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Dennis R. AIKENS *v.* Sharon LEE

CA 94-1449 918 S.W.2d 204

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1996

Dennis R. Aikens, pro se.

Mixon & McCauley, P.A., by: *Scott Waddell*, for appellee.

JOHN E. JENNINGS, Chief Judge. This is an appeal from an order of the Craighead County Chancery Court that appellant, Dennis R. Aikens, pay child support in the amount of $250.00 per month for the support of his son, Shon. For reversal appellant contends that the court erred in ordering him to pay child support because the child has reached majority and there was no showing of "special circumstances" and that the court erred in regard to the amount of support ordered. We agree with appellant's first point and therefore need not address the second.

At the time of the hearing the parties' son, Shon, had reached the age of majority and had finished one year as a student at the University of Arkansas. Shon is a music major and plays in the band, and when he goes on band trips must pay a portion of the cost of room and board. His mother testified that he had allergies and had to take allergy medicine. Shon testified that, at the time of the hearing in the summer of 1994, he was working forty hours a week as a cook at Hardee's. Ms. Lee testified that although Shon received scholarships, while he was in school it cost her between $120.00 to $150.00 per month.

The chancellor ordered child support in the amount of $250.00 per month beginning September 1, 1994. The court specifically found that there was sufficient justification and need shown for the court to extend child-support payments until the child attended three additional years of college. Support was conditioned on continued enrollment and also upon the child having regular communication with his father.

In ordering child support the court took into consideration the limited amount of support the appellant had paid in the past; that the child had completed one year of school and was a member of the band; and that his extracurricular activities did not permit him to work part-time.

Arkansas Code Annotated section 9-14-237(a)(1) provides:

> 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.

This statute became effective August 13, 1993. Cases decided prior to the effective date of this act held that a parent may not be ordered to support a child who has reached majority absent special circumstances. *See Elkins* v. *James*, 40 Ark. App. 44, 842 S.W.2d 58 (1992). The parties to this appeal agree that Ark. Code Ann. § 9-14-237 did not abrogate these prior decisions. We need not decide that question because even if the statute does not supersede prior case law, the award of child support here cannot be sustained.

The question is what kind of circumstances will justify an award of support for a child who has reached majority. In *Mitchell* v. *Mitchell*, 2 Ark. App. 75, 616 S.W.2d 753 (1981), an opinion written by Judge Cloninger, we reviewed the existing decisions. We said:

> A number of Arkansas cases have held that a parent has a legal obligation to contribute to the education of an adult child, but in every case so holding there has been a circumstance of special need. In *Petty* v. *Petty*, 252 Ark. 1032, 482 S.W.2d 119 (1972), the Court held that support should be continued past majority where the daughter was afflicted with epilepsy and was in need of specialized training to obtain employment. In *Elkins* v. *Elkins*, 262 Ark. 63, 553 S.W.2d 34 (1977), the father was required to continue child support payments as long as his handicapped adult child was in college. In *Matthews* v. *Matthews*, 245 Ark. 1, 430 S.W.2d 864 (1968), the Court ordered support continued for an eighteen-year-old child until she graduated from high school.

We also cited *Riegler* v. *Riegler*, 259 Ark. 203, 532 S.W.2d 734 (1976). There the supreme court said:

> The question in the case at bar as to the youngest daughter is not whether appellant is morally obligated to assist her financially while attending college, but the question is whether he is *legally* obligated to do so under the evidence in this case.
>
> . . . .
>
> The appellant's daughter involved in the case at bar has

reached her majority and is not physically or mentally handicapped. We conclude, on trial *de novo*, that the appellant should have been relieved of the legal obligation to support his youngest daughter after she obtained her majority and graduated from high school.

While we appreciate the chancellor's motives in requiring support, we conclude that there is an insufficient showing of "special circumstances" to justify the award. In light of our holding on the first issue raised, appellant's second argument is moot.

Reversed.

ROBBINS and GRIFFEN, JJ., agree.

Sheila ROHRER *v.* HART'S MANUFACTURING COMPANY, Inc., a Tennessee Corporation

CA 95-312 917 S.W.2d 180

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1996

Keith Blackman, for appellant.

Jackson, Shields, Yeiser & Cantrell, by: *Valerie Barnes Speakman*, for appellee.

