-traumatic stress syndrome as a result of the sexual harassment by her supervisor.

The administrative law judge held that sexual harassment is not a risk to which an employee is exposed because of the nature of the employment but is a risk to which the employee could be equally exposed outside the employment. The law judge also held that intentional personal acts associated with sexual harassment do not arise out of and in the course of employment and are not risks associated with employment. The law judge found that the Commission has no jurisdiction over this case because a claim for sexual harassment is neither covered nor barred by the Act.

Appellant appealed to the Full Commission. The Full Commission held it did not have jurisdiction over appellant's complaint, that personal acts associated with sexual harassment do not arise out of and in the course of employment and are not risks associated with a claimant's employment. We hold that the Commission's finding that it did not have jurisdiction over appellant's claim was incorrect and must be reversed.

■ Whether sexual harassment may constitute a compensable injury under workers' compensation law is an issue we have not previously addressed. Other jurisdictions have addressed the issue with mixed results. See cases collected in Annotation, *Workers' Compensation: Sexual Assaults as Compensable*, 52 A.L.R. 4th 731 (1987) and 2A Arthur Larson and Lex K. Larson, *The Law of Workmen's Compensation* § 68.34(d) (1995). The United States District Court for the Western District of Arkansas addressed the issue applying Arkansas law and stated that it believed that the Arkansas courts would hold that sexual harassment does not fall within the purpose and intent of the workers' compensation law. *King* v. *Consolidated Freightways Corp.*, 763 F.Supp. 1014, 1017 (W.D. Ark. 1991). Despite the well-reasoned opinion in *King*, *supra*, we find that Arkansas Workers' Compensation statutes do not exclude sexual harass-

ment claims.[1]

Arkansas Workers' Compensation laws provide a remedy to workers injured or killed from an accidental injury arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4) (1987). We have recognized that a non-traumatically induced mental illness is compensable if it is causally connected to or aggravated by extraordinary work-related stress. *See City of Ft. Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992); *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). Claimant alleged that she suffered a non-traumatically induced mental illness caused by extraordinary work-related stress due to continuous sexual harassment by her supervisor. Thus, the inquiry the Commission must make is whether the claimant sustained a compensable injury arising out of and in the course of the employment relationship. In this case, the Commission failed to make such an inquiry. Instead, it erroneously adopted a rule that sexual harassment could never arise out of and in the course of an employment relationship. The Commission should have inquired into the facts and circumstances of appellant's claim and determined whether they supported her assertion that her injury arose out of and in the course of her employment.

It appears undisputed that a portion of the alleged incidents at issue in this case occurred "in the course" of appellant's employment. Appellant claims that she was harassed by her supervisor while she was at work in her office. Thus, the real question is whether the alleged incidents "arose out of" the employment relationship.

In order for an injury to arise out of employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks. *Deffenbaugh Indus.* v. *Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). To determine this issue, the Commission should apply the same rule to sexual harassment cases that it applies in assault cases: an injury arises out of the employment if the risk is increased by the nature or setting of the work. *See Welch's Laundry & Cleaners*

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[1] Appellant's injury occurred prior to July 1, 1993; thus, the 1987 version of the Workers' Compensation statute applies.

v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Whether sexual harassment is a risk to which an employee is exposed because of the nature of the work environment is a fact that should be decided on a case-by-case basis, and it was error for the Commission to find that it did not have jurisdiction because sexual harassment could never arise out of and in the course of the employment.

It is not for us or the Commission to decide whether sexual harassment is the type of injury workers' compensation should cover. If the workers' compensation statutes are to be changed to exclude sexual harassment claims, it must be done by the Arkansas General Assembly.[2]

Appellee urges us to affirm the Commission's decision because it made an alternative finding that the claimant failed to meet her burden of proving a work-related stress claim. However, in light of the Commission's express finding that it did not have jurisdiction over the claim at all, that finding was *obiter dictum*. Thus, we reverse and remand to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

JENNINGS, C.J., MAYFIELD, COOPER, STROUD, and GRIFFEN, JJ., agree.

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[2] In 1993, the Arkansas Legislature amended the Workers' Compensation laws by revising the definition of compensable injury and by adding Ark. Code Ann. § 11-9-113 (Supp. 1995), which provides that "A mental injury or illness is not a compensable injury unless it is caused by a physical injury to the employee's body." We express no opinion on the issue of whether the legislature has excluded sexual harassment claims from the purview of Workers' Compensation laws by this amendment.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY *v.* David W. ROSE, Jr.

CA 95-37 916 S.W.2d 764

Court of Appeals of Arkansas
Division II
Opinion delivered February 28, 1996

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia L. Busfield*, for appellant.

David Goldman, P.A., for appellee.

WENDELL L. GRIFFEN, Judge. State Farm Insurance Company has appealed the judgment of the Circuit Court of Garland County denying its post-trial motion for a set-off against a $45,000 jury verdict rendered in favor of David Rose, State Farm's insured under a policy providing underinsured motorist ("UIM") coverage. Rose was injured when a driver insured by another insurance company side-swiped his vehicle on July 19, 1991. The insurer for the tortfeasor paid $25,000, the limits under its liability coverage, and Rose then sued State Farm under his UIM coverage claiming damages totalling $95,000. That lawsuit, the basis of this appeal, was tried to a jury that was allowed to hear evidence concerning disability benefits paid to Rose under the disability provision of his policy. However, the trial court refused to allow State Farm to introduce evidence that it had paid $13,133 under the medical payments provision of the policy, despite allowing Rose to introduce evidence of medical expenses he incurred. After the jury returned the verdict for $45,000, State Farm moved for a set-off for the disability and medical payments. The trial court denied the motion for both.

On appeal, State Farm argues that the effect of the trial court's ruling is to permit Rose to obtain a double recovery contrary to the holding in *Shelter Mutual Ins. Co.* v. *Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992). State Farm also argues that the trial court's decision is contrary to the unambiguous language of its UIM policy with Rose. The UIM provision includes this language:

> Medical expenses paid or payable under the medical payments coverage will not be paid for again as damages under this coverage. This does not reduce the limits of liability of this coverage.

Rose argues, however, that because the jury considered the amount of his damages and returned a general verdict, it would be speculative to presume that any part of the verdict went to the

amount that he claimed for medical expenses.

We agree with the trial court's decision denying set-off for the disability payments made to Rose by State Farm under its disability provision. The jury heard testimony from Rose and his wife about the disabling effects of his injuries as well as the likelihood that he would continue to suffer from them. Most importantly, the jury received evidence that State Farm had paid disability benefits to Rose. Therefore, the jury could have taken that proof into account in reaching its verdict. The jury also knew that Rose had already received $25,000 from the tortfeasor's insurer, and the jury was instructed to assess Rose's damages "over and above" that amount.[1] Therefore, State Farm's motion for a set-off for the disability payments was properly denied.

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[1] The jury instruction that the court issued regarding damages read, in pertinent part:

> "[State Farm] has admitted [that Rose] had a policy of underinsurance coverage and is liable for any damages sustained by [Rose] over and above [$25,000] paid by Farmers Insurance Company, which were proximately caused by the occurrence. You need only to decide what those damages are and what amount [Rose] should recover. [Rose] has the burden of proving the amount of those damages. [AMI Civ. 3d 210.]
>
> . . . .
>
> If you decide for [Rose] against [State Farm], you must then fix the amount of money which will reasonably and fairly compensate him for any of the following four (4) elements of damage sustained which you find were proximately caused by the negligence of Wilma Stokes [sic]:
>
> First: the nature, extent, and duration of any injury and whether it is temporary or permanent.
>
> Second, the reasonable expense of any necessary medical care, treatment, and services rendered.
>
> Third, any pain and suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.
>
> Fourth, the value of any lost wages and the present value of any lost wages reasonably certain to be lost in the future. Whether any of these four elements of damage has been proved by the evidence is for you to determine. [AMI Civ. 3d 2201.]
>
> In the event that you find that David W. Rose, Jr., is entitled to damages arising in the future because of injuries or future medical expenses or loss of earnings, you must determine the amount of these damages. If these damages are of a continuing nature, you may consider how long they will continue." [AMI Civ. 3d 2218.]

(Appellant's abstract, pages 65-66).

However, we reverse the trial court's decision denying State Farm's motion for a set-off for the medical expenses paid to Rose. It is true that the UIM coverage extended to damages for the bodily injuries that Rose sustained. Yet, the jury did not know — and had no reason to infer from the proof at trial — that all or any part of Rose's medical expenses had already been paid by State Farm under the medical payments provision of his auto policy. Part of the money received from the tortfeasor's insurer went to subrogate State Farm, but that left $5,401.42 for which it was not subrogated. To allow Rose to recover a verdict that included the cost of those medical expenses that had already been paid by State Farm would leave Rose with a double recovery contrary to the equitable principle of subrogation as demonstrated by the *Bough* holding. *Id.*, 310 Ark. at 28, 834 S.W.2d at 641 (1992). Furthermore, this result would be contrary to the express and unambiguous language of Rose's UIM coverage which informed him that medical payments under the medical payments provision of his basic policy would not be paid again as damages under the UIM coverage.

At bottom, this case presents a variant of the collateral source rule. The collateral source rule is designed to prevent prejudice by a jury due to the mere presence of collateral sources of support like insurance coverage. *Amos* v. *Stroud*, 252 Ark. 1100, 482 S.W.2d 592 (1972). Where, as here, the insurer is a party to the action, the presence of insurance is no longer an issue and the theoretical basis of the rule loses much of its force. The "collateral source" in this case is simply a second provision of the same insurance policy. In such a case, the jury should be permitted to see a more complete financial picture. For the court to admit evidence of medical bills incurred while denying evidence of medical payments is to portray a "false and misleading" financial condition. *See Younts* v. *Baldor Elec. Co.*, 310 Ark. 86, 832 S.W.2d 832 (1992). If this evidence is not admitted during the trial, in the alternative, set-off should be allowed post-trial.

Therefore, we affirm that part of the judgment denying State Farm's motion for set-off for the disability payments. We reverse the part that denied the motion for set-off regarding the medical payments, and remand the case to the trial court with instructions that judgment be entered consistent with this opinion.

Affirmed in part; reversed in part.

COOPER and STROUD, JJ., agree.

Theodis JONES, Jr. *v.* STATE of Arkansas

CA CR 94-1418 916 S.W.2d 766

Court of Appeals of Arkansas
Division III
Opinion delivered March 6, 1996

David L. Dunagin, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Theodis Jones, Jr., appeals from the revocation of two suspended sentences and his commitment to the Arkansas Department of Correction for two, concurrent five-year terms. He contends that the trial court had no authority to revoke one of the suspensions and that the evidence was insufficient to support revocation of either. We agree with appellant's first point and reverse that part of the order revoking the first suspension. However, we disagree with appellant's second point and affirm the revocation of the second

suspension.

On December 8, 1989, appellant pleaded *nolo contendere* in case number CR-89-681-A to the offense of criminal mischief in the first degree. Imposition of any sentence was suspended for a period of one year on various conditions, including that appellant not violate any law and that he pay restitution and costs. On August 31, 1990, appellant pleaded guilty in case number CR-90-430 to the offense of burglary, for which he was sentenced to fifteen years in the Arkansas Department of Correction with ten years suspended. The suspended execution portion of this second sentence was conditioned upon appellant not violating the law.

On April 6, 1994, the prosecuting attorney filed petitions to revoke appellant's suspensions. In each petition, it was alleged that appellant violated the conditions of his suspension by committing the offense of possession of a firearm by a felon. In the petition related to case number CR-89-681-A, it was also alleged that appellant had failed to pay the court-ordered restitution and costs. After a hearing at which the State presented evidence relevant only to the felon-in-possession allegation, the trial court found that appellant had violated the conditions of both suspensions, revoked the suspensions, and sentenced appellant to two, concurrent five-year terms in the Arkansas Department of Correction.

On appeal, appellant first contends that the revocation in case number CR-89-681-A must be reversed because, *inter alia*, the period of suspension had expired. The State concedes that appellant can raise this issue for the first time on appeal, *see Bilderback* v. *State*, 319 Ark. 643, 893 S.W.2d 780 (1995), and concedes that the trial court erred in revoking the suspension. We agree.

Except where the court sentences the defendant to a term of imprisonment and suspends imposition as to an additional term of imprisonment, a period of suspension begins to run on the day that it is imposed. Ark. Code Ann. § 5-4-307 (Repl. 1993). The general rule is that the trial court may revoke a defendant's suspension only "prior to the expiration of the period of suspension." Ark. Code Ann. § 5-4-309(d) (Repl. 1993). There are two exceptions to this general rule. Under Ark. Code Ann. § 5-4-309(e) (Repl. 1993), the court may revoke a

suspension subsequent to the expiration of the period of suspension "provided the defendant is arrested for violation of suspension . . . or a warrant is issued for his arrest for violation of suspension . . . before expiration of the period." Under Ark. Code Ann. § 5-4-303(f) (Repl. 1993), if the court has suspended imposition of sentence conditioned upon the defendant's making restitution "and the defendant has not satisfactorily made all his payments when the [period of suspension] has ended, the court shall have the authority to continue to assert its jurisdiction over the recalcitrant defendant."

Here, appellant's one-year suspended imposition of sentence in case number CR-89-681-A began to run on December 8, 1989, and expired on December 7, 1990. Appellant's alleged possession of a firearm, on which the revocation was based, did not occur until March 22, 1994. While the petition for revocation alleged that appellant had also violated the conditions of his suspension by failing to pay court-ordered restitution and costs, the State presented no proof and the court made no findings on those allegations. Therefore, neither of the exceptions to Ark. Code Ann. § 5-4-309(d) are applicable, and the trial court was without authority to revoke the suspension in CR-89-681-A.

Appellant next contends that the trial court erred in finding that he violated the conditions of his suspended execution of sentence in case number CR-90-430. Specifically, he contends that the finding that he committed the offense of possession of a firearm by a felon is not supported by the evidence. We cannot agree.

In revocation proceedings, the burden is on the State to prove by a preponderance of the evidence that the defendant has violated a condition of his suspension. *Cavin* v. *State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984). Subject to certain exceptions not applicable here, it is unlawful under Ark. Code Ann. § 5-73-103(a)(1) (Repl. 1993) for a convicted felon to possess or own a firearm. Where the sufficiency of the evidence is challenged on appeal from an order of revocation, we will not reverse the trial court's decision unless its findings are clearly against the preponderance of the evidence. *Cavin* v. *State*, *supra*. In making our review, we defer to the superior position of the trial court to

determine questions of credibility and the weight to be given to the evidence. *Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

Only two witnesses testified at the hearing. Mr. James Mackey, an employee of the Fort Smith Parks Department, testified that on March 22, 1994, he heard a gunshot at Martin Luther King Park. When he heard the shot, Mr. Mackey turned around and saw two men about sixty feet away, one of whom was holding a chrome-plated pistol. The man with the gun put it in the back of his pants, talked to the other man for a short time, got into a car alone, and drove away. Mr. Mackey testified that he did not get a good look at the face of the man with the gun, but he did give a general description of him and provided the police with a description and the license plate number of the car.

Detective Archie Goins of the Fort Smith Police Department testified that he investigated the shooting reported by Mr. Mackey. Detective Goins testified that the license plate number provided belonged to a car owned by appellant's wife. The detective found the car at appellant's home. After being given *Miranda* warnings and signing a waiver of his rights, appellant made a statement in which he admitted that he had been in the park at the time and place and with the car described by Mr. Mackey. He also admitted that he had had an altercation with another man. However, appellant denied that he had a gun that day.

It was undisputed that appellant was a convicted felon, and the parties agreed that the court could take judicial notice that he had previously been convicted of the offense of burglary. No witnesses were called by the defense.

The thrust of appellant's argument is that the State's proof is lacking because he denied possessing a gun and because Mr. Mackey did not see the shot fired and could not positively identify appellant as the man with the gun. However, as noted above, credibility and conflicts in the evidence were matters for the trial court. *Jared* v. *State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986). Clearly, the trial court was not required to believe appellant's denial that he possessed a firearm. *See Scott* v. *State*, 27 Ark. App. 1, 764 S.W.2d 625 (1989). Furthermore, the fact that the evidence may be circumstantial does not render it insuf-

ficient as a matter of law. *See Needham* v. *State*, 270 Ark. 131, 640 S.W.2d 118 (Ark. App. 1980). From our review of the record, we cannot conclude that the trial court clearly erred in finding that appellant possessed a firearm in violation of state law.

The revocation and sentence in case number CR-90-430 are affirmed. The revocation and sentence in case number CR-89-681-A are reversed.

ROBBINS and ROGERS, JJ., agree.

Wendell SCHAEFFER *v.* CITY of RUSSELLVILLE

CA 94-1406 916 S.W.2d 134

Court of Appeals of Arkansas
En Banc
Opinion delivered March 6, 1996

Michael U. Sutterfield, for appellant.

Peel Law Firm P.A., by: *John R. Peel*, for appellee.

JOHN MAUZY PITTMAN, Judge. Wendell Schaeffer has appealed from an order of the Pope County Circuit Court affirming a ruling by the City of Russellville's civil service commission, which upheld his demotion from the rank of captain to that of firefighter. We dismiss this appeal because appellant failed to file a timely notice of appeal.

On May 16, 1994, appellant appealed the civil service commission's decision to the circuit court. The circuit court's order affirming the ruling of the civil service commission was filed on September 8, 1994. On September 16, 1994, appellant filed a "Petition for Rehearing," in which he argued that he was entitled to a new trial under Rule 59 of the Arkansas Rules of Civil Procedure. On October 7, 1994, appellant filed his notice of appeal from the order "entered in this case on the 8th day of September, 1994, as well as no formal order being issued as of this date as to the Plaintiff's Petition for Rehearing." When appellant filed his notice of appeal, the circuit judge had not ruled on his petition and thirty days had not passed since appellant had filed it. On October 12, 1994, the circuit judge's order denying the petition for rehearing was filed. Appellant filed no further notice of appeal.

Rule 4(a) of the Arkansas Rules of Appellate Procedure provides that a notice of appeal must be filed within thirty days from the entry of the judgment, decree, or order appealed from. Rule 4(c) provides that, if a timely motion for new trial is filed, the time for appeal shall run from the entry of the order granting or denying the new trial. Rule 4(c) goes on to state that a notice of appeal filed before the disposition of any such motion, or if no order is entered, prior to the expiration of the thirty-day period, shall have no effect; a new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the thirty-day period. Rule 4(d) provides that the time prescribed for filing a notice of appeal will be measured from the entry of the order

disposing of the motion or from the expiration of the thirty-day period. The failure to file a timely notice of appeal deprives this court of jurisdiction. *Williams* v. *Hudson*, 320 Ark. 635, 898 S.W.2d 465 (1995); *Rossi* v. *Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995).

Here, appellant's only notice of appeal was filed prior to either the entry of the order deciding the post-trial motion or the expiration of thirty days after the motion was filed. Therefore, the notice of appeal was premature and the appeal must be dismissed. *See Snowden* v. *Benton*, 49 Ark. App. 75, 896 S.W.2d 451 (1995); *Glover* v. *Langford*, 49 Ark. App. 30, 894 S.W.2d 959 (1995).

In his reply brief, appellant argues that Rule 4(c) does not render his notice of appeal ineffectual because, before he filed it, the trial judge orally advised appellant that he had denied, and hence "disposed of," the motion for new trial. Appellant asserts that this is sufficient to trigger the running of the period within which he was required to file his notice of appeal. We disagree. Rule 4(c) provides: "A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the thirty-day period." Rule 4(e) provides that an order is "entered . . . when it is filed with the clerk of the court in which the claim was tried." A trial court's decision from the bench is ineffective in this context. *See Nance* v. *State*, 318 Ark. 758, 891 S.W.2d 26 (1994).

Appeal dismissed.

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

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to dismiss this appeal. The circuit court's order upholding the decision of the Civil Service Commission was entered on September 8, 1994. On September 16, 1994, appellant filed a "Petition for Rehearing" in which he noted that his notice of appeal asked for a jury trial and to submit additional evidence "in the form of testimony, documents and physical evidence." He also asked for a new trial because the circuit judge's decision was made without any hearing whatsoever. When by October 7, 1994, there had

been no decision on his petition for rehearing, appellant filed a notice of appeal to this court.

On October 12, 1994, within thirty days from the filing of the petition for rehearing, the trial judge denied the petition for rehearing. No additional notice of appeal was filed.

Arkansas Rules of Appellate Procedure 4(c) provides:

> *If a timely motion listed in section (b) of this rule is filed in the trial court by any party*, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any other such motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. A notice of appeal filed before the disposition of any such motion or, if no order is entered, prior to the expiration of the 30-day period shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period. No additional fees shall be required for such filing. [Emphasis added.]

Ark. R. App. P. 4(b) lists a motion for judgment notwithstanding the verdict under ARCP 50(b), a motion to amend the court's findings of fact or to make additional findings under ARCP 52(b), and a motion for new trial under ARCP 59(b). However, I do not think appellant's petition for rehearing was actually an Ark. R. Civ. P. Rule 59 motion for a new trial; it was a request *for a trial. See Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Fuller* v. *State*, 316 Ark. 341, 872 S.W.2d 54 (1994).

The order entered in the circuit court on September 8, 1994, without benefit of a hearing, simply stated:

> Now on this 1st day of September, 1994, is presented to the Court the petition for a judicial review filed in the above styled cause, and from said petition, a review of the court file, and other matters before the Court, the Court does hereby affirm the ruling of the City of Russellville Civil Service Commission.

The notice of appeal filed on October 7, 1994, was within

thirty days of the entry of the order appealed from, and I think the time in which to appeal from that order is controlled by Arkansas Rule of Appellate Procedure 4(a), not 4(b) and (c). Under 4(a) "a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from."

Therefore, I dissent from the dismissal of the appeal in this case.

COOPER, J., joins in this dissent.

CITY of SHANNON HILLS *v.* David L. SPARKS and Joe Claypool, d/b/a Claypool & Sparks Realty, Inc.

CA 95-23 916 S.W.2d 140

Court of Appeals of Arkansas
Division II
Opinion delivered March 6, 1996
[Petition for Rehearing denied April 14, 1996.]

Roachell & Streett, by: *Richard W. Roachell*, for appellant.

Ellis Law Firm, by: *George D. Ellis*, for appellees.

JOHN B. ROBBINS, Judge. Appellant City of Shannon Hills (Shannon Hills) brought an action against appellees David L. Sparks and Joe Claypool in the Saline County Chancery Court. In its complaint, Shannon Hills alleged that appellees had breached an oral contract to bring certain roads up to city specifications. Shannon Hills sought specific performance or, in the alternative, damages. In its answer, the appellees prayed that the case be transferred to circuit court because this was not a proper case for specific performance and chancery court lacked jurisdiction. The chancellor agreed and transferred the case to the Saline County Circuit Court.

A jury trial was held in Saline County Circuit Court. After Shannon Hills rested its case, the appellees moved for a directed verdict, which was granted. The trial court found that, even if a contract existed between the parties, Shannon Hills was not entitled to damages because none were suffered.

For reversal, Shannon Hills contends that the chancery court erred in transferring the action to circuit court. In addition, it argues that the circuit court erred in dismissing the case because it had a right to recover damages. We find no error and affirm.

Harold McIntire, Mayor of Shannon Hills, testified on behalf of the city. He stated that, in 1983, it came to his attention that the appellees were seeking approval to develop a subdivision to be known as Joan's Subdivision. He stated that appellees wanted Shannon Hills to accept the private gravel roads in the subdivision for dedication to the city as city roads. However, this request was denied. Later, on September 26, 1983, the city council conducted a meeting after which it approved the appellee's subdivision plans. However, as a condition to the approval, the appellees were required to bring the roads up to city standards in 7 ½ years. According to the mayor, the appellees were present at this meeting and did not object to the condition. It was also agreed that, at the discretion of Shannon Hills, the city was authorized to grade the roads, provide police patrol on the roads, and respond to any emergencies.

More than seven years later appellees had not paved the roads in question, yet they continued to develop the subdivision. Therefore, two months before the 7 ½-year period ended, the mayor notified appellees that the deadline was approaching and that the roads were not up to city specifications. The appellees failed to upgrade the roads, and this action was commenced.

Tommy Bond, a consulting engineer, also testified on behalf of Shannon Hills. He stated that, based on his estimation, it would cost $58,286.55 to bring the roads in Joan's Subdivision up to city specifications. Shannon Hills sought this amount as damages, and the mayor testified that this money would be used to pave the roads and bring them up to the city's standards.

Shannon Hills' first argument for reversal is that the chancery court erroneously transferred this case to circuit court. It asserts that, since its complaint sought specific performance, the chancery court had jurisdiction to hear the case. Shannon Hills acknowledges that, in order to be entitled to specific performance, a plaintiff must first show that it is able to perform its part of the bargain. *See McIllwain* v. *Bank of Harrisburg*, 18

Ark. App. 213, 713 S.W.2d 469 (1986). It asserts that its part of the bargain has been fully performed because it approved the subdivision, and that appellees should be ordered to fulfill its obligation to bring the roads up to city specifications. Shannon Hills further acknowledges that specific performance of an agreement will not be granted unless the subject matter is so unique that damages in an action at law would be inadequate. *See McCallister* v. *Patton*, 214 Ark. 293, 215 S.W.2d 701 (1948). However, it argues that special circumstances exist in the instant case which render specific performance the appropriate remedy. As a special circumstance, Shannon Hills asserts that damages may be difficult to recover. It also states that if damages are awarded, the city would have the added expense and inconvenience of soliciting bids and retaining a company to do the necessary paving. Finally, Shannon Hills asserts that it would be a burden if it were required to supervise their selected contractor, inspect the work, and make payment therefor.

We need not address Shannon Hills' argument that this case was erroneously transferred from chancery court because there is nothing in the abstract or record to demonstrate that Shannon Hills ever made any objection to the transfer. Since there is no evidence that Shannon Hills objected to the transfer, it effectively consented to the circuit court's adjudication of the controversy, and cannot now take issue with the transfer. *See Towell* v. *Shepherd*, 286 Ark. 143, 689 S.W.2d 564 (1985). Although counsel for Shannon Hills stated during oral arguments before this court that objections to the transfer were made to the chancellor, the record does not so reflect, and it is well established that it is the appellant's burden to bring up a record sufficient to demonstrate reversible error. *SD Leasing, Inc.* v. *RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983). The record is silent as to any objection on this issue. Thus, it is not preserved for our review.

Shannon Hills' remaining argument is that the circuit court erred in directing a verdict in the appellee's favor, thereby denying Shannon Hills' claim for damages. It argues that it was under no obligation to approve appellees' request to develop Joan's Subdivision, and that it is now entitled to have the roads upgraded pursuant to the agreement between the parties. Shannon Hills further asserts that it would not have approved the

subdivision absent this agreement.

We need not decide whether a binding contract existed in this case because, as the circuit court found, even if appellees breached a contract with Shannon Hills, there was no proof that Shannon Hills suffered any damages. Although Shannon Hills was under no obligation to approve a development of this subdivision, doing so caused it no financial harm. The mayor and former council members conceded that the roads in question were not owned by the city, but were privately owned, and may never be dedicated to the city even if they were brought up to city standards. Therefore, the fact that appellees failed to pave the roads did not damage Shannon Hills. It simply had no property interest in the roads.

Shannon Hills seems to suggest that approval of the subdivision caused them the expense of providing fire and police protection, as well as performing minor repairs to the roads as they become necessary. However, it provided no proof of the cost of such undertakings, and its request for damages apparently did not include such cost. Moreover, it is undisputed that the city was not required to provide these services and rendered them at its sole discretion.

In *Lytle* v. *Wal-Mart Stores, Inc.*, 309 Ark. 142, 827 S.W.2d 652 (1992), our supreme court quoted from *Howard* v. *Hicks*, 304 Ark. 112, 800 S.W.2d 706 (1990), as follows:

> [I]n addressing the issue of whether a directed verdict should have been granted, we must view the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. Where the evidence is such that fair-minded people might have different conclusions, then a jury question is presented, and the directed verdict should be reversed.

Lytle at 143.

In the case at bar, we find no error in the circuit court's conclusion that a jury question was not presented due to Shannon Hills' failure to prove any damages. Thus, we affirm its decision to grant a directed verdict in favor of the appellees.

Affirmed.

JENNINGS, C.J., and GRIFFEN, J., agree.

NETWORK DESIGN ENGINEERING, INC. *v.*
DIRECTOR, Employment Security Department

E 95-48 917 S.W.2d 168

Court of Appeals of Arkansas
Division I
Opinion delivered March 6, 1996

Friday, Eldredge & Clark, by: *Michael S. Moore*, for appellant.

Allan Pruitt, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Board of Review's decision finding that appellant's relationship to inspectors constituted covered employment subject to the payment of unemployment insurance taxes under Ark. Code Ann. § 11-10-210(e) (Supp. 1993), based on the finding that the inspectors were not independent contractors, but employees of appellant. On appeal, appellant argues that the Board's decision is arbitrary, capricious, unreasonable and not supported by substantial evidence. We disagree and affirm.

It is undisputed that Finley Engineering Company contracted with the Federated States of Micronesia Telephone Company (FSM) to design and supervise the installation of cable in the Federated States. Finley then subcontracted to appellant, an engineering company involved in the communications industry, the function of supervising the installation portion of the prime contract. Appellant maintained offices at FSM and hired twenty to twenty-five inspectors. The inspectors were engaged pursuant to a form contract which was required by FSM's government. The inspectors were to insure that the installation was accomplished according to specifications contained in the prime contract.

On appeal, appellant argues that the inspectors were exempt as independent contractors within the meaning of Ark. Code Ann. § 11-10-210(e) (Supp. 1993), which provides:

> Services performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the Director that:

(1) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and

(2) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

In order to obtain the exemption contained in § 11-10-210(e), it is necessary that the employer prove each of subsections (e)(1) through (3). *Stepherson* v. *Director*, 49 Ark. App. 53, 895 S.W.2d 950 (1995). Therefore, if there is sufficient evidence to support a finding that any one of the three requirements is not met, the case must be affirmed. *Id.* In reviewing a decision of the Board of Review, this court views the evidence in the light most favorable to the Board's findings, giving them the benefit of every legitimate inference that can be drawn from the testimony and will affirm the Board's decision if its findings are supported by substantial evidence. *American Transportation Corp.* v. *Director*, 39 Ark. App. 104, 840 S.W.2d 198 (1992).

Appellant first argues that the Board's finding that the inspectors were not free from appellant's direction and control is not supported by substantial evidence. We disagree.

Charles W. Miller, president of appellant's corporation, testified that appellant and the inspectors entered into a contract which was required by the government of the Federated States. The contract in this case reveals that all language used referred to appellant as "employer" and the inspectors as "employees". The contract also reveals that the inspectors were to be paid by the hour, that appellant would pay the inspectors $50.00 per day for board and lodging, and that appellant reserved the right to terminate the relationship by giving a 30-day written notice. The contract also revealed that appellant essentially controlled the number of overtime hours worked by the inspectors. The con-

tract specifically provided that appellant had the right to terminate the inspectors for failure to maintain good personal habits as well as failure to conform to appellant's rules and regulations policy. Mr. Miller testified that appellant had the right to terminate a contract with an inspector if he or she did not perform his or her duties. Another section of the contract indicates that the inspectors will be employed ". . . for the employer and no other person or company for wage . . ." without prior written consent by the Federated States.