JOHN E. JENNINGS, Chief Judge. Sheila Rohrer, the appellant, was employed by the appellee, Hart's Manufacturing Company, Inc. In November 1990, she sustained an on-the-job injury and subsequently filed a claim with the Arkansas Workers' Compensation Commission. In December 1991 she was fired. The parties settled appellant's workers' compensation claim in December 1993 by way of joint petition. In August 1994 appellant filed suit in Clay County Circuit Court, alleging that she had been discharged in retaliation for the filing of her workers' compensation claim and seeking damages. In January 1995 the circuit court granted summary judgment for the appellee, holding that the suit was barred by the language of the earlier joint petition and barred by Ark. Code Ann. § 11-9-107. We disagree and reverse and remand.

In 1991 the Arkansas Supreme Court decided *Wal-Mart Stores, Inc.* v. *Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991). There the court held that an employee has a common-law action against his employer who fires him for claiming workers' compensation benefits. The court has since followed its decision in *Baysinger. See e.g.*, *Mapco, Inc.* v. *Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991); *Leggett* v. *Centro, Inc.*, 318 Ark. 732, 887 S.W.2d 523 (1994).

In 1993 the General Assembly passed Act 796, which eliminated the cause of action for retaliatory discharge. The Act, as codified in Ark. Code Ann. § 11-9-107 (Supp. 1995) provides, in part:

> Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual's claim for benefits under this chapter, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter, shall be subject to a fine of up to ten thousand dollars ($10,000) as determined by the Workers' Compensation Commission.
>
> . . .
>
> A purpose of this section is to preserve the exclusive remedy doctrine and specifically annul any case law inconsistent herewith, including but not necessarily limited to: *Wal-Mart Stores, Inc.* v. *Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991); *Mapco, Inc.* v. *Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991); and *Thomas* v. *Valmac Industries, Inc.*, 306 Ark. 228, 812 S.W.2d 673 (1991).

Section 41 of the Act provides that "the provisions of this Act shall apply only to injuries which occur after July 1, 1993." The Act also declared its effective date to be July 1, 1993.

In *Tackett* v. *Crain Automotive*, 321 Ark. 36, 899 S.W.2d 839 (1995), the supreme court was faced with the question of the meaning of the word "injuries" as used in section 41 of Act 796. A majority held that the date of the injury was the date the worker was discharged from employment. The dissenting justices argued that the date of injury was the date the employee suffered a compensable injury at work.

In the case at bar, appellant was discharged in December 1991, long before the effective date of the Act. Therefore, by its terms, it is not applicable to her cause of action. The fact that her suit for damages was not filed until after the effective date of the Act is not determinative.

We also agree with the appellant that her claim is not barred by the language of the joint petition filed in the workers' compensation proceeding. The language in the joint petition relied upon by the appellee as a bar states: "It is further expressly understood and agreed by the parties hereto that if this joint petition be approved by the Commission, Claimant will have no other claim against Hart's of Arkansas or Wassau Insurance Companies under

the Arkansas Workers' Compensation Act of any nature[.]" The short answer to the appellee's contention is that appellant's suit in circuit court is not a "claim under the Arkansas Workers' Compensation Act." Appellant's cause of action for retaliatory discharge is not barred by the language of the joint petition. For the reasons stated the decision of the trial court is reversed and the case is remanded for further proceedings.

Reversed and Remanded.

ROBBINS and GRIFFEN, JJ., agree.

200 GARRISON ASSOCIATES LIMITED PARTNERSHIP *v.* CRAWFORD CONSTRUCTION COMPANY, Inc.

CA 94-1325 918 S.W.2d 195

Court of Appeals of Arkansas
Division I
Opinion delivered March 20, 1996

Gean, Gean, & Gean, by: *Roy Gean, Jr.*, for appellant.

Harper, Young, Smith & Maurras, PLC, by: *Michael K. Redd*, for appellee.

JOHN MAUZY PITTMAN, Judge. Crawford Construction Company, Inc., appellee, filed a complaint in the Sebastian County Circuit Court against 200 Garrison Associates, appellant, alleging that appellant owed appellee a balance of $154,172.24 on the parties' breached construction contract. Appellant filed a counterclaim contending that appellee had breached the contract by providing substandard materials and workmanship and erroneous billings. The parties' contract contained a statutory arbitration clause. The circuit court stayed the proceedings and directed that the parties submit their dispute to arbitration with the American Arbitration Association. Appellant then filed an arbitration claim against appellee, and appellee counterclaimed. On October 25, 1993, the arbitrator denied appellant's claim, awarded appellee $154,172.24 on its coun-

terclaim and denied appellee's claim for interest and costs. On January 21, 1994, appellant filed a motion in the circuit court to modify or vacate the arbitrator's award.