Mr. Miller testified further that appellant assigned the inspectors to each crew that was to be supervised. He also stated that the inspectors were not supervised on the job, and that they had authority to make changes "so long as it was not a major change in design." Mr. Miller added that on the first day he was the only individual available and that he worked as an inspector on that day. He also concluded that if an inspector had not been available on a particular day, he would have supervised the crew as an inspector on a temporary basis.

From our review of the record, including the evidence of the inspector's assignments, rate of wages, number of overtime hours, limited discretion, and appellant's ability to terminate the inspectors for failure to maintain personal habits and conform to appellant's rules and regulations policy, we conclude that there is substantial evidence to support the Board's finding that the inspectors were not free from appellant's control and direction. Because we find that the Board's finding that appellant failed to satisfy the first prong of the test under § 11-10-210(e) is supported by substantial evidence, we need not discuss the Board's findings on the remaining two prongs.

Affirmed.

PITTMAN and COOPER, JJ., agree.

Vickey Lee FULGHAM *v.* DIRECTOR, Employment Security Department, and Regal Ware, Inc.

E 95-124 918 S.W.2d 186

Court of Appeals of Arkansas
Division III
Opinion delivered March 6, 1996

Appellant, Pro Se.

Allan Pruitt, for appellees.

JOHN F. STROUD, JR., Judge. Appellant, Vickey Fulghum, applied for unemployment compensation benefits after she was discharged by her employer, Regal Ware, Inc., for being involved in a fight with another employee. The Arkansas Employment Security Division determined that appellant was not entitled to benefits under Ark. Code Ann. § 11-10-514 (Supp. 1995) because she was fired for misconduct connected with the work on account of willful violation of the rules of her employer. She appealed that determination to the Arkansas Appeal Tribunal, which reversed the Division's finding and awarded appellant benefits. Regal appealed the Tribunal's decision to the Board of Review, which reversed the Tribunal's findings and found that appellant was disqualified for benefits because she was involved in a fight in willful violation of Regal's rules. We reverse.

The Board of Review's decision was based solely on the record of the proceedings before the Appeal Tribunal. Appellant was the only eyewitness to the incident who testified at the hearing before the Tribunal. She stated that she was returning to her work station after borrowing a piece of gum from another employee when her co-worker Aram Koger walked past her. When she walked past Ms. Koger, they bumped into each other. Ms. Koger said, "You better watch out," and appellant replied, "[You] watch out." Appellant then turned around and began walking back to her station. She heard someone following her and turned around and said, "Yes?" Then Ms. Koger slapped her and appellant pulled Ms. Koger's hair. The two fell to the floor in a scuffle which was broken up by other employees.

Charlene Brown, a human resource assistant for Regal, testified that the other employees who witnessed the event did not see anything until both women were on the floor. When asked why appellant was terminated, she stated:

> Our employee rules of conduct, and we cover this in every pre-employment orientation, [state that if] there is any fighting on company property at all that is grounds for immediate termination, there are no exceptions. Both parties are terminated. And all indications point that Ms. Koger was the aggressor but company policy says that both employees must be terminated.

Ms. Brown never disputed appellant's claim that she acted in self-defense nor did she offer any evidence to rebut the claim of self-defense.

The Board of Review found that appellant was discharged from work for misconduct connected with the work on account of a willful violation of the rules of the employer. A person is disqualified from benefits if she is discharged from her last work for misconduct in connection with the work. Arkansas Code Annotated § 11-10-514(a)(1) (Supp. 1995). "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. *George's Inc.* v. *Director*, 50 Ark. App. 77, 900

S.W.2d 590 (1995). There is an element of intent associated with a determination of misconduct. *Id.* Mere good-faith errors in judgment or discretion and unsatisfactory conduct are not considered misconduct unless they are of such a degree of recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of an employer's interest. *Id.* Whether the employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question for the Board to decide. *Id.*

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. *George's Inc.* v. *Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Our review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

The Board found:

> the evidence fails to establish that the claimant did not have the opportunity to retreat, or that the response to the slap was self-defense. Thus, while the claimant might feel that her actions of retaliation were justified, misconduct is established.

Upon our review of the record in this case, we hold that there was no relevant evidence from which reasonable minds could conclude that appellant manifested the requisite culpability for her violation of Regal's rules to constitute misconduct. There is no evidence in the record to indicate that she harbored any wrongful intent, evil design, or intentional disregard of her employer's interest.

The facts of this case are parallel to those in *Hodges* v. *Everett, Director*, 2 Ark. App. 125, 617 S.W.2d 29 (1981), in which we stated:

> It may well be that the employer is justified in having a rule making any employee engaging in a fight subject to discharge, but the existence of such rule does not

> necessarily mean that the discharged employee is guilty of misconduct within the meaning of the Arkansas Employment Security Law. There is no evidence in this case that appellant knew of a rule against self defense, but even if she had known, legitimate self defense would not disqualify her for unemployment benefits. Furthermore, there is no substantial evidence to indicate that appellant struck her attacker, or do more than hold her by the hair. The right of self defense is recognized under English common law and by Arkansas statutory law, and is universally accepted. It is a right the exercise of which cannot be said to be an act of wanton or willful disregard of the employer's interest. There is no substantial evidence to support the Board of Review's finding that appellant was guilty of misconduct, and she is entitled to unemployment benefits. (Internal citations omitted.)

In this case, as in *Hodges*, there is no doubt that appellant violated one of her employer's rules. However, there is not substantial evidence to support the Board of Review's finding that appellant was guilty of misconduct.

Reversed and remanded.

MAYFIELD and NEAL, JJ., agree.

B. Ray HEFLIN *v.* Gwen K. Heflin BELL

CA 95-105 916 S.W.2d 769

Court of Appeals of Arkansas
Division III
Opinion delivered March 6, 1996
[Petition for Rehearing denied April 17, 1996.]

Dewey Moore, for appellant.

Price Law Firm, by: *Dale Price*, for appellee.

JOHN F. STROUD, JR., Judge. Gwen and Ray Heflin were divorced in 1986. The divorce decree incorporated a property settlement stating that the wife would have custody of the minor child and that the husband would pay $350.00 monthly for support and maintenance of the child. In 1989, after Ms. Heflin had moved from Arkansas to Tennessee, the court adjusted the summer visitation of Mr. Heflin but refused to increase the child support as urged by Ms. Heflin. Ms. Heflin subsequently moved to Plano, Texas, and Mr. Heflin moved to Atlanta, Georgia. In November and December of 1992, Ms. Heflin filed motions on various matters relating to the property settlement and again asked for an increase in child support. A hearing was held in February of 1994 on several motions alleging, among other things, that Mr. Heflin was in arrears in child support and that there had been a change in circumstances warranting an increase in child support. At the hearing, there was evidence of a substantial increase in Mr. Heflin's income since the time of the divorce decree. The chancellor made several findings regarding child support arrearages, health insurance and medical expenses. Mr. Heflin does not contest those findings. He appeals from the portion of the order finding that monthly support payments should be increased from $350.00 per month to $928.42 and that the increase should be retroactive to January 1993. We affirm.

We will consolidate appellant's first two points into one issue as he did in his brief. The issue appellant presents is whether the Arkansas Supreme Court's per curiam on guidelines

for child support, *In re Guidelines for Child Sup. Enforce.*, 305 Ark. 613, 804 S.W.2d XXVIII (1991) (interpreting Act 948 of 1989, amending Ark. Code Ann. §9-12-312(a)), requires a party moving for modification of a child support order to offer evidence of a change of circumstances other than an increase in the non-custodial parent's income. Appellant argues that under the per curiam and case law, the trial court was required to consider the totality of the present circumstances of the parties in determining the requested modification of the child support order. We agree with appellant that the guidelines for child support must be followed; however, appellant relies upon *In re Guidelines for Child Sup. Enforce.*, 305 Ark. 613 (1991), and cases following the guidelines of that per curiam, such as *Roland* v. *Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993). Although that per curiam was in effect at the time the petition to modify child support was filed, we point out that a subsequent per curiam was issued by the Arkansas Supreme Court in October of 1993.

The Arkansas Supreme Court has held that the statute in effect at the time of a divorce decree is the applicable law pertaining to the division of property. *Clayton* v. *Clayton*, 297 Ark. 342, 760 S.W.2d 875 (1988). Consistent with the holding in *Clayton* v. *Clayton*, we hold that a statute or per curiam order of the Arkansas Supreme Court that is in effect at the time of the hearing on the request for modification of child support is the applicable law pertaining to the modification. In the case now before us the issue is controlled not by the per curiam of 1991, which was in effect at the time appellee's petition was filed, but by the per curiam in effect at the time of the modification, *In re: Guidelines for Child Support*, 314 Ark. 644, 863 S.W.2d 291 (1993), and by Ark. Code Ann. § 9-14-107(a) (Repl. 1993).[1]

We first point out language in the 1991 per curiam which is not included in the per curiam of 1993. The 1991 per curiam, upon which appellant relies, contains the following paragraph:

> In publishing its per curiam, this Court recognizes that the trial court has continuing jurisdiction to modify

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[1] Ark. Code Ann. § 9-14-107 (Repl. 1993) has since been amended by Act 1184 of 1995, codified at Ark. Code Ann. § 9-14-107 (Supp. 1995).

> child support orders to advance the welfare of the child when there is a material change in circumstances. Approval of the Family Support Chart by this Court does not per se create a material change in circumstances. In determining requested modifications of child support orders entered prior to the effective date hereof, the trial court should consider the totality of the present circumstances of the parties and avoid modifications that would work undue hardship on the parties or any persons presently dependent thereon.

In re Guidelines for Child Sup. Enforce., 305 Ark. at 618. (Internal citations omitted.) The paragraph is identical to that found in *In re Guidelines for Child Sup. Enforce.*, 301 Ark. 627, 784 S.W.2d 589 (1990). In the past this court has quoted the paragraph and used language compatible with it in determining modification of child support. *See Roland* v. *Roland*, 43 Ark. App. at 67. The per curiam of 1993 is very similar to the per curiam of 1991, but the above-quoted paragraph is omitted and, therefore, not applicable to child support matters decided after the 1993 per curiam was issued.

Turning to the case now before us, we apply the statute which determines whether a change in payor's income warrants consideration of a petition for modification of a child support order:

> Upon application to a court of competent jurisdiction for the purpose of modification of a child support award, a change in gross income, as defined in subsection (b) of this section, of the payor in an amount equal to or more than twenty percent (20%) or more than one hundred dollars ($100) per month shall constitute a material change of circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support chart after appropriate deductions.

Ark. Code Ann. § 9-14-107(a) (Repl. 1993).[2]

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[2] Before the 1993 amendment, Ark. Code Ann. § 9-14-107(a) (Supp. 1991) stated: Upon application to a court of competent jurisdiction for the purpose of modification of a

At the time of the parties' divorce in 1986, appellant had supplied the court with an affidavit of financial means which showed his weekly gross wages as $1105.00 and his take-home pay as $670.00, which was $34,840.00 annually. At the hearing in February of 1994 on modification of support, the chancellor found from the evidence presented that appellant's gross income was $129,667.61 as of January 1, 1993. After all deductions mentioned in the child support chart were subtracted, she found that appellant's net pay was $85,697.00 as of January 1, 1993.

Appellant contends that appellee did not meet her burden of proof in that she did not establish that the child's needs had increased and that the chancellor erred in finding that appellee had met her burden of proof by simply introducing evidence of the increase in appellant's income. Arkansas Code Annotated § 9-14-107(a) (Supp. 1993), which controls our decision along with the 1993 per curiam, was the statute in effect at the time of the hearing. Under a prior statute, a change in the payor's income of ten percent (10%) was sufficient to support a determination of changed circumstances and an increase in child support pursuant to the chart. Under Ark. Code Ann. § 9-14-107(a) (Supp. 1993), the specified change in the payor's income does not necessarily support the determination but merely constitutes a material change of circumstances sufficient to allow the petition to the court for its review and adjustment of child support.

Although we review chancery cases de novo on the record, we do not reverse unless the chancellor's findings are clearly against the preponderance of the evidence or are clearly erroneous. *Jones* v. *Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995). A chancellor's determination as to whether there are sufficient changed circumstances to warrant an increase in child support is a finding of fact, and this finding will not be reversed unless it is clearly erroneous. *Irvin* v. *Irvin*, 47 Ark. App. 48, 883 S.W.2d 862 (1994).

Appellant also contends that the chancellor erred in not per-

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child support award, a change in income of the payor in an amount equal to ten percent (10%) of income shall be sufficient for a determination by the presiding judge of changed circumstances to warrant a change in the child support obligated amount.

mitting him to inquire about appellee's lifestyle and the needs of the minor child and in refusing to take into account appellant's increased living expenses in Atlanta, Georgia, compared to those in Little Rock. After the chancellor sustained an objection to appellant's questioning of how appellee spent her child support each month, appellant made no further attempts to inquire into appellee's lifestyle. In his proffer to the Court as to what he intended to offer into evidence through the appellee during cross examination, the subjects were transportation, things appellant bought for the child, and life insurance and health insurance purchased by appellant. Appellee subsequently answered his questions about transportation and health insurance premiums, and appellant asked no further questions of her. On redirect, appellee answered questions about an orthodontist bill.

The record shows that evidence of appellant's increased living expenses was admitted. Appellant's exhibit 2, a chart showing his increased monthly living expenses since moving to Georgia, was admitted into evidence. Thus, appellant's complaint is not justified that the chancellor refused to take into consideration appellant's increase in expenses in Georgia. We find the court acted properly in reviewing the circumstances to determine if an adjustment in child support was warranted.

Appellant also complains that the lower court should have considered the relocation expenses in arriving at appellant's income for support purposes. He has not, however, brought up a record sufficient for us to determine this issue. Appellant's abstract and brief show the admission into evidence of appellant's 1992 W-2's and a certified public accountant's letter to appellant "explaining moving expenses included in this W-2 form for 1992." The letter states that appellant's 1992 income per W-2's was $153,222.14, that the moving expenses paid by the employer amounted to $11,965.60, and that the difference was $141,256.54. As we previously noted, the chancellor found that appellant's gross pay as of January 1, 1993, was $129,667.61, an amount less than that figured by appellant's accountant. Absent from the abstract is a showing of which items were deducted from the gross pay of $141,256.54 as shown on the W-2's in arriving at the lesser amount of $129,667.61. It may be that the Chancellor did not make specific findings on this matter, but it is appellant's burden to bring up a record showing

that the trial court erred. We cannot determine this issue because appellant has not abstracted proof that the chancellor did not deduct the relocation expenses from his gross salary.

Having determined that the court did not err in awarding an increase in child support, we turn to appellant's remaining point of error: that the court erred in making the increase retroactive. In *Pardon* v. *Pardon*, 30 Ark. App. 91, 782 S.W.2d 379 (1990), a mother filed a petition for a change of custody after the parties' sixteen-year-old son moved into her home and desired to be placed in her custody. The hearing was held nine months later. We found no abuse of discretion in the chancellor's ordering support payments retroactive to the date of the filing of a petition. *Pardon* v. *Pardon*, 30 Ark. App. at 94. Here the petition was filed in 1992, the hearing was held in 1994, and the chancellor made a finding of the father's income as of January 1, 1993. We find no abuse of discretion in the chancellor's ordering support payments retroactive to January 1993.

For the reasons above, the decision of the chancellor is affirmed.

MAYFIELD and NEAL, JJ., agree.

Frank QUINN, Deceased *v.* WEBB WHEEL

CA 95-146 915 S.W.2d 740

Court of Appeals of Arkansas
Division II
Opinion delivered March 6, 1996
[Supplemental Opinion on Granting of Rehearing
delivered June 5, 1996.*]

* PITTMAN, COOPER, ROGERS, and GRIFFEN, JJ., agree; ROBBINS, J., concurs.