After a hearing, the circuit court held that the arbitrator's award of $154,172.24 erroneously included $6,908.24 in interest and that appellant failed to demonstrate a miscalculation in the amount of damages awarded. In addition, the court awarded pre- and post-judgment interest on the reduced award of $147,264.00 ($154,172.24 - $6,903.24). The appellant appeals the circuit court's order arguing that the court erred in affirming the arbitrator's award of damages and by awarding pre- and post-judgment interest.

■ An arbitrator's award may be modified or corrected by the court if there is evident miscalculation of figures in the award. Ark. Code Ann. § 16-108-213(a)(1) (1987). An arbitrator's decision on all questions of law and fact is conclusive and should be affirmed by the court unless grounds are established to support vacating or modifying the award. *McLeroy* v. *Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987). Judicial review of an arbitration award is more limited than appellate review of a trial court's decision; whenever possible, a court must construe an award so as to uphold its validity. *Chrobak* v. *Edward D. Jones & Co.*, 46 Ark. App. 105, 878 S.W.2d 760 (1994). An award should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or misfeasance or malfeasance. *Id.* Moreover, the illegality must appear on the face of the award. *Id.* Even a gross mistake of fact will not vitiate an award unless the mistakes are apparent on the face of the award. *Ark. Dep't of Parks and Tourism* v. *Resort Managers, Inc.*, 294 Ark. 255, 743 S.W.2d 389 (1988).

■ Appellant first argues that the arbitrator's award of damages contained miscalculations. Appellant lists in dispute six items under the contract. All are factual issues, and appellant admits that the same evidence presented to the circuit court was presented to the arbitrator. Because there is no mistake evidenced on the face of the arbitrator's award of damages, the court did not err in finding that appellant had not shown a miscalculation.

■ Appellant next argues that the circuit court erred by awarding pre- and post-judgment interest because the arbitrator denied appellee's request for interest. We agree. Arkansas Code Annotated § 16-108-213(b) states that unless the award is modified,

the court "shall confirm the award as made." Thus, we reverse the circuit court's award of interest.

Appellee cross-appeals the circuit court's reduction of the award from $154,172.24 to $147,264.00, or $6,908.24, which was allegedly pre-arbitration interest. Appellee argues that the arbitrator granted its claim for $154,172.24. There is no evidence on the face of the arbitrator's award of $154,172.24 that it included $6,908.24 in interest.

There being no evidence that there was a miscalculation on the face of the arbitrator's award, we remand for the circuit court to enter judgment affirming the arbitrator's award of $154,172.24.

Affirmed in part; reversed in part.

COOPER and ROGERS, JJ., agree.

W.C. GARMON, Jr. and Susan Garmon *v.* Troy MITCHELL d/b/a Troy Mitchell Elevator and First National Bank in Stuttgart

CA 95-39 918 S.W.2d 201

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1996

[redacted]

Ramsay, Bridgforth, Harrelson & Starling, by: *William M. Bridgforth* and *John T. Starling,* for appellants.

Russell D. Berry, for appellee Troy Mitchell.

Duff Nolan, Jr., for appellee First National Bank.

JAMES R. COOPER, Judge. The appellants in this chancery case purchased from the appellee, First National Bank in Stuttgart, ten acres of land on which were located a store, a house, various outbuildings, and a large grain-storage facility. After occupying the property for several months the appellants learned that the appellee, Troy Mitchell, claimed to be the owner of the grain-storage facility and that he had a lease to keep the facility on the appellants' land. Advised by the appellee bank that Mitchell had no valid lease or interest in the grain storage facility, the appellants disputed Mitchell's claim. Mitchell subsequently brought suit to enforce the lease and, after a hearing, the trial court found that the grain storage bins were personal property belonging to Mitchell; that Mitchell would be permitted to remove the bins if he did so within 90 days; that the Bank will have breached its warranty if Mitchell removes the bins; and that the value of the bins is $3,500.00.

The appellants argue on appeal that the chancellor erred in finding that the bins are personalty, in finding the value of the bins to be $3,500.00, and in failing to enter judgment against the bank for their attorney's fees incurred in defending title to the subject property. On cross-appeal, Mitchell argues that the chancellor erred in finding that the appellants were not bound by the lease, and in finding that the appellants were not liable for evicting Mitchell from the leased premises.

We first address the appellants' contention that the trial court erred in finding that the grain-storage facility constituted personal property owned by the appellee, Troy Mitchell. The appellants

argue that the grain bins were fixtures as evidenced by their very large size, their attachment to their footings by extremely large bolts, and expert testimony to the effect that the bins could not be moved unless they were dismantled and cut into smaller pieces with a cutting torch.

Although it is true that there are cases in which similar installations were found to have been fixtures, rather than personalty, *see e.g.*, *Corning Bank* v. *Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979); *Barron* v. *Barron*, 1 Ark. App. 323, 615 S.W.2d 394 (1981), it does not follow that such grain-storage facilities are fixtures as a matter of law. The question of whether particular property constitutes a fixture is usually a mixed question of law and fact. *Corning Bank* v. *Bank of Rector, supra.* In determining whether items are chattels or fixtures, it is necessary to consider: (1) whether the items are annexed to the realty; (2) whether the items are appropriate and adapted to the use or purpose of that part of the realty to which the items are connected; and (3) whether the party making the annexation intended to make it permanent. *McIlroy Bank & Trust* v. *Federal Land Bank*, 266 Ark. 481, 585 S.W.2d 947 (1979). In the case at bar it is clear that the original lessee of the property did not intend for the annexation to be permanent because the lease agreement expressly provided that the lessee should have the right to build a grain-storage facility on the property and, within 60 days of termination of the lease, "to remove from the premises all improvements placed thereon" by the lessee. Given this clear expression of the intent of the party making the annexation to treat the storage facility as a chattel, we cannot say that the chancellor clearly erred in holding that it was not a fixture. *See* Ark. R. Civ. P. 52(b).

The appellants next contend that the chancellor erred in assessing the amount of their damages arising out of breach of warranty by the appellee bank. The record clearly demonstrates that the bank agreed to sell to the appellants the subject property, including any attached fixtures or equipment, and that the grain bins were attached to the property under the terms of the agreement. The chancellor found that a breach of warranty would arise if Mitchell elected to remove the grain bins as permitted by the order appealed from and that, in such event, judgment should be entered in favor of the appellants for the value of the grain bins. The thrust of the appellant's argument under this point is that the trial court

erred in finding the value of the bins to be $3,500.00. The testimony in this regard was in sharp dispute, with the appellee Mitchell opining that the value of the bins was $90,000.00, while Cole Martin, who was the bank's agent in the sale of the property to the appellants, testified that he viewed the grain bins as a liability with no value whatsoever. Furthermore, the record shows that the grain bins were in poor repair and inoperable, and that the appellants paid only $50,000.00 for the entire property, including a house and a store. In this context we think it significant that the store, which later burned, was itself insured for $50,000.00. Under these circumstances, giving due regard to the superior position of the chancellor to resolve disputes in the evidence and assess credibility, we cannot say that the chancellor clearly erred in finding the value of the grain bins to be $3,500.00.

Finally, the appellants contend that the chancellor erred in failing to enter judgment against the bank for attorney's fees incurred in defending their title to the property. We agree. Where, as here, there is a covenant to warrant and defend title, the covenantee is entitled to recover the costs and necessary expenses incurred in the bona fide defense of title, including a reasonable attorney's fee. *Murchie* v. *Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993). Although the record shows that the bank provided the appellants with an attorney during the first trial in this matter, it failed to provide a defense when it appeared that its interests were adverse to those of the appellants and a second trial was necessitated. We do not consider this partial participation in the appellants' defense to be sufficient defense of title, *see Murchie*, *supra*, and in light of the appellants' successful defense of their title to the realty against Mitchell's assertion of a leasehold interest, we reverse and remand for the chancellor to enter judgment against the bank for costs and necessary expenses, including a reasonable attorney's fee.

On cross-appeal, the appellee, Troy Mitchell, contends that the chancellor erred in finding that the appellants were innocent purchasers for value and, therefore, not bound by the terms of the unrecorded lease between Mitchell and the bank's predecessor in title. It is undisputed that Mitchell's lease was not recorded. Arkansas Code Annotated § 14-15-404(b) provides that:

> No deed, bond, or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, made or executed after Decem-

> ber 21, 1846, shall be good or valid against a subsequent purchaser of the real estate for a valuable consideration without actual notice thereof or against any creditor of the person executing such an instrument obtaining a judgment or decree which by law may be a lien upon the real estate unless the deed, bond, or instrument, duly executed and acknowledged or proved as required by law, is filed for record in the office of the clerk and ex officio recorder of the county where the real estate is situated.