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

Michael H. Mashburn, for appellee.

JOHN F. STROUD, JR., Judge. This is an appeal from an order of the Workers' Compensation Commission finding that appellant's death constituted new evidence to be considered in determining the propriety of awarding a lump-sum payment pursuant to Ark. Code Ann. § 11-9-804 (Supp. 1993).[1]

Appellant sustained a compensable back injury on November 23, 1991, and was awarded permanent partial disability benefits by the administrative law judge in the amount of forty-four percent to the body as a whole in an order dated January 7, 1993. That order was affirmed on appeal to the Commission on June 22, 1993. On September 28, 1993, appellant requested that the remaining portion of the permanent partial disability benefits be paid in a lump sum pursuant to Ark. Code Ann. § 11-9-804(a) (Supp. 1993), and a hearing on that request was held on January 3, 1994.

In his opinion dated January 13, 1994, the ALJ found that it was in appellant's best interest to receive a lump sum. He also found that, because appellant was suffering from terminal cancer, special circumstances existed under Ark. Code Ann. §11-9-804(b) (Supp. 1993) which required him to make a determination of appellant's probable life span and reduce the amount of benefits awarded to reflect the likelihood that the appellant would not live to collect the full amount of benefits if they had been awarded weekly. After reviewing the medical evidence, the ALJ determined that appellant was unlikely to survive more than sixty weeks. The ALJ made a lump-sum award of sixty weeks of benefits discounted at ten percent compounded annually.

On February 1, 1994, the appellant died, and the appellee appealed the award of a lump-sum payment to the full Commis-

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[1] Although this appeal was filed in appellant's name, it was filed subsequent to his death.

sion on February 14, 1994, asking the Commission to reverse the ALJ's award of a lump-sum payment and to remand for the taking of additional evidence pursuant to Ark. Code Ann. §11-9-704(b)(7) (Supp. 1993). The Commission remanded the case to the ALJ and instructed him to conduct a hearing to consider new evidence, the fact that appellant had died, in assessing the amount and propriety of the lump-sum payment.

The Commission is vested with discretion in determining whether and under what circumstances a case appealed to them should be remanded for the taking of additional evidence, and that discretion will not be lightly disturbed on appeal. *Roberts-McNutt, Inc.* v. *Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985). From our review of the record we cannot say that the Commission abused its discretion in remanding the case for the taking of additional evidence.

The ALJ found that appellant's right to permanent disability benefits previously awarded terminated with his death on February 1, 1994, pursuant to Ark. Code Ann. § 11-9-704(e) (Supp. 1993), which provides that "[n]o compensation for disability of an injured employee shall be payable for any period beyond his death." He also found that appellant was not entitled to a lump-sum payment because he had been paid weekly and the payments were current at the time of his death; thus, there were no "future payments of compensation" on which to compute a lump-sum award. On appeal, the full Commission affirmed and adopted the ALJ's opinion.

Appellant has raised only two points on appeal: (1) that the Commission erred in remanding the case to the ALJ to consider appellant's death as new evidence and (2) that the case must be reversed because the composition of the Workers' Compensation Commission violated his due process rights. We disagree and affirm.

Appellant's first contention fails because the Commission is authorized to take testimony by deposition or other means under Ark. Code Ann. § 11-9-207(a)(10) or to remand the matter to the ALJ for the purpose of taking additional evidence under Ark. Code Ann. § 11-9-704(b)(7). *Thornton* v. *Bruce*, 33 Ark. App. 31, 800 S.W.2d 723 (1990). Arkansas Code Anno-

tated § 11-9-704(b)(7) provides:

> The full commission may remand to a single member of the commission or administrative law judge any case before the full commission for the purpose of taking additional evidence.

Under the prior version of the Workers' Compensation statutes which were identical to those in force today, we established a four-part test that must be satisfied before the Commission can remand a case for additional evidence. In *Haygood* v. *Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982), we stated that the following are prerequisites for remand by the full Commission on proffer to present newly discovered evidence: (1) the newly discovered evidence must be relevant; (2) it must not be cumulative; (3) it must change the result; and (4) the party seeking to introduce the evidence must be diligent.

The Commission addressed this test in its opinion and found that all the elements were satisfied. Appellant's representative contends that the fact of appellant's death is not relevant because the only evidence that should be considered is the evidence that existed at the time the ALJ made his decision. This is simply not the law. The period for appeal had not yet expired, and the Commission was free to further develop the record pursuant to Ark. Code Ann. § 11-9-704(b)(7)(1987).

It is clear that the fact of appellant's death was relevant upon remand. Once the ALJ found that appellant should be granted a lump-sum award, he was required to determine the amount of future payments of compensation under the statute. In doing so, he was required to assess the probability of death of the injured employee pursuant to Ark. Code Ann. § 11-9-804(b). Because he found that special circumstances existed that required him to deviate from the American Experience Table of Mortality, the ALJ was required to make an independent assessment of appellant's probable life span. Clearly, the actual life span is the best evidence that could be acquired on this issue. Thus, it was relevant.

For his second point, appellant challenges the constitutionality of Ark. Code Ann. § 11-9-201 (1987), which provides for the appointment of three members of the Workers' Compensa-

tion Commission. Subsection (a)(1) of the statute requires that one member appointed to the Commission must be classified as a representative of employers, and subsection (a)(2) requires that one member be classified as a representative of employees. The third member, who is to be chairman of the Commission, is not required to have any type of affiliation. It is appellant's contention that the fact that two of the commissioners are chosen on the basis that they have a bias toward one side in workers' compensation cases violates due process. We do not address this contention because appellant has failed to preserve the issue for appeal.

The record in this case does not show that the appellant ever obtained a ruling on the constitutionality of the statute from the Commission. This court established in *Hamilton* v. *Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), that constitutional questions must first be presented to the ALJ or the Commission before we can reach the issue on appeal. The reason for the rule is that "[c]onstitutional questions often require an exhaustive analysis which is best accomplished by an adversary proceeding." *Id.* In this case, appellant's counsel purported to raise the constitutional issue at the commission level by writing a letter to the ALJ and by including it in his notice of appeal to the full Commission. However, he neither developed the argument nor obtained a ruling from the Commission. As stated by the Arkansas Supreme Court in *Todd* v. *Shrum*, 302 Ark. 83, 787 S.W.2d 240 (1990):

> Although it may be argued that this issue was raised during the proceedings, we do not consider it on appeal since the matter was not brought to the attention of the trial court for ruling. The burden to obtain a ruling is on the movant, and questions left unresolved are waived, and may not be relied upon on appeal.

Thus, the issue of the constitutionality of the statute is not properly before us, and we cannot address the merits of this point.

Affirmed.

GRIFFEN, J., agrees; COOPER, J., concurs.

JAMES R. COOPER, Judge, concurring. I reluctantly concur in the decision of the Court. Although I agree that we have arrived at the result that the law requires, I write separately to

point out that the law, as presently formulated, is unjust in mandating the result we reach.

The employee in the case at bar, suffering from a non-work-related fatal disease, sought and obtained a lump-sum settlement. To permit the record to be reopened after the award was made can only prompt employers and insurers to delay such proceedings. Perhaps this is a matter which should be addressed by the legislature.

SUPPLEMENTAL OPINION ON GRANTING OF REHEARING JUNE 5, 1996

923 S.W.2d 287

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

Michael H. Mashburn, for appellee.

JOHN F. STROUD, JR., Judge. This is an appeal from an order of the Workers' Compensation Commission finding that appellant's death constituted new evidence to be considered in determining the propriety of awarding a lump-sum payment pursuant to Ark. Code Ann. § 11-9-804 (1987).[1]

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[1] Although this appeal was filed in appellant's name, it was filed subsequent to his death.

Appellant sustained a compensable back injury on November 23, 1991, and was awarded permanent partial disability benefits by the administrative law judge in the amount of forty-four percent to the body as a whole in an order dated January 7, 1993. That order was affirmed on appeal to the Commission on June 22, 1993. On September 28, 1993, appellant requested that the remaining portion of the permanent partial disability benefits be paid in a lump sum pursuant to Ark. Code Ann. § 11-9-804(a) (1987), and a hearing on that request was held on January 3, 1994.

In his opinion dated January 13, 1994, the ALJ found that it was in appellant's best interest to receive a lump sum. He also found that, because appellant was suffering from terminal cancer, special circumstances existed under Ark. Code Ann. §11-9-804(b) which required him to make a determination of appellant's probable life span and reduce the amount of benefits awarded to reflect the likelihood that the appellant would not live to collect the full amount of benefits if they had been awarded weekly. After reviewing the medical evidence, the ALJ determined that appellant was unlikely to survive more than sixty weeks. The ALJ made a lump-sum award of sixty weeks of benefits discounted at ten percent compounded annually.

On February 1, 1994, the appellant died, and the appellee appealed the award of a lump-sum payment to the full Commission on February 14, 1994, asking the Commission to reverse the ALJ's award of a lump-sum payment and to remand for the taking of additional evidence pursuant to Ark. Code Ann. §11-9-704(b)(7). The Commission remanded the case to the ALJ and instructed him to conduct a hearing to consider new evidence, the fact that appellant had died, in assessing the amount and propriety of the lump-sum payment.

The ALJ found that appellant's right to permanent disability benefits previously awarded terminated with his death on February 1, 1994, pursuant to Ark. Code Ann. § 11-9-704(e), which provides that "[n]o compensation for disability of an injured employee shall be payable for any period beyond his

death." He also found that appellant was not entitled to a lump-sum payment because he had been paid weekly and the payments were current at the time of his death; thus, there were no "future payments of compensation" on which to compute a lump-sum award. On appeal, the full Commission affirmed and adopted the ALJ's opinion.

Appellant contends that the Commission erred in remanding the case to the ALJ to consider appellant's death as new evidence and that the case must be reversed because the composition of the Workers' Compensation Commission violated his due process rights. We affirm the Commission's decision to remand the case to the ALJ to take new evidence, but remand appellant's constitutional argument to the Commission.

Appellant's first contention fails because the Commission is authorized to take testimony by deposition or other means under Ark. Code Ann. § 11-9-207(a)(10) or to remand the matter to the ALJ for the purpose of taking additional evidence under Ark. Code Ann. § 11-9-704(b)(7). *Thornton* v. *Bruce*, 33 Ark. App. 31, 800 S.W.2d 723 (1990). Arkansas Code Annotated § 11-9-704(b)(7) provides:

> The full commission may remand to a single member of the commission or administrative law judge any case before the full commission for the purpose of taking additional evidence.

Under the prior version of the Workers' Compensation statutes which were identical to those in force today, we established a four-part test that must be satisfied before the Commission can remand a case for additional evidence. In *Haygood* v. *Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982), we stated that the following are prerequisites for remand by the full Commission on proffer to present newly discovered evidence: (1) the newly discovered evidence must be relevant; (2) it must not be cumulative; (3) it must change the result; and (4) the party seeking to introduce the evidence must be diligent.

The Commission addressed this test in its opinion and found that all the elements were satisfied. Appellant's representative contends that the fact of appellant's death is not relevant because the only evidence that should be considered is the evidence that existed at the time the ALJ made his decision. This is simply not the law. The period for appeal had not yet expired, and the Commission was free to further develop the record pursuant to Ark. Code Ann. § 11-9-704(b)(7)(1987).

It is clear that the fact of appellant's death was relevant upon remand. Once the ALJ found that appellant should be granted a lump-sum award, he was required to determine the amount of future payments of compensation under the statute. In doing so, he was required to assess the probability of death of the injured employee pursuant to Ark. Code Ann. § 11-9-804(b). Because he found that special circumstances existed that required him to deviate from the American Experience Table of Mortality, the ALJ was required to make an independent assessment of appellant's probable life span. Clearly, the actual life span is the best evidence that could be acquired on this issue. Thus, it was relevant.

The Commission is vested with discretion in determining whether and under what circumstances a case appealed to them should be remanded for the taking of additional evidence, and that discretion will not be lightly disturbed on appeal. *Roberts-McNutt, Inc.* v. *Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985). From our review of the record we cannot say that the Commission abused its discretion in remanding the case for the taking of additional evidence.

For his second point, appellant challenges the constitutionality of Ark. Code Ann. § 11-9-201 (1987), which provides for the appointment of three members of the Workers' Compensation Commission. Subsection (a)(1) of the statute requires that one member appointed to the Commission must be classified as a representative of employers, and subsection (a)(2) requires that

one member be classified as a representative of employees. The third member, who is to be chairman of the Commission, is not required to have any type of affiliation. It is appellant's contention that the fact that two of the commissioners are chosen on the basis that they have a bias toward one side in workers' compensation cases violates due process. In our original opinion in this case, *Quinn* v. *Webb Wheel*, 52 Ark. App. 208, 915 S.W.2d 740 (1996), we declined to address this contention because appellant did not preserve the issue for appeal because he failed to obtain a ruling on the issue from the Commission.

We grant appellant's petition for rehearing on this issue because of our holding today in *Green* v. *Smith & Scott Logging*, 54 Ark. App. 53, 922 S.W.2d 746 (1996). In *Green* we upheld the position taken in our original opinion in this case that a party must obtain a ruling from the Commission on constitutional issues to preserve them for appeal. However, we made that holding prospective only because the Commission was under the misapprehension that it had no authority to rule on constitutional matters due to our holding in *International Paper Co.* v. *McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984). Thus, consistent with our holding in *Green*, we remand appellant's constitutional challenge to the Commission for further proceedings consistent with this opinion.

Affirmed in part, remanded in part.

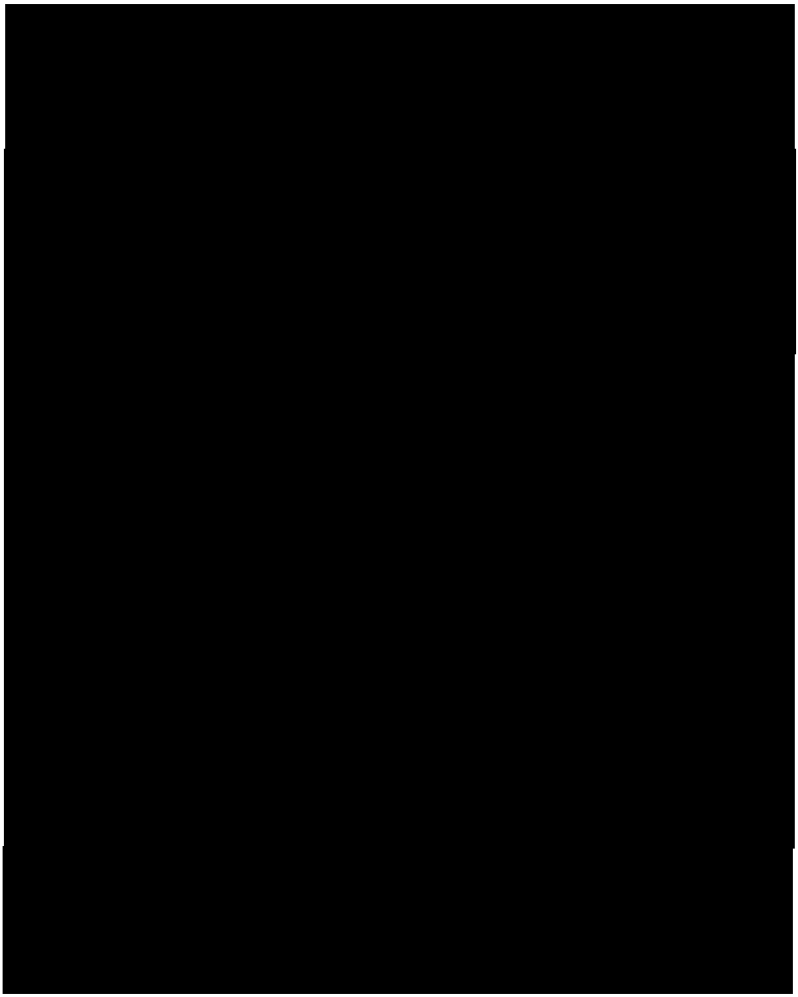
PITTMAN, COOPER, ROGERS, and GRIFFEN, JJ., agree.