The cross-appellant contends, however, that the appellants should have been held to be bound by the lease despite the lack of recordation because the circumstances were such to put them on notice of Mitchell's lease. For this proposition he cites *Affiliated Laundries, Ltd.* v. *Keeton*, 270 Ark. 841, 606 S.W.2d 370 (Ark. App. 1980), where we held that the purchasers of an apartment complex had a duty to inquire as to the ownership of equipment in the laundry room. However, in *Affiliated Laundries*, *supra*, the purchasers were aware prior to closing that the laundry equipment was owned and maintained by someone other than the seller. Such actual notice was lacking in the case at bar and, in addition, we think that it was not readily apparent that the 70-foot-tall structure at issue in the case at bar was personalty. On our review of the record, we cannot say that the chancellor erred in failing to find that the circumstances were such as to put the appellants on inquiry.

Finally, the cross-appellant contends that the chancellor erred in finding that the appellants were not liable for damages arising out of an assertedly wrongful eviction of Mitchell from the leased premises. Insomuch as this argument is foreclosed by our holding that the appellants were not bound by the terms of the unrecorded lease, we need not address it.

Affirmed in part, reversed and remanded in part on direct appeal; affirmed on cross-appeal.

STROUD and GRIFFEN, JJ., agree.

James SHELTON *v.* FREELAND PULPWOOD, Cigna Insurance Companies, and Second Injury Fund

CA 95-515 918 S.W.2d 206

Court of Appeals of Arkansas
Division I
Opinion delivered March 20, 1996

Denver L. Thornton, for appellant.

Shackleford, Shackleford, & Phillips, P.A., by: *Brian H. Ratcliff*, for appellees Freeland Pulpwood and Cigna Insurance Companies.

David L. Pake, for appellee Second Injury Fund.

JAMES R. COOPER, Judge.

The appellant in this workers' compensation case was injured

in the course of his employment with the appellee, Freeland Pulpwood. He filed a claim for benefits and asserted that he was totally and permanently disabled. After a hearing, the Commission found that the appellant was not totally and permanently disabled, but had instead sustained a permanent partial disability of 17% to the body as a whole. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in failing to find that he was totally and permanently disabled. We reverse and remand because the Commission's findings are insufficient to justify the denial of benefits.

When the Commission denies compensation, it is required to make findings sufficient to justify that denial. *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). A satisfactory, sufficient finding of fact must contain all the specific facts relevant to the contested issue or issues so the reviewing court may determine whether the Commission has resolved these issues in conformity with the law. *Id.* The Commission must find as facts the basic component elements on which its conclusion is based. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992).

A finding of fact sufficient to permit meaningful review is a "simple, straightforward statement of what happened . . . not a statement that a witness, or witnesses, testified thus and so." *Wright* v. *American Transportation*, *supra*, 18 Ark. App. at 21. In the case at bar, the Commission adopted the opinion of the Administrative Law Judge as its own. That opinion is almost exclusively a recitation of testimony, rather than findings based on that testimony. Almost every sentence is preceded by "claimant testified," "Dr. Callaway opined," or similar language and, consequently, we are unable to determine the facts on which the Commission relied in reaching its conclusion. Where, as here, the Commission fails to make specific findings of the fact on which it relies to support its decision, reversal and remand is appropriate.

Reversed and remanded.

PITTMAN and ROGERS, JJ., agree.

Walter Lee WALTON *v.* STATE of Arkansas

CA CR 94-971 918 S.W.2d 192

Court of Appeals of Arkansas
Division I
Opinion delivered March 20, 1996

[redacted]

Maxie G. Kizer, P.A., for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of battery in the first degree and sentenced to seven years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in failing to give jury instructions AMCI 2d 704 on the use of physical force in defense of a person and AMCI 2d 705 on the use of deadly physical force in defense of a person. We disagree and affirm.

The appellant admitted that he had stabbed the victim, Ferbia Allen, a correctional officer at the Tucker Maximum Security Unit. The appellant testified, however, that he was defending himself from unlawful actions of the correctional officers. At the close of the evidence, the appellant proffered the instructions on the justification defenses. The trial court found that the testimony was insufficient to warrant the giving of either instruction.

The victim, Sergeant Allen, testified that he had gone to the appellant's cell in punitive isolation on the day of the incident to question the appellant about throwing something on Officer Coleman, a correctional officer under Sergeant Allen's supervision. After going to the appellant's cell, Sergeant Allen discovered that it was flooded and needed to be cleaned. Sergeant Allen testified that he handcuffed the appellant and brought him out of his cell. He further testified that while he and the appellant were standing in the hallway, he heard a noise in the control room and stepped away from the appellant to investigate. The appellant then slipped out of his handcuffs and stabbed Sergeant Allen in the side with a homemade knife or shank. Sergeant Allen testified that the appellant then ran back into his cell, got the broom the porter was using, and began swinging it. Although he had been stabbed, Sergeant Allen managed to kick the appellant's cell door closed. He testified that he was not armed with a night stick at the time of the stabbing. He further testified that he had not had any problems with the appellant prior to the stabbing.