ROBBINS, J., concurs for the reasons set forth in his concurring opinion in *Green* v. *Smith & Scott Logging*, 54 Ark. App. 53, 922 S.W.2d. 746 (1996).

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* Raymon BREWER and Fireman's Fund Insurance Company

CA 95-363 916 S.W.2d 773

Court of Appeals of Arkansas
Division III
Opinion delivered March 6, 1996



Trammell Law Firm, by: *Robert D. Trammell*, for appellant.

Shackleford, Shackleford & Phillips, P.A., by: *Brian H. Ratcliff*, for appellee Fireman's Fund Ins. Co.

JOHN F. STROUD, JR., Judge. This is an appeal from a decision of the Workers' Compensation Commission finding that it had no authority to vacate its prior opinion and order a new trial on the basis of newly discovered evidence after the thirty-day appeal period had expired. We agree and affirm.

Raymon Brewer sustained a compensable injury to his back during the course and scope of his employment on February 12, 1990. At the time of the injury, appellant was the workers' compensation carrier for Brewer's employer, Charles Allen Construction. As part of his medical treatment, Brewer underwent an MRI on April 2, 1990, which showed that he suffered from degenerative arthritis but revealed no herniated disc injury. Brewer returned to work on May 17, 1990, but continued to have some back pain. On January 1, 1991, appellee Fireman's Fund Insurance Company became the workers' compensation carrier for Charles Allen Construction.

On July 9, 1992, Brewer suffered a second injury to his back during the course and scope of his employment when he fell five to six feet from a track hoe. He filed a workers' compensation claim for the injury, and a hearing was held on February 11, 1993, to determine whether he had sustained an aggravation or a recurrence. If the injury had been found to be an aggravation, appellee Fireman's Fund would have been liable for Brewer's benefits. However, the administrative law judge found that Brewer's injury was a recurrence of the February 12, 1990,

injury, which rendered appellant liable. The Commission affirmed and adopted the ALJ's opinion in an order entered on February 23, 1994. Appellant did not appeal the February 23, 1994, order.

During the course of his treatment for the second injury, Brewer underwent an MRI on July 13, 1994. The MRI revealed that Brewer had a herniated disc. Both Brewer's treating physician and an orthopedic surgeon who examined him opined that Brewer's herniated disc was a result of the July 9, 1992, fall.

On November 1, 1994, appellant filed a motion to vacate the February 23, 1994, order and requested a new hearing. The Commission denied the motion and found that it lacked the authority to vacate its prior opinion and to order a new hearing after the thirty-day appeal period expired. Appellant filed a timely notice of appeal from that opinion.

Appellant contends that the Commission had the authority to vacate its opinion and that its refusal to do so violates appellant's constitutional right to seek a remedy. It also argues that it was reversible error for the Commission to refuse to admit additional evidence because the prerequisites for the admission of additional evidence have been met. We find no merit in appellant's arguments and affirm.

Appellant's first contention is that Ark. Const. art. II, § 13 guarantees a remedy for every injury and that it was injured by the Commission's order finding it liable for Brewer's injuries. It argues that the Commission unconstitutionally denied it a remedy for that injury by failing to vacate its order and remand for rehearing. We do not address appellant's constitutional argument because it was not raised before the Commission. The rule that prohibits presentation of constitutional issues for the first time on appeal applies with equal force to appeals from the Commission. *Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991).

Appellant also contends that the Commission had statutory authority to vacate its order and remand for a rehearing pursuant to Ark. Code Ann. § 11-9-713 (1987), which provides:

(A) Except where a joint petition settlement has been

> approved, the commission may review any compensation order, award, or decision. This may be done at any time within six (6) months of termination of the compensation period fixed in the original compensation order or award, upon commission's own motion or upon the application of any party in interest, *on the ground of a change in physical condition or upon proof of erroneous wage rate.* Upon the review, the commission may make an order or award terminating, continuing, decreasing, or increasing for the future the compensation previously awarded, subject to the maximum limits provided for in this chapter. (Emphasis added.)

Although Ark. Code Ann. § 11-9-713 grants the Commission the authority to modify a final award subsequent to the expiration of the time for appeal, the Commission may only do so upon a showing of a change in physical condition or proof of an assignment of an erroneous wage rate. See, *Cooper Indus. Prod.* v. *Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982).

Appellant did not argue in his motion to vacate filed with the Commission that Brewer's physical condition had changed since the order was entered or that there was an assignment of an erroneous wage rate. Instead, appellant argues that Mr. Brewer experienced a change in physical condition prior to the entry of the award but subsequent to the change in workers' compensation carriers. Appellant seeks to offer new evidence to show that Mr. Brewer had a herniated disc at the time the original order was entered to shift liability for Brewer's compensation to Firemen's Fund. This is clearly outside the scope of the statute, which only allows modification of the amount of an award due to a change in physical condition. Thus, appellant's reliance on Ark. Code Ann. § 11-9-713 (1987) is misplaced.

The Commission was correct in its finding that it did not have the authority to vacate its prior order. Arkansas Code Annotated section 11-9-711(b) (1987) provides:

> (b) Award or Order of Commission—Appeal. (1) A compensation order or award of the Workers' Compensation Commission shall become final unless a party to the dispute shall, within thirty (30) days from receipt by him of the order or award, file notice of appeal to the Court of

> Appeals, which is designated as the forum for judicial review of those orders and awards.

In this case, no appeal was filed from the order entered on February 23, 1994. We have previously held that the Commission has no authority to entertain a petition for rehearing after the expiration of the thirty-day appeal period. *Lloyd* v. *Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986); *Smith* v. *Servomation*, 8 Ark. App. 274, 651 S.W.2d 118 (1983); *Cooper Indus. Prod.* v. *Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982). *Lloyd*, *Smith*, and *Cooper* are controlling in this case, and the Commission was correct in its finding that it had no authority to grant appellant's motion to vacate.

Because we hold that the Commission did not have authority to vacate its order and remand the case for the taking of additional evidence, we need not address appellant's argument that the statutory requirements for admitting additional evidence were met.

Affirmed.

MAYFIELD and NEAL, JJ., agree.

Shea HOSKINS *v.* ROGERS COLD STORAGE

CA 95-187 916 S.W.2d 136

Court of Appeals of Arkansas
Division II
Opinion delivered March 6, 1996

Robert S. Blatt and *Timothy C. Sharum*, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Robert L. Henry III* and *Christopher Gomlicker*, for appellee.

WENDELL L. GRIFFEN, Judge. Shea Hoskins, stepdaughter of Leonard Jack Slate (deceased), has appealed the November 28, 1994, decision by the Workers' Compensation Commission denying her claim for dependency benefits due to Slate's work-related death on March 30, 1984. Her appeal presents the question whether the Commission's determination that appellant was not wholly and actually dependent upon Slate at the time of his death is supported by substantial evidence. Because we find substantial evidence supporting the result reached by the Commission, we affirm its decision.

Slate suffered a compensable injury resulting in his death on March 30, 1984. Appellant and her mother lived with Slate at the time of his death, and had lived with him for almost a year and a half, after appellant's mother separated from John Hoskins, her husband and appellant's father. On March 28, 1984, two days before Slate's death, appellant's mother obtained a divorce from John Hoskins, and then married Slate.

After Slate's death, Fireman's Fund Insurance Company, the workers' compensation insurance carrier for his employer, began paying death benefits to his widow (appellant's mother), and to his two children from a previous marriage. Dependency benefits were later paid to Cody Jack Slate, a child Slate fathered with appellant's mother but who was not born until after Slate died. No benefits were ever paid to appellant. Her

mother contended that she did not learn that appellant may have been entitled to dependency benefits until nine years after Slate died. Appellant's father had been ordered to pay child support in the divorce decree entered on March 28, 1994, and did so for a period of time after the divorce. However, appellant and her mother testified that Leonard Jack Slate was her sole support for most of the time that appellant lived in Slate's home with her mother before he died. Appellant's father paid child support sporadically after the divorce, and later became disabled. Appellant received social security benefits based upon her father's disability, but argues that Slate was her sole support on March 30, 1984, when he died. An administrative law judge awarded dependency benefits to appellant after finding that she was wholly and actually dependent upon Slate at the time of his death. That decision was reversed by the Commission, and this appeal followed.

Appellant contends that the Commission erred when it found she was not wholly and actually dependent upon Slate. That contention requires that we determine whether there is substantial evidence to support the finding. In doing so, we are duty-bound to view the evidence in the light most favorable to the result reached by the Commission, resolving all doubtful inferences in favor of its findings. Our role is not to review the record *de novo*, or to weigh the evidence presented to the Commission. Instead, our responsibility is to review the record and decide whether there is evidence that could have led fair-minded persons to reach the same result. If so, our duty is to affirm the Commission. *Bradley* v. *Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995); *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993).

Arkansas Code Annotated § 11-9-527(c) (1987) provides that compensation for the death of an employee shall be paid to the persons who were wholly and actually dependent upon him. Subsection (h) states that all questions of dependency shall be determined as of the time of the compensable injury. Arkansas Code Annotated § 11-9-102 (10) (1987) contains the statutory definition of "child" applicable to dependency determinations in workers' compensation cases such as this, and states:

> "Child" means a natural child, a posthumous child, a

> child legally adopted prior to injury of the employee, a stepchild, an acknowledged illegitimate child of the deceased or spouse of the deceased, and a foster child. . . .

The parties do not dispute that appellant was the stepchild of Leonard Jack Slate when he died. Their disagreement involves whether appellant was wholly and actually dependent upon Slate when he died so as to be entitled to dependency benefits pursuant to § 11-9-527 (c). Appellant argues that, through her testimony and that from her mother, she proved that she was wholly and actually dependent upon Slate, that Slate provided for her total support at the time of his death, and that he had done so for more than a year beforehand. Appellant also presented proof that her natural father provided no support during that time span. There was proof that although the divorce decree, issued two days before Slate's death, contained an order directing appellant's natural father to pay child support, he failed to do so consistently, and eventually became disabled some time after Slate died. Appellee maintains that appellant was not wholly and actually dependent upon Slate because her natural father had been ordered to pay child support for her at the time that Slate died, even though her father had not done so before that time.

Before our Workers' Compensation Law was amended in 1976 to provide that death benefits are payable to persons who are "actually" dependent upon a deceased employee, persons claiming entitlement to those benefits could prevail by showing that they were "wholly" dependent. But the Arkansas General Assembly amended the law in 1976 to require proof that a claimant to death benefits is "wholly and actually dependent." Court decisions after the amendment was enacted reflect the different result that it produced. The pre-1976 judicial interpretation of the statutory requirement that one be "wholly dependent" resulted in benefits being awarded to a widow whose deceased husband provided no support to her or their children at the time of his death based on the view that the term "wholly dependent" was intended to be understood in its figurative, rather than literal, sense. *Chicago Mill & Luber Co.* v. *Smith*, 228 Ark. 876, 310 S.W.2d 803 (1958). By contrast, after the General Assembly amended the law to require proof that a claimant to death benefits was "wholly and actually dependent"

upon the deceased employee, the denial of benefits was upheld in the case of a widow whose husband left her and moved to another city, married another woman without obtaining a divorce, and provided no support to her before he was accidentally killed in the course of his employment. *Roach Mfg. Co.* v. *Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979). The rationale stated by Justice George Rose Smith in the *Roach* case for affirming the Commission's decision to deny benefits was that the wife made no effort to enforce whatever right to legal support she had during the eleven months of her husband's absence before his death, and that she had attempted to support herself. Yet, the Supreme Court in *Roach* affirmed the Commission's decision granting death benefits to the minor child of the deceased worker. In doing so, it reasoned that the eleven-month absence of action by the mother to enforce the child's right to support from her father did not demonstrate absence of a "reasonable expectation of support," because the child was unable to act for herself, and would incur increased necessary expenses as she matured that her mother possibly would be unable to meet to maintain her standard of living. *Id.*, at 265 Ark. 914.

In *Doyle Concrete Finishers* v. *Moppin*, 267 Ark. 874, 596 S.W.2d 1 (Ark. App. 1979), our court affirmed and modified a decision by the Commission that awarded death benefits to the minor child of a deceased worker who was not living with his father when the father died. The worker had been divorced from his wife and had been ordered to pay child support in the divorce decree. A claim for death benefits was made for the child, but the employer contended that the child's death benefit should not have been more than the amount of the child support decreed in the divorce decree ($108 per month), rather than the $77 per week maximum benefit then prescribed by law. Our court affirmed the Commission's decision awarding the maximum benefit, but modified the award because the Commission had concluded that the child was entitled to the maximum benefit "as a matter of law." There was proof in the record that the child's father had provided child support pursuant to the decree plus other forms of support to the child before he died. Noting that a minor child may have independent resources and, therefore, be capable of being non-dependent upon a deceased parent for purposes of workers' compensation benefits, Judge Steele Hays,

writing for the court in *Doyle Concrete Finishers*, rejected the dependency "as a matter of law" standard, and indicated that death benefits may nevertheless be entitled where the expectation and need for support are real or actual. *Id.*, at 267 Ark. 881. Because the court in that case concluded that the *Roach* holding demonstrates that "a minor child continues to have an expectancy of future support," it refused to conclude that a minor who was actually dependent and receiving support was entitled to less than full benefits.

The foregoing authorities show that before death benefits are payable to persons enumerated in the Workers' Compensation Law to receive them, there must be proof that the claimant was "wholly and actually dependent" upon the deceased worker at the time of the compensable death. Ark. Code Ann. § 11-9-527(c). Dependency may be established by evidence that the decedent actually provided support, as shown by the holding in *Doyle Concrete Finishers*. The dependency requirement can also be met by proof of actual need for support, and a reasonable expectancy of future support even if no actual support may have been provided the claimant when the decedent died, as demonstrated by the *Roach* holding. In any event, dependency is an issue of fact rather than a question of law, and the issue is to be resolved based upon the facts present at the time of the compensable injury. Ark. Code Ann. § 11-9-527(h).

In view of these principles, we believe that the Commission's decision to deny the claim for death benefits to appellant is supported by substantial evidence. It is true that appellant and her mother testified that the decedent provided actual support to appellant from the time shortly after she and her mother began living with him until his death more than a year later. There was also proof that appellant's natural father failed to provide support for her during that time span. Nevertheless, the Commission also received evidence that appellant was entitled to receive child support payments from her natural father pursuant to the terms of her parent's divorce decree that had been entered only two days before the decedent's death. This indicates that appellant had a reasonable expectancy of support from her natural father when the decedent died. But, that is not the critical inquiry. The issue is whether appellant had a reasonable expectancy of support from the decedent. She was his stepchild, to be

sure, and she had enjoyed his support before he married her mother. There was no reason, however, to expect that the decedent was obligated to support appellant at any time. In fact, appellant's mother demonstrated as much by her conduct in seeking child support payments from appellant's father in her divorce. The Commission was entitled to consider this in reaching its decision that appellant was not "wholly and actually dependent" upon the decedent.