The appellant testified that he and the victim had a number of

problems prior to the incident. He testified that the victim used abusive language, failed to feed him, failed to give him exercise yard call, and failed to release him from his restraints so that he could use the restroom.

The appellant testified that on the day of the incident he was unable to turn the water off in his cell and that Officer Coleman refused to turn it off for him. He stated that he subsequently threw some of his food on Officer Coleman's shirt. The appellant testified that Sergeant Allen eventually came to his cell and turned his water off. The appellant testified that Sergeant Allen handcuffed him and brought him out of the cell and that the two of them stood outside the cell while Officer Coleman was at a nearby control booth.

The appellant testified that he and Officer Coleman began to exchange words and that Officer Coleman subsequently came out of the control booth armed with a night stick. The appellant testified that Officer Coleman said, "It's dying time," and raised his night stick. The appellant explained that he then slipped from his handcuffs, raised his knife and told the officers to get away from him. He stated that he stabbed Sergeant Allen when he came toward him because he thought Sergeant Allen was going to hit him with his night stick. The appellant acknowledged, however, that Sergeant Allen did not come toward him with his night stick until he had pulled out his knife. He further testified that he pulled the knife to keep Officer Coleman from hitting him when he came out of the control booth. He testified that he retreated to his cell and used a broom to fight off the advances of the correctional officers. The appellant testified that he was eventually able to close the gate to his cell to prevent the officers from entering.

An inmate, Revis Leon Hamilton, testified that he overheard Sergeant Allen threaten to "bust his [appellant's] head the first chance he got." He also testified that the officers were armed with night sticks.

Another inmate, Danny Floyd, testified that he was in a cell near the appellant's on the day of the incident. He testified that he witnessed Officer Coleman run out of the control booth with his night stick, heard a scream and then witnessed the officers run back into the control booth. He stated that Sergeant Allen was "holding his gut."

■ AMCI 2d 704 is based on the defense provided by

Arkansas Code Annotated § 5-2-606 (Repl. 1993), which states:

> (a) A person is justified in using physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force that he reasonably believes to be necessary. However, he may not use deadly physical force except as provided in § 5-2-607.

Arkansas Code Annotated 5-2-607 provides:

> (a) A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is:
>
> (2) Using or about to use unlawful deadly physical force.

Where the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense. *Lair* v. *State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986). However, there is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction. *Purifoy* v. *State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

Here, we find that the evidence does not warrant the giving of either instruction. The instruction on the use of physical force in self-defense was not appropriate because there was no evidence from which the jury could have found that the appellant responded with anything other than deadly force since he admitted to stabbing the victim with a knife. Moreover, the appellant testified that the victim did not advance toward him with his night stick until he had slipped out of his handcuffs and brandished his knife. Once the appellant threatened him, Sergeant Allen could lawfully use non-deadly physical force against the appellant. *See* Ark. Code Ann. § 5-2-605(2) (Repl. 1993). Thus, the giving of the instruction on the use of deadly physical force in self-defense was not warranted because the evidence did not show that the appellant reasonably believed that Sergeant Allen was using or about to use unlawful deadly physical force.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

Katherine KENNEDY *v.* Kern KENNEDY

CA 95-270 918 S.W.2d 197

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1996

[redacted]

Joseph H. O'Bryan, for appellant.

Todd C. Sears, for appellee.

JOHN B. ROBBINS, Judge. Appellant, Katherine Kennedy, appeals an order of the Lonoke County Chancery Court that amended the parties' 1983 divorce decree. She contends that the chancellor erred in holding that the parties' property settlement agreement was subject to modification and in modifying the award of alimony. We agree that the chancellor was without authority to modify the property settlement agreement and therefore reverse and remand.

On December 15, 1983, a decree of divorce was entered by the Lonoke County Chancery Court, awarding appellant a divorce from appellee. The decree also approved and incorporated the parties' written property settlement agreement that provided in part:

> 3. Husband agrees to pay to the Wife unless she should remarry the sum of $250.00 on the first and fifteenth of each and every month as support for the Wife. . . .
>
> . . . .
>
> 6. It is agreed that the Wife shall be entitled to one-half (1/2) of the retirement benefits of the husband through his railroad retirement as if the parties were still married.

The property settlement agreement bears the notarized signatures of both parties, and no other disposition of the parties' property or rights were included in the decree except those that appear in the property settlement agreement. Appellee paid appellant $500.00 monthly alimony pursuant to this agreement and continued to do so until June 15, 1994, when appellee sent appellant a $250.00 payment, marking it "final payment." Included with his payment was a note that stated his obligation to pay appellant support had ended because she was now able to draw from his railroad retirement.

Appellant petitioned the chancery court for declaratory relief, requesting that the court construe and interpret the terms of the parties' 1983 decree and to take such action as necessary to enforce those terms. Appellee responded that it was the parties' intention when they executed the property settlement agreement that alimony would cease when appellant became eligible to receive one-half of appellee's retirement benefits. He further argued that it would be unconscionable to award appellant one-half of his retire-

ment benefits in addition to alimony and that the property settlement agreement is not an independent contract and is therefore subject to modification by the court.

After a hearing on appellant's petition, the chancellor entered his order, holding that he had the power to modify and reform the previous agreement of the parties. The chancellor found that the parties did not intend for appellant to continue to receive $500.00 monthly alimony after she became eligible to draw on appellee's railroad retirement benefits. The chancellor modified the agreement to reduce appellant's alimony award to $72.33 per month, which represents the difference between the retirement benefits that she was eligible to receive and the $500.00 per month spousal support that she had been receiving.

We agree with appellant that the chancery court did not have authority to modify her alimony payments. The alimony provision is part of the parties' written property settlement agreement, which is an independent contract between the parties. Where a decree of alimony is based on an independent contract between the parties which is incorporated in the decree and approved by the court as an independent contract, it does not merge into the court's award and is not subject to modification except by consent of the parties. *Kersh* v. *Kersh*, 254 Ark. 969, 973, 497 S.W.2d 72 (1973). Decisions of this court and the supreme court have recognized two different types of agreements for the payment of alimony:

> One is an independent contract, usually in writing, by which the husband, in contemplation of the divorce, binds himself to pay a fixed amount or fixed installments for his wife's support. Even though such a contract is approved by the chancellor and incorporated in the decree, as in the *Bacchus* [*Bacchus* v. *Bacchus*, 216 Ark. 802, 227 S.W.2d 439 (1950)] case, it does not merge into the court's award of alimony, and consequently, as we pointed out in that opinion, the wife has a remedy at law on the contract in the event the chancellor has reason not to enforce his decretal award by contempt proceedings.
>
> The second type of agreement is that by which the parties, without making a contract that is meant to confer upon the wife an independent cause of action, merely agree

> upon "the amount the court by its decree should fix as alimony." *Pryor* v. *Pryor*, 88 Ark. 302, 114 S.W. 700, 129 Am. St. Rep. 102, which construed an agreement of the first type, and *Holmes* v. *Holmes*, 186 Ark. 251, 53 S.W.2d 226, involving an agreement of the second type. See also 3 Ark. L. Rev. 98. A contract of the latter character is usually less formal than an independent property settlement; it may be intended merely as a means of dispensing with proof upon an issue not in dispute, and by its nature it merges in the divorce decree. In the *Holmes* case we held that the second type of contract does not prevent the court from later modifying its decree.

Seaton v. *Seaton*, 221 Ark. 778, 780, 255 S.W.2d 954, 956 (1953). *See also Armstrong* v. *Armstrong*, 248 Ark. 835, 838, 454 S.W.2d 660, 662 (1970); *McGaugh* v. *McGaugh*, 19 Ark. App. 348, 350-51, 721 S.W.2d 677, 679 (1986).

The burden was on appellant to show that the parties intended to have an independently enforceable contract for support. *See Songer* v. *Songer*, 267 Ark. 1075, 1077, 594 S.W.2d 33, 35 (Ark. App. 1980). Although there was no testimony presented by the parties at the hearing in regard to their intent when they executed the property settlement agreement, we find that the wording of the agreement and the actions of the parties at the time of the divorce clearly show that the parties intended to have an independent contract.

The parties' agreement was in writing and contained eleven separate provisions that covered the division of their property, including appellee's agreement to pay appellant alimony. There is no other provision in the decree that discusses the parties' property rights or makes a provision for alimony except what is mentioned in the property settlement agreement. Furthermore, the property settlement agreement specifically provides:

> 8. It is the purpose of the parties to this agreement that it fully and finally settle, resolve and terminate any and all claims, demands and rights of whatever kind or nature between the parties.
>
> 9. Either party hereto may petition the Court in the aforesaid suit for divorce to incorporate this agreement into any decree which may be entered therein and to give this

> instrument the full force and effect of a decree of the Court.