Our result in this case should not be interpreted to mean that a stepchild may never recover death benefits following the death of her stepparent as a matter of law. The holding in *Doyle Concrete Finishers* shows that dependency is not a question of law, but a fact issue to be determined by the circumstances existing when the compensable injury occurs. It is based on proof of either actual support from the decedent, as was shown in that case, or a showing of a reasonable expectation of support, as was shown in *Roach.* Our decision does not address whether a stepchild may always, or never, have a reasonable expectation of support from a deceased worker where there is evidence that she is being actually supported by her natural parent, or where she has a right to expect support from the natural parent even if it is not actually provided. Each case will turn on its facts. On the facts presented in this case, however, we are unable to conclude that fair-minded persons presented with the same evidence could not have reached the conclusion that the Commission made, namely, that appellant was not "wholly and actually dependent" upon Leonard Jack Slate when he died.

Affirmed.

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

Debra I. HUBLEY *v.* BEST WESTERN-GOVERNOR'S INN

CA 95-381 916 S.W.2d 143

Court of Appeals of Arkansas
Division II
Opinion delivered March 6, 1996
[Petition for Rehearing denied April 17, 1996.]

Gary Eubanks & Associates, by: *James Gerard Schulze*, for appellant.

Friday, Eldredge & Clark, by: *J. Michael Pickens*, for appellee.

WENDELL L. GRIFFEN, Judge. Debra Hubley has appealed from the December 14, 1994, decision of the Workers' Compensation Commission denying her claim for workers' compensation benefits for treatment of complaints with her mouth and jaw that she alleges were caused by a compensable injury on April 3, 1992. The Commission denied appellant's claim for treatment of temporomandibular joint pain and held that appellant had failed to prove by a preponderance of the evidence that her temporomandibular joint pain was caused by the cervical sprain injury that she sustained from an automobile accident that arose out of her employment. Appellant argues on appeal that the Commission's decision is not supported by substantial evidence. We agree. Therefore, we reverse the Commission and remand the case to it for further consideration.

On April 3, 1992, appellant was involved in an automobile accident while returning to her workplace from a work-related meeting. She was taken from the accident scene by ambulance to a hospital, and was treated for injuries to her head, neck, and back, before being released to her home later that day. Over the next several days appellant obtained additional medical care due to headaches and muscle spasms in her back and neck. About a week after the accident, she began to experience pain in her

mouth and cheek area. She learned that she had a broken tooth. The tooth was removed, and the dentist who removed it noticed that her jaw seemed out of alignment. He referred appellant to another dentist, Dr. Shelby Woodiel, who diagnosed appellant's condition as a musculoskeletal dysfunction with referred pain to the temporomandibular joint (TMJ) area. Dr. Woodiel prescribed a temporary orthotic, and opined that appellant would either need to undergo orthodontic treatment or would need to have overlays made for her teeth so that her jaws would be in proper position if the temporary orthotic failed to correct appellant's condition. Appellee refused to pay the cost of Dr. Woodiel's treatment, and all other expenses related to her mouth and jaw complaints. An administrative law judge held an evidentiary hearing January 24, 1994, and held that appellant's dental complaints were compensable. Appellee appealed that decision to the Commission, which reversed the administrative law judge in a split decision.

Appellant's sole contention on appeal is that there is no substantial evidence to support the Commission's finding that Dr. Woodiel was not qualified to render an opinion on the causation of TMJ pain. The Commission made that finding while concluding that appellant failed to prove by a preponderance of the evidence that her TMJ complaint was caused by the compensable injury. Appellant mounts a direct challenge to the Commission's finding regarding Dr. Woodiel's lack of qualifications to opine concerning the causes of her TMJ pain. Appellee argues that the Commission's ruling was proper because the Commission had evidence before it from two other dentists, Dr. Frederick McFall and Dr. J.R. Graham, who opined that appellant's complaints were not caused by the compensable accident. Our decision to reverse is not based on this argument concerning Dr. Woodiel's qualification to render opinion testimony. Instead, we hold that the finding that appellant failed to prove that her TMJ complaint was caused by the compensable injury is not supported by substantial evidence.

The substantial evidence test applicable for judicial review of a Commission decision means that the Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same result if presented with the same facts. *Lepard* v. *West Memphis Mach. & Welding*, 51 Ark.

App. 53, 908 S.W.2d 666 (1995). The Commission has broad discretion in deciding to admit evidence, and its decision will not be reversed without a showing of abuse of discretion. *Kendrick* v. *Peel*, 32 Ark. App. 29, 795 S.W.2d 365 (1990). We have also stated that the Commission has the authority to accept or reject medical opinion, and the authority to determine its soundness and probative force. *Jordan* v. *Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995). This includes the duty of weighing conflicting medical evidence. When that evidence is conflicting and the Commission chooses to accept the testimony of one physician over another, we are without power to reverse the decision unless substantial evidence is lacking. *Whaley* v. *Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995).

The substantial evidence standard of appellate review means that we must affirm the Commission if fair-minded people could have reached the same result after reviewing the evidence in the light most favorable to the result that the Commission reached (i.e., that appellant's TMJ discomfort and the treatment for it were not caused by the compensable injury). In reaching that decision, the Commission concluded that " . . . there is no opinion from a medical practitioner suggesting that the cervical injury is responsible for the claimant's dental or temporomandibular joint problems, and there is no suggestion in the medical records that a medical practitioner has ever suspected such a relationship." While the Commission made a passing reference to the fact that Dr. Edwin Barron, a medical doctor, had been appellant's treating physician for her cervical and low back complaints, and that his records noted tenderness over the temporomandibular joint, the Commission failed to mention that Dr. Barron never retracted his opinion that appellant's TMJ pain and loosened gold crown was "possibly secondary to the MVA [motor-vehicle accident]." This error is prejudicial, particularly given the Commission's double-standard analysis of the opinion evidence from Dr. Woodiel, Dr. McFall, and Dr. Graham, three dentists whose opinions were given the greatest scrutiny.

The Commission's decision cannot be sustained when we consider that Dr. Woodiel's conclusion and Dr. Barron's initial impression are consistent. Dr. Woodiel opined that although appellant definitely had pre-existing periodontal disease that

could have been the cause of her pain, the stress of the muscle spasm associated with her cervical strain triggered the onset of her TMJ symptoms. That opinion was not contradicted by any medical doctor despite the fact that the Commission states that medical opinion evidence would have been important to determine causation. Instead, the Commission reasoned as follows:

> Consequently, Dr. Woodiel's opinion is based on his evaluation and assessment of the physical injury to the claimant's cervical spine. However, Dr. Woodiel is a dentist and we are aware of no authority which suggests that the practice of dentistry includes the examination, diagnosis, and treatment of physical injuries to areas other than the oral cavity, teeth, gingivae, and jaw. *See, e.g.*, Ark. Code Ann. § 17-82-191 (1987). Instead, it is commonly accepted that the examination, diagnosis, and treatment of physical injuries to other areas of the body, such as the cervical spine, is limited to those licensed to practice in such areas such as medicine, chiropractic, and osteopathy. *See* Ark. Code Ann. § 17-93-201 & 17-93-202 (1987). There simply is no evidence in the record establishing that Dr. Woodiel, as a dentist, is qualified to render an opinion regarding medical matters such as cervical strains and cervical muscle spasms. Such matters may affect dental conditions, and, when this occurs, the evaluations and opinions of medical practitioners may be important in determining causation.
>
> In the present claim, there is no opinion from a medical practitioner suggesting that the cervical injury is responsible for the claimant's dental or temporomandibular joint problems, and that there is no suggestion in the medical records that a medical practitioner has ever suspected such a relationship.

(Appellant's Abstract, pages 12-13.)

The Commission's analysis was both factually inaccurate and logically flawed. As mentioned earlier, Dr. Barron, a medical doctor, had suggested that appellant's TMJ difficulties were secondary to the injuries received in the automobile accident. Dr. Barron had the very credentials that the Commission professed to find credible on the issue. His was the only medical opinion

addressed to this question, and was not refuted by another medical doctor.

Even if we accept the Commission's reasoning about the relative probative value to be given to testimony from medical doctors versus dentists on this issue (a conclusion that we do not affirm), we may not ignore the plain failure by the Commission to consistently apply its own standard for evaluating the evidence. The opinion by Dr. Woodiel was deemed lacking in probative weight because he is a dentist; the opinions of Doctors McFall and Graham were given more weight despite the fact that they too are dentists, and had never examined appellant. The logical fallacy in that analysis is self-evident. If one multiplied by zero equals zero in the case of Dr. Woodiel, then two times zero cannot be more than zero in the case of the opinions by Doctors McFall and Graham. The Commission's decision demonstrates the sort of arbitrary reasoning that the substantial evidence rule was never intended to insulate from judicial review, and that compels that its decision be reversed.

Additional proof that the Commission's decision must be reversed arises from its view that appellant's condition could not be compensable because, as stated in the Commission's opinion:

> Dr. Woodiel could not say that this problem was a *direct* result of the compensable injury. In this regard, his testimony suggests that the pain is actually caused by other causes, such as structural abnormalities including the crowding of the lower anterior teeth, flaring of the upper anterior teeth, inclination on lower posterior tooth, a high roof, and evidence of uneven stress on teeth. Dr. Woodiel testified that any of these conditions, as well as the gum disease, could be the cause of the claimant's pain, although he concludes that the stress of the cervical muscle spasm triggered the onset of the symptoms. Interestingly, although Dr. Woodiel asserts that these problems are the result of the cervical muscle spasm, he also asserts that orthodontic treatment and the restructuring of the overlays is needed for treatment of the problem.

(Appellant's abstract, pages 13-14, emphasis added.)

Appellant was examined in the emergency room on the day

the accident occurred, and no acute discomfort to the temporomandibular joint was detected by the treating physicians during that examination. Ten days later (April 13, 1992), appellant was examined by Dr. Barron as a follow-up. Dr. Barron, a medical doctor, noted that she had tenderness in the temporomandibular joint on the left. He opined that appellant had a gold crown that was loosened, possibly due to the motor vehicle accident. Afterwards, appellant consulted Dr. Woodiel who concluded that she had substantial gum disease that predated the compensable injury which could have contributed to her problems. Although Dr. Woodiel could not state whether all of appellant's TMJ complaints had been caused by the compensable injuries sustained in the automobile accident, he did opine that had those conditions been present when the accident occurred they would have been "greatly aggravated" by the accident.

Proof of causation in workers' compensation cases does not require medical certainty. *Gencorp Polymer Products* v. *Landers*, 36 Ark. App. 190, 820 S.W.2d 375 (1991).[1] And we have held that if the original injury is compensable, every natural consequence from it is also compensable. *McDonald Equipment Co.* v. *Turner*, 26 Ark. App 264, 766 S.W.2d 936 (1989). Here there was proof from Dr. Barron that the compensable cervical strain produced muscle spasms that resulted in appellant's TMJ complaints, possibly in conjunction with other pre-existing conditions according to Dr. Woodiel. Since it is well-settled that the aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable, we must also reverse the Commission's decision because it is based on the erroneous view that appellant's TMJ condition could not be compensable because there were other possible causes for it. *See Beardon Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

To avoid being arbitrary, the Commission should have analyzed the evidence to determine whether the appellee produced any proof to counter the opinion by Dr. Barron that appellant's

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[1] This proposition was legislatively changed for all injuries that occur after July 1, 1993, by virtue of Act 796 of 1993, Section 2, which is modified as Ark. Code Ann. Section 11-9-102(16)(Supp. 1995). Appellant's injury occurred April 3, 1992, so the legislative amendment does not apply to it. *See also*, Acts 1993, No. 796, Section 41.

condition was possibly caused by the compensable automobile accident. If appellee failed to produce that evidence, then appellant's proof constituted the only proof on the critical issue. The opinions of Doctors McFall and Graham could not supply the missing proof for appellee, however, because they are dentists and, according to the Commission, are unqualified to render a credible opinion on the existence or non-existence of a causal relationship between a medical condition (appellant's cervical strain and associated muscle spasm) and her TMJ symptoms.

Therefore, we reverse the Commission's decision denying the compensation benefits sought by appellant, and remand the case to the Commission for further consideration in light of this opinion. Reversed and remanded.

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

Paul B. SONNY *v.* BALCH MOTOR COMPANY

CA 94-1425 917 S.W.2d 173

Court of Appeals of Arkansas
En Banc
Opinion delivered March 13, 1996
[Petition for Rehearing denied April 17, 1996.*]

* PITTMAN, ROGERS, and NEAL, JJ., would grant.

Wallace, Hamner & Adams, by: *Dale E. Adams*, for appellant.

Anderson & Kilpatrick, by: *Mariam T. Hopkins*, for appellee.

JOHN B. ROBBINS, Judge. Appellee Balch Motor Company (Balch) sued appellant Paul B. Sonny and his wife for an unpaid bill owed for repairs to Mr. Sonny's car. Mr. Sonny counterclaimed, alleging malicious prosecution and abuse of process in connection with Balch's unsuccessful attempt to have Mr. Sonny prosecuted for theft of services. After a jury trial, the jury found in favor of Balch in the amount of $871.13, and against Mr. Sonny on his counterclaims. Mr. Sonny now appeals, arguing that the trial court erred in denying his motion in limine in which he sought to prevent Balch from introducing any evidence about a prior lawsuit between the parties. In addition, Mr. Sonny contends that Balch unconstitutionally used its peremptory strikes to exclude two black people from the jury. We find no error and affirm.

The evidence in this case shows that Mr. Sonny went to Balch on November 4, 1991, for the purpose of having repairs made to his Oldsmobile. Mr. Sonny testified that, after Balch had finished repairing his car, the cashier gave him a receipt which indicated that no amount was due. Mr. Sonny then drove away without paying any money for the repairs. He stated that he and Darrell Stockton, one of Balch's mechanics, had talked extensively about warranty coverage before Balch worked on the car. However, Mr. Sonny acknowledged that the Oldsmobile had approximately 83,000 miles on it at that time and he knew the car had only a 50,000-mile warranty. He also admitted that Mr. Stockton told him that it would cost an estimated $500.00 or $600.00 to repair his car.

Herman Anderson, a service supervisor for Balch, testified that subsequent to the initial estimate he informed Mr. Sonny that additional problems were detected and it would cost a total of $894.00 to repair the car. Mr. Anderson stated that Mr. Sonny told him to go ahead with the work, and that upon com-

pletion of the work the amount due was $871.13. When asked about the document that indicated a zero balance, Mr. Anderson explained that this was not Mr. Sonny's bill, but rather an internal parts warranty ticket drawn up as a result of a faulty part Balch had received from the factory. Mr. Anderson noted that this document showed that there was another repair order. The other repair order was introduced into evidence, and showed a balance due of $871.13.

After Mr. Sonny had left the premises, Mr. Anderson noticed that Mr. Sonny's bill had not been paid and he immediately tried to contact Mr. Sonny about paying the bill. He testified that he eventually contacted Mr. Sonny by telephone four or five days later and told him that he owed the bill. According to Mr. Anderson, Mr. Sonny acknowledged the debt and agreed to come in and pay it. After several days Mr. Sonny had failed to contact Balch, so Mr. Anderson called him again. At this time Mr. Sonny denied that he owed anything for the repairs.

On November 25, 1991, counsel for Balch mailed a demand letter to Mr. Sonny urging him to pay the $871.13 debt. The letter stated that if Mr. Sonny failed to arrange payment within thirty days, a civil suit would be filed against him. Less than ten days later, agents for Balch decided to go to the prosecutor and attempt to have Mr. Sonny arrested for theft of services. Based on an affidavit made by John Hodges, Balch's service manager, a warrant was issued for his arrest. Mr. Sonny was arrested but the charges against him were dismissed for lack of probable cause.

Mr. Sonny's first argument for reversal is that the trial court erroneously admitted evidence of a prior lawsuit between the parties. John Noonan, director of service and parts for Balch, was permitted to testify that Balch had sued Mr. Sonny for $1600.00 about eighteen months prior to the November 4, 1991, incident. His testimony revealed that Balch had previously worked on Mr. Sonny's car and that Mr. Sonny's insurance company apparently sent him a check for about $1600.00 which was supposed to be applied on the repair bill owed to Balch. Mr. Sonny did not use the money to pay Balch, but upon being sued agreed to a consent judgment for $1600.00. According to Mr. Noonan, this judgment had not been satisfied at the time Balch

decided to pursue criminal sanctions against Mr. Sonny over the November 1991 incident.

Mr. Sonny now contends that the above evidence should have been excluded pursuant to Arkansas Rules of Evidence 404(b) and 403. Rule 404(b) provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Mr. Sonny asserts that the sole purpose for admitting evidence of the prior lawsuit was to show that he stole from Balch in the past and had probably done it again. He further argues that, if evidence of the prior lawsuit was not precluded by Rule 404(b), it should have been excluded by Rule 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Mr. Sonny submits that the probative value of the prior lawsuit, if any, was substantially outweighed by the danger of unfair prejudice.

The admission or rejection of evidence under Rule 404(b) and Rule 403 is left to the sound discretion of the trial court. *Jarrett* v. *State*, 310 Ark. 358, 833 S.W.2d 779 (1992); *Weger* v. *State*, 315 Ark. 555, 869 S.W.2d 688 (1993). On appeal, the trial court's ruling on admissibility will not be reversed absent a manifest abuse of discretion. *Id.*

At the pretrial hearing on Mr. Sonny's motion in limine, the trial court indicated that it would not have allowed evidence of the prior lawsuit if this case had involved only a dispute over the debt. However, it found the evidence to be relevant and admissible in light of Mr. Sonny's counterclaim for malicious prosecution. We agree. Lack of probable cause and malice

are essential elements of the tort of malicious prosecution. *Cordes* v. *Outdoor Living Center*, 301 Ark. 26, 781 S.W.2d 31 (1989). In the instant case, evidence of the prior lawsuit was not introduced to show that Mr. Sonny had stolen from Balch in the past. Rather, it was introduced to show Mr. Noonan's state of mind at the time he decided to pursue criminal charges against Mr. Sonny, and the trial court gave a limiting instruction to this effect. Moreover, evidence of the prior lawsuit was highly probative as to whether Mr. Noonan acted with malicious intent. Mr. Noonan testified that he did not attempt to bring charges against Mr. Sonny until he discovered that Balch had an unsatisfied judgment against Mr. Sonny for previous repairs, and this evidence is probative of his motive for bringing the charges. The trial court did not abuse its discretion in finding that this evidence was not precluded by Rule 404(b) and that the danger of unfair prejudice did not outweigh its probative force.

Mr. Sonny, a black man, raises as his remaining argument that Balch unconstitutionally exercised its peremptory strikes to exclude two black persons from the jury. After voir dire, Balch exercised three peremptory strikes, two of which removed the only two black jurors from the venire panel. Mr. Sonny objected and asked that Balch give a racially neutral explanation for the strikes. Balch responded by stating that it struck the black woman because she was young and tended to look down and not be responsive during her voir dire. Balch also explained that it struck the black man because he did not make eye contact during voir dire and because he was a backhoe operator and Balch was seeking jurors who were conservative and had business experience.

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause guarantees a criminal defendant that the State will not use peremptory challenges to exclude members of his race from the jury venire on account of race. This principle has been extended to protect private litigants in civil cases. *See Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991). In *Colbert* v. *State*, 304 Ark. 250, 801 S.W.2d 643 (1990), the Arkansas Supreme Court set out the following standards:

> We now hold that upon a showing by a defendant of

> circumstances which raise an inference that the prosecutor exercised one or more of his peremptory challenges to exclude venire persons from the jury on account of race, the burden then shifts to the state to establish that the peremptory strike(s) were for racially neutral reasons. The trial court shall then determine from all relevant circumstances the sufficiency of the racially neutral explanation. If the state's explanation appears insufficient, the trial court must then conduct a sensitive inquiry into the basis for each of the challenges by the state.
>
> The standard of review for reversal of the trial court's evaluation of the sufficiency of the explanation must test whether the court's findings are clearly against a preponderance of the evidence. In every instance, however, the court shall state, in response to the defendant's objections, its ruling as to the sufficiency or insufficiency of the racially neutral explanation provided by the state.

The facts present in the instant case clearly raised an inference that Balch exercised peremptory challenges to exclude persons from the jury on account of race because it struck the only two black jurors on the venire panel. *See Colbert* v. *State*, *supra*. After this inference of racial bias was established, it was incumbent upon Balch to provide racially neutral reasons for the strikes. The trial court found the explanations given by Balch were sufficient, and we conclude that this determination was not clearly against a preponderance of the evidence. Balch argues that the black woman was the youngest member of the jury panel, which Mr. Sonny does not dispute, and that the black man operated a backhoe. Balch contends that this gave it the impression that they may be overly sympathetic to Mr. Sonny in a dispute against a car dealership. In addition, Balch asserted that both jurors were somewhat unresponsive to questioning, and the trial judge had the opportunity to observe the jurors during this voir dire. In *Hernandez* v. *New York*, 500 U.S. 352 (1991), the United States Supreme Court was faced with a *Batson* challenge and stated:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will

> turn on evaluation of credibility." In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U.S. 412 (1985), citing *Patton* v. *Yount*, 467 U.S. 1025 (1984).

The trial judge in the instant case had an opportunity to judge the demeanor of Balch's attorney and decide whether the explanations given for the peremptory strikes were valid, and we affirm the judge's decision on this issue.

Balch has filed a motion seeking reimbursement from Mr. Sonny for its costs in preparing a supplemental abstract. We have reviewed Mr. Sonny's abstract and believe that it was sufficient to permit an understanding of the issues presented to the court for decision. Consequently, Balch's motion is denied.

Affirmed.

JENNINGS, C.J., and MAYFIELD, J., agree.

PITTMAN, ROGERS, and NEAL, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. I respectfully dissent from the decision reached in this case with regard to the issue raised by appellant concerning the unconstitutional use of appellee's peremptory strikes excluding the only two black venire members from the jury. It is clear from the record, and both parties agree, that appellee struck the only two black jurors on the entire jury panel by the use of its peremptory strikes. Therefore, a prima facie case of racial discrimination was established and this point is not contested by the parties.

After it was established that a prima facie case of racial discrimination was established, the burden then shifted to appellee to provide a racially neutral explanation for the use of its challenges. The following occurred:

Ms. Hopkins: The young lady who was sitting on the

very front row, she was a young lady. We struck her because she was young. When she was asked various questions about what she thought, she tended to look down and be not responsive, and it was just a feeling that she did not — she was the young lady who was sitting on the front row.

Mr. Adams: Sitting on the front row, about number three or about the fourth.

Ms. Hopkins: And the other gentleman whose name was —

Mr. Adams: It was the black guy on the back row, Stewart.

Ms. Hopkins: Stewart.

Mr. Adams: Right there, sir.

Ms. Hopkins: Yeah. And the other gentleman, Mr. Stewart — Well, there are two gentlemen we struck. One gentleman was because he knew Mr. Wallace and that's the reason why we struck that — I mean, that lady that we struck. An the other gentleman we struck was Mr. Stewart. And Mr. Stewart was also — my impression of him was the same as the others. He did not make eye contact with me when I was — during the process of voir dire; as, for instance, the two ladies that were sitting next to him who are on the jury. Also, we were looking for, obviously very conservative jurors. We felt that with his background as a —

The Court: His background?

Ms. Hopkins: He's a backhoe operator. We thought with his background that he might feel sorry for Mr. Stewart [sic] and about the situation, and that he —

The Court: What's his background? What does a backhoe operator have to do with it?

Ms. Hopkins: A backhoe operator is somebody who operates —

The Court: I know what it is. What's it have to do with a

> master cylinder or striking?
>
> Ms. Hopkins: Your Honor, we just thought that his background, we tended to try and pick people who have been in business, or business oriented, and we wanted to be very conservative.
>
> The Court: Okay. Well, okay. Well, I think that —
>
> Ms. Hopkins: And we just did not feel like that the background —
>
> Mr. Adams: Judge, I don't think the reasons she articulated are sufficient.
>
> The Court: Oh, I understand them, and you have made your record and I think she has.

In *Cleveland* v. *State*, 318 Ark. 738, 888 S.W.2d 629 (1994) the Supreme Court set out the following standards to follow:

> Upon a showing by a defendant of circumstances which raise an inference that the prosecutor exercised one or more of his peremptory challenges to exclude venire persons from the jury on account of race, the burden then shifts to the state to establish that the peremptory strike(s) were for racially neutral reasons. The trial court shall then determine from all relevant circumstances the sufficiency of the racially neutral explanation. *If the state's explanation appears insufficient, the trial court* ***must*** then conduct a sensitive inquiry into the basis for each of the challenges by the state.
> The standard of review for reversal of the trial court's evaluation must test whether the court's findings are clearly against a preponderance of the evidence. *In every instance, however, the court* ***shall state***, in response to the defendant's objections, its ruling as to the sufficiency or insufficiency of the racially neutral explanation provided by the state. (Emphasis added.)

In this case, the trial court clearly did not state its rulings as to the sufficiency or insufficiency of appellee's explanations. In particular, the trial court made no finding with regard to the black female juror who was struck because she was "young" and "tended" to look down and not be responsive.

In the case of *U.S.* v. *Garrison*, 849 F.2d 103 (4th Cir. 1988), the court noted that the term "young" may be vague in some contexts. In the context of this case, I believe it is clear, without any inquiry by the court, that appellee's explanation that the woman was "young" was too vague to establish a racially neutral reason for its peremptory strike. There is no evidence in the record concerning the ages of the individual members of the jury nor did the court inquire as to the lady's age or what relevance that factor had in appellee's jury selection.

Also, the record reveals that the questions posed by appellee were to the entire jury panel. Of those questions, a few received responses by a limited number of venire members. The black female juror was not asked specific questions nor did the questions posed to the whole panel relate to her. In addition, it is clear from the record that there were many others on the jury who did not respond to the questions posed to the jury panel. Therefore, I find appellee's explanation that the black female juror was unresponsive inadequate.

With regard to Mr. Stewart, the black male juror, appellee explained that he did not make eye-contact and was a backhoe operator. Again, the record does not reveal, nor did the trial court inquire, if Mr. Stewart owned his own backhoe business. There is also no evidence in the record and the trial court failed to inquire whether other members of the jury who were selected had their own business or were employed. I believe that the reasons for the peremptory strike of Mr. Stewart were clearly suspect and insufficient; therefore, the court should have conducted a sensitive inquiry to determine the true basis for the strike.

Because the trial court failed to make findings, from all relevant circumstances, as to the sufficiency of appellee's racially neutral explanations, and to conduct a sensitive inquiry into the basis for *each* of the challenges by appellee, I believe that appellant's constitutional rights have not been protected and the trial court's error requires a reversal and retrial.

PITTMAN and NEAL, JJ., join in this dissent.

Terry Glen GREEN *v.* STATE of Arkansas

CA CR 95-73 917 S.W.2d 171

Court of Appeals of Arkansas
Division III
Opinion delivered March 13, 1996

Witt Law Firm, P.C., by: *Ernie Witt*, for appellant.

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

JUDITH ROGERS, Judge. Terry Green appeals his misdemeanor convictions of driving while intoxicated (DWI), violating the implied consent law, and of driving without a valid license. As a consequence of the jury's verdicts, he was sentenced to ninety days in jail for DWI; his driver's license was suspended for six months for violating the implied consent law; and he was fined $100 for driving without a valid license. Appellant's convictions were the result of a second trial, the first having ended in a mistrial. His sole point on appeal is the contention that the trial court erred in denying his motion to dismiss in which he raised the issue of former jeopardy. We find no error in the trial court's decision, and we affirm.

Appellant's first trial began on the morning of May 20, 1994, a Friday. The court recessed at noon for lunch and was to resume trial at 1:30 p.m. The prosecuting attorney for the city, however, did not return to court at the designated time. At 2:17 p.m., the court noted the city attorney's absence for the record. The court was advised that the sheriff's office, the city police and the city attorney's office were all searching for him, but that his whereabouts were unknown. Both the court and defense counsel understood that the city attorney suffered from "medical problems." The hospital had been called, but he was not there. The trial court declined to order a mistrial and instead continued the case until the following Monday morning.

On Monday, the 23rd of May, the court convened for the continuation of appellant's trial. The city attorney was not present. The court again noted for the record that the case had been continued from Friday because the city attorney had become ill. The court was informed that the authorities had located the city attorney on Friday at around 4:30 p.m. on Mt. Magazine. It was said that he was unresponsive and did not understand that he was to be in court that afternoon. The trial judge remarked that this was "very uncharacteristic" of the city attorney "unless

he is suffering some disability," and stated that he was convinced that the city attorney had been unable to continue with trial on Friday and that he remained unable to continue with trial that morning. The court accepted the services of a deputy prosecuting attorney for the county to proceed on behalf of the State. *Voir dire* of the six-person jury was conducted for the purpose of disclosing any acquaintance with the deputy prosecutor. A conflict with one of the jurors was revealed. The trial court then declared a mistrial, and appellant's case was reset for another jury trial.

Prior to the second trial, appellant moved to dismiss the charges on grounds of double jeopardy. At a hearing on this motion, testimony was adduced from the two officers who had located the city attorney that Friday afternoon. During the course of the hearing, appellant's counsel stipulated that the city attorney had since died and that the manner of his death had been ruled a suicide. It was not known, however, exactly when the death had occurred. Limiting his ruling to what was known at the time of the mistrial, the trial judge denied the motion to dismiss, holding that he had declared a mistrial for reasons of overriding necessity.

The Fifth Amendment to the United States Constitution states, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Article 2, Section 8 of the Arkansas Constitution provides that "no person, for the same offense, shall be twice put in jeopardy of life or liberty." With respect to former jeopardy, Arkansas Code Annotated § 5-1-112 (Repl. 1991) provides in pertinent part that:

> A former prosecution is an affirmative defense to a subsequent prosecution for the same offense under any of the following circumstances:
>
> . . . .
>
> (3) The former prosecution was terminated without the express or implied consent of the defendant after the jury was sworn . . . unless the termination was justified by overruling necessity.

The supreme court has interpreted these laws to mean that:

> When the jury is finally sworn to try the case, jeopardy has attached to the accused and when, without the consent of the defendant, expressed or implied, the jury is discharged before the case is completed, then the constitutional right against double jeopardy may be invoked, except in cases of "overruling necessity."

Smith v. *State*, 307 Ark. 542, 545, 821 S.W.2d 774, 776 (1992) (quoting *Wilson* v. *State*, 289 Ark. 141, 145, 712 S.W.2d 654, 656 (1986)). Courts have recognized the difficulty of categorizing cases involving claims of double jeopardy and the resulting inadequacy of expounding any standard formula for guidance. *See Jones* v. *State*, 288 Ark. 162, 702 S.W.2d 799 (1986). Consequently, each case must turn largely on its own facts. *Id.* As was said by our supreme court in *Cody and Muse* v. *State*, 237 Ark. 15, 371 S.W.2d 143 (1963):

> The manifest necessity permitting the discharge of a jury without rendering a verdict and without justifying a plea of double jeopardy may arise from various causes or circumstances; but the circumstances must be forceful and compelling, and must be in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care.

Id. at 21, 371 S.W.2d at 147.

Appellant contends that this does not present a case of overruling necessity and that he was entitled to an absolute discharge when the city attorney first failed to appear that Friday afternoon. We cannot agree.

Although each case is dependent on its own facts, we do find guidance from previous decisions involving the question of "overruling necessity". Under Arkansas law it is well settled that the illness of a juror is a circumstance which qualifies as overruling necessity. *Shaw* v. *State*, 304 Ark. 381, 802 S.W.2d 468 (1991); *Atkins* v. *State*, 16 Ark. 568 (1855). Overruling necessity has also been found due to the illness of a material witness for the State. *Jones* v. *State*, *supra*. The intoxication of defense counsel has also been considered to present a case of overruling necessity. *Franklin and Reid* v. *State*, 251 Ark. 223,

471 S.W.2d 760 (1971).

The record in this case supports the trial court's conclusion that the prosecutor had become ill and could not continue with the prosecution of appellant's trial. Confronted with this situation, the trial court endeavored to proceed with trial by accepting the substitution of a deputy prosecutor. However, that effort was thwarted when a conflict with one of the jurors was revealed. We think that the unexpected mental breakdown of the prosecutor and the events which followed were circumstances beyond anyone's control and that these facts presented an emergency which could not have been averted with reasonable diligence. We thus conclude that it was manifestly necessary for the court to order a mistrial, and we hold that the trial court did not err in ruling that appellant's second trial was not barred by double jeopardy.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

Judy BARKER *v.* STATE of Arkansas

CA CR 95-498 916 S.W.2d 775

Court of Appeals of Arkansas
Division III
Opinion delivered March 13, 1996

Michael L. Allison, for appellant.

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

OLLY NEAL, Judge. Judy Barker appeals from a conviction of DWI, second offense, in Conway County Circuit Court, wherein she was sentenced to seven (7) days in the county jail, assessed a fine of $800.00, and had her motor vehicle operator's license suspended for 12 months. For reversal Barker raises two points: (1) the trial court erred in ruling that the municipal judge, who was suspended from the practice of law at the time of appellant's trial, was a de facto judge; and (2) the trial court erred when it failed to grant a mistrial after the prosecution questioned appellant concerning prior DWI convictions. Because we agree with appellant's second argument we reverse as to that point and remand.

We first discuss appellant's argument that it was error for the trial court to deny her motion for a mistrial in light of the prosecutor's question concerning her prior DWI convictions. Appellant was afforded a bifurcated trial and was found guilty of DWI, second offense. On cross-examination of appellant, during the guilt phase of the trial, the first question asked by the prosecutor was: "Ms. Barker isn't it a fact you've been convicted twice of DWI." Appellant's counsel responded by making a motion for a mistrial, which was subsequently denied. The trial court is granted wide latitude of discretion in granting or denying a motion for a mistrial, and the decision of the court will not be reversed except for an abuse of that discretion or manifest prejudice to the complaining party. *Bullock* v. *State*, 317 Ark. 204, 876 S.W.2d 579 (1994); *Strawhacker* v. *State*, 304 Ark.

726, 804 S.W.2d 720 (1991).

The trial court offered the following admonishment to the jury:

> THE COURT: I must instruct you at this time that opening statements remarked [sic] during the trial and closing arguments of the attorneys are not evidence, but are made only to help you in understanding the evidence and applicable law. Any argument, statements or remarks of attorneys having no basis in the evidence should be disregarded by you. You are to consider only this case that you are here to decide today and should disregard the first or the only question, first and last, which was the only question that was asked by the prosecutor before we broke for lunch.

An important factor is whether the prosecutor deliberately intended to induce a prejudicial response. Nothing in the record suggests that the prosecutor had a good-faith basis for believing that appellant had two prior DWI convictions. In fact, the record reveals that appellant had only one prior conviction. The case at bar is similar to *Maxwell* v. *State*, 279 Ark. 423, 652 S.W.2d 31 (1983). In *Maxwell*, where the relevant issue related to the prosecutor's questioning the defendant concerning a prior conviction, our supreme court concluded that the deliberateness of the prosecutor's action could not be made harmless by anything less than a reprimand in the presence of the jury or a mistrial.

We believe that the decision of the trial court in denying the motion for a mistrial resulted in manifest prejudice to the appellant to the extent that she was denied a fair trial.

Appellant's other argument merits little discussion. As appellee correctly points out, appellant was tried de novo in the Circuit Court. As such, we believe that appellant's due process rights were not violated.

Reversed and remanded.

MAYFIELD and STROUD, JJ., agree.

Joel Keith TABOR *v.* STATE of Arkansas

CA CR 95-1017 918 S.W.2d 189

Court of Appeals of Arkansas
En Banc
Opinion delivered March 13, 1996

Donald J. Adams, for appellant.

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

WENDELL L. GRIFFEN, Judge. Appellant has moved that his appeal be reinstated. We dismissed the appeal in an order dated January 17, 1996, pursuant to the motion of appellee contending that jurisdiction is lacking because the record does not show that the requirements were met for reserving the right to appeal an adverse determination of a pretrial motion to suppress evidence under Rule 24.3(b) of the Arkansas Rules of Criminal Procedure.

In its response to appellant's petition to reinstate the appeal, appellee asserts that the parties have entered into a stipulation for supplementation of the record concerning appellant's intention to conditionally plead guilty and reserve his right to appeal the adverse determination of the pretrial motion to sup-

press evidence. However, the joint stipulation before us was filed on January 29, 1996. Neither party has tendered anything from the trial court that shows that it approved appellant's conditional plea of guilty pursuant to Rule 24.3(b).

In order that the complete record on this issue can be presented to us, we hereby remand this matter to the trial court and direct that the record be settled regarding appellant's purported conditional plea of guilty. The trial court and parties are further directed to ensure that all material portions of the record that pertain to the purported conditional plea of guilty be included in the record, including all orders by the trial court pertaining to appellant's claim that he entered a conditional plea of guilty. Upon compliance with these directives, the motion for reinstatement of the appeal may be renewed.

Remanded.

STROUD and NEAL, JJ., agree.

MAYFIELD and COOPER, JJ., concur.

ROGERS, PITTMAN, ROBBINS, JJ., and JENNINGS, C.J., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur in remanding this case to the trial court; however, I would rather simply reinstate the appeal. We dismissed it without knowing that appellant's counsel and the prosecuting attorney had entered into an agreement, which was reduced to writing in the trial court, that in the event the trial court did not grant the defendant's motion to suppress evidence the defendant would enter a plea of guilty with the reservation that he would have the right to appeal the adverse ruling on his motion to dismiss.

I really do not see any reason to remand for the record to be settled. The defendant's counsel and the Arkansas Attorney General have stipulated to the above agreement and Ark. R. Crim. P. 24.5 requires that where there is a plea of guilty the trial court shall determine whether the plea is the result of a plea agreement and, if it is, "the court shall require that the agreement be stated." The Arkansas Supreme Court has said that this requirement is "mandatory," *Zoller* v. *State*, 282 Ark. 380, 385, 669 S.W.2d 434 (1984), and I would assume that the trial court

followed the rule. Surely there is sufficient indication that this was done. *See Noble* v. *Smith*, 314 Ark. 240, 862 S.W.2d 234 (1993).

COOPER, J., joins in this concurrence.

JUDITH ROGERS, Judge, dissenting. On January 17, 1996, this court dismissed the appeal of appellant, Joel Keith Tabor. Before us today is appellant's motion to reinstate the appeal. The decision of the court on this motion is to remand this case to the trial court to "settle" the record. I must respectfully dissent because that course of action is procedurally defective and is in complete disregard of the law. However unfortunate the situation may be, the motion should be denied.

The judgment and commitment order in this case reflects that appellant pled guilty to the offenses of delivery of a controlled substance (cocaine), conspiracy to deliver a controlled substance (cocaine), and conspiracy to deliver a controlled substance (marijuana). He received sentences totalling six years in prison. Appellant purported to bring this appeal pursuant to Ark. R. Crim. P. 24.3(b), which provides:

> With the approval of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

As a general rule, direct appeals from guilty pleas are prohibited. *Scalco* v. *City of Russellville*, 318 Ark. 61, 883 S.W.2d 813 (1994); *Hampton* v. *State*, 48 Ark. App. 93, 890 S.W.2d 279 (1995). Rule 24.3(b) provides one exception to that rule. However, the supreme court has held that, because guilty pleas are generally not appealable, an attempted appeal from a guilty plea must be dismissed for lack of jurisdiction unless the requirements of Rule 24.3(b) have been met. *Burress* v. *State*, 321 Ark. 329, 902 S.W.2d 225 (1995). Stated another way, if the requirements of Rule 24.3(b) are not met, the appellate court acquires no jurisdiction to hear the appeal. *Bilderback* v. *State*, 319 Ark. 643, 893 S.W.2d 780 (1995); *Burress* v. *State*, *supra*; *Scalco* v.

City of Russellville, supra. See also Noble v. *State*, 314 Ark. 240, 862 S.W.2d 234 (1993).

The requirements of the rule are three-fold. The record must demonstrate: (1) the approval of the court; (2) the consent of the prosecutor; and (3) the right of review must be reserved in writing. Here, we dismissed the appeal, on motion of the State, because the record did not reflect that any of the requirements had been met so as to permit an appeal from the pleas of guilt.

Included with the motion to reinstate the appeal is a "Stipulation to Supplementation of Appellate Record," entered into by the parties. The stipulation states that appellant's counsel and the prosecuting attorney entered into an oral agreement whereby appellant would plead guilty to the charges and would be entitled to appeal the trial court's denial of appellant's motion to suppress inculpatory statements. It is admitted, however, that this agreement was not reduced to writing. The stipulation also refers to a plea statement prepared by the prosecuting attorney which contained language purporting to reserve the right to appeal. It is admitted, however, that the plea statement was neither signed by appellant nor filed with the trial court. Also attached to the motion to reinstate is the affidavit of the prosecuting attorney in which he avers that the appellant's pleas of guilt were meant to be conditioned upon the right to appeal the trial court's denial of the motion to suppress. He was at a loss, however, to explain why a plea agreement was not filed with the court.

It is on the basis of the stipulation and the exhibits attached thereto that this court remands for the "settling" of the record. I disagree because the stipulation does not alter the result of dismissing the appeal for noncompliance with the rule.

First, it is abundantly clear that there was a total failure to preserve in writing the right of review. Appellant does not even allege that this requirement was met. In fact, counsel accepts full responsibility for not strictly following the rule, but argues that the appeal should go forward because "the matter is procedural." Noncompliance with the rule, however, constitutes a jurisdictional defect, which is a matter that cannot be so easily excused.

In its decisions on this subject, the supreme court has required strict compliance with the rule. *Burress* v. *State*, *supra*; *Bilderback* v. *State*, *supra*. In *Burress*, the trial court had made a verbal reference to a document entitled "Guilty Plea Statement," but no such document, reserving the right of review, was contained in the record. The supreme court dismissed the appeal "for lack of jurisdiction because there was a lack of strict compliance with the rule." In *Bilderback*, the court found that the "reserved in writing" requirement was not met and dismissed the appeal, even though the trial court had announced in open court its understanding that the defendant's offer to plead guilty was conditioned on preserving the right to appeal the issue of suppression of a confession. The court said:

> The requirement of "reserving in writing" the right of review was not met, and we have been cited to no authority which would allow us to consider whether there was substantial compliance in view of the opening pronouncement of the Trial Court and the fact that the parties may have proceeded as if the plea were conditional.

Id. at 647, 893 S.W.2d at 782. The case at bar cannot be distinguished from the decisions in *Buress* and *Bilderback*. The stipulation reflects only the understanding that the pleas were entered on the condition that the right of appeal be preserved. However, as particularly demonstrated by the decision in *Bilderback*, *supra*, the parties' intention is no substitute for compliance with the rule.

Secondly, the failure to comply with the rule cannot be cured by simply remanding to "settle" the record. The purpose of settling the record, under Ark. R. App. P. 6(e), is to ensure that the record "truly discloses what occurred in the trial court." *Tacket* v. *First Savings of Ark.*, 306 Ark. 15, 810 S.W.2d 927 (1991). Settling the record is not a device to be used in retrospect to correct that which was not done. It is conceded in this case that the requirement of preserving the right to appeal in writing was not met. It is, therefore, improper to remand for the record to be reconstructed to reflect something that did not occur.

Third, it is a fundamental proposition of law that jurisdiction cannot be created by agreement. Parties cannot vest an appellate court with jurisdiction by agreeing that an appeal may

be taken. *Eckl* v. *State*, 312 Ark. 544, 851 S.W.2d 428 (1993); *Jenkins* v. *State*, 301 Ark. 586, 786 S.W.2d 566 (1990). Consequently, the stipulation, evidencing that the parties proceeded as if the plea were conditional, does nothing to salvage this appeal.

In summary, I dissent from this court's decision to remand for the "settling" of the record. Rule 24.3(b) represents an exception to the general rule prohibiting appeals from pleas of guilt. Compliance with the rule is considered jurisdictional, which explains why strict adherence with the requirements of the rule is deemed necessary. The record before us discloses that there was no compliance with the requirement that the right of review be preserved in writing. For this reason alone, we properly dismissed the appeal in the first instance. Nevertheless, this court remands for the record to be "settled" when it is conceded that the record accurately reflects that the right of review was not reserved in writing. Admittedly, such a course has its appeal in expediency, but it is a procedure not sanctioned by any rule. While I submit that this court has no choice under controlling precedent but to deny appellant's motion to reinstate the appeal, appellant is not left without a remedy. One avenue of recourse might be for appellant to seek relief under Ark. R. Crim. P. 37. *See Noble* v. *State*, 319 Ark. 407, 892 S.W.2d 477 (1995).

I am authorized to state that Chief Judge Jennings and Judges Pittman and Robbins join in this opinion.

Dan Chris IVY *v.* STATE of Arkansas

CA CR 95-135 917 S.W.2d 179

Court of Appeals of Arkansas
Opinion delivered March 13, 1996

Erwin L. Davis, for appellant.

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

PER CURIAM. The appellant in this criminal case is appealing his conviction for the third-degree battery of his ex-wife. One of the issues on appeal involves the medical records of the victim. These records were not introduced at trial. By a *per curiam* of

May 24, 1995, we ordered the medical records sealed. By a *per curiam* of August 30, 1995, we granted the appellant leave to review the portions of the record under seal. We explicitly directed the appellant to confine any mention of the sealed documents to a separate addendum to his brief filed with our Clerk under seal. The appellant did not comply with this order. He filed no addendum, but has discussed the sealed documents in the body of his brief. After filing his brief, the State filed a motion to have the appellant's brief sealed in its entirety because of its contamination by reference to the sealed documents. The appellant has joined in the State's motion. Nevertheless, we deny the motion and direct the appellant to rebrief this case in compliance with our *per curiam* of August 30, 1995.

The agreement of the parties to seal the appellant's entire brief cannot suffice in this case because the right of access to court records does not belong to the parties, but instead belongs to the public. *See Arkansas Best Corp.* v. *General Electric Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994). This Court is therefore required to balance the public's right of access in exercising its inherent authority to seal records, and in so doing it must overcome a "strong presumption in favor of the right of access." *Id.* Our Supreme Court has said that the sealing of any other records besides those explicitly authorized by statute would be subjected to close scrutiny. *Id.* at 247. Although no statute specifically authorizes a sealed record in the case at bar, Ark. Code Ann. § 16-13-318 (Repl. 1994) authorizes closed proceedings in domestic relations cases. We think that, given the confidential nature of the sealed records relating to the victim and the fact that this case arose out of a domestic relations matter, the circumstances of the case at bar are sufficiently within the concerns addressed by § 16-13-318 to support the partial and selective sealing of the appellant's brief we ordered on August 30, 1995. We do not, however, believe that the entire brief should be sealed in this criminal matter.

Consequently, the State's motion to file the appellant's brief under seal is denied. The brief previously filed by the appellant is to be stricken, and the appellant is ordered to rebrief this matter in its entirety in the manner specified in our *per curiam* of August 30, 1995, with the briefs to be filed with our Clerk on or before the 15th day of April, 1996, including the

separate brief which is to be filed under seal. The State's brief will be due thirty days thereafter.

Motion denied.

[redacted]

[redacted]