The agreement was signed by the parties after they had an opportunity to make any corrections to the agreement, which in fact they did. It stands to reason that appellee would not have signed a waiver of his appearance at the divorce hearing if he had believed that the parties' rights had not been settled at the time he signed the property settlement agreement.

Appellee relies on the supreme court's holding in *Shipley* v. *Shipley*, 305 Ark. 257, 807 S.W.2d 915 (1991), for his proposition that, because the language in the property settlement agreement did not specifically state that the parties intended it to be an independent contract, the chancellor's finding that the agreement was subject to modification is correct. In *Shipley*, however, there was not a separate property settlement agreement executed by the parties but a stipulation that was dictated into the record during the course of the hearing. In discussing this distinction, the court stated:

> The independent property settlement will usually be in the form of a separate written agreement, *Seaton* v. *Seaton*, *supra*, but it may be in the form of a complete property settlement which is dictated into the record. *Kunz* v. *Jarnigan*, 25 Ark. App. 221, 756 S.W.2d 913 (1988). Obviously, if the parties intend for an agreement which is dictated into the record to constitute an independent agreement they should so state.

305 Ark. at 259, 807 S.W.2d at 916.

We also disagree that our decision in *Songer* v. *Songer*, 267 Ark. 1075, 594 S.W.2d 33 (Ark. App. 1980), controls the outcome of this appeal. That case did not involve a separately executed property settlement agreement, but a *decree* providing for alimony, child support, and a detailed division of property that had been presented to the chancellor for his signature after it had been approved as to form and substance by the parties and their respective attorneys. The chancellor later held that the alimony part of the decree was not subject to modification because he had nothing to do with the division of the property and it was strictly the parties' dealings. Nevertheless, in another part of the order, the chancellor relieved the appellant of his obligation under the decree to pay for insurance for the appellee's car. In reversing the chancellor's determination that the alimony portion of the decree was not subject to modifica-

tion, this court stated:

> To us, it seems highly inconsistent that the chancellor would say the decree was "contractual" and thus not subject to modification with respect to one aspect of support for the appellee but not as to another. More importantly, however, we find no evidence in the record to show the decree should be regarded as an independent contract which would make the decree unmodifiable.
>
> . . . . It seems clear in this case the parties were agreeing to the contents of the suggested decree when they signed it and presented it to the chancellor. The decree did not mention any separate agreement, and there is nothing, written or otherwise, showing intent that any agreement be enforceable separately from the decree.

Id. at 1076-77, 594 S.W.2d at 34.

In her petition for declaratory relief, appellant requested the court to construe and interpret the parties' property settlement agreement. The order of the chancellor recites that the intent of the parties was that the alimony would terminate when appellant became eligible to collect appellee's retirement. However, when a contract is unambiguous, its construction is a question of law for the court, *see Moore* v. *Columbia Mut. Cas. Ins. Co.*, 36 Ark. App. 226, 228, 821 S.W.2d 59, 60 (1991), and the intent of the parties is not relevant. Here, neither provision number three, which addresses alimony, nor number six, which addresses retirement benefits, is ambiguous, nor do they make any reference to the other provision. By a handwritten insertion, the alimony provision of the property settlement agreement was corrected to provide that alimony would terminate upon the remarriage of appellant. No such correction was made in reference to appellant's becoming eligible to collect retirement benefits.

Appellee contends that the chancellor's decision can be affirmed based upon his showing of fraudulent inducement that brought about his execution of the property settlement agreement. There is no evidence, however, to support such a finding. Appellee testified at trial that he received legal advice from Mr. Darrow and that he attended a conference where he, Mr. Darrow, and Mr. Feland (appellant's lawyer) were present before he signed the contract. He also admitted that appellant never did tell him that she

thought that the alimony was going to cease after she started getting her share of retirement.

■ We also find no merit to appellee's contention that the award of alimony beyond his retirement age violates federal law. The federal act upon which appellee relies for his argument prohibits a court from awarding a spouse a community interest in certain federal retirement benefits. Appellee argues that, if he is required to pay alimony beyond retirement age, he will have to make those payments from his Tier I benefits, which are not divisible under federal law. Appellee, however, has not cited any law that restricts him from paying alimony from retirement benefits that he might receive. The fact that appellee now finds that he has entered into an improvident agreement is not grounds for relief. *See Armstrong* v. *Armstrong*, 248 Ark. 835, 838-39, 454 S.W.2d 660, 663 (1970).

■ Accordingly, we reverse and remand this appeal to the chancery court for reinstatement of appellant's alimony and to enter judgment in favor of appellant for the unpaid alimony that has accrued to date.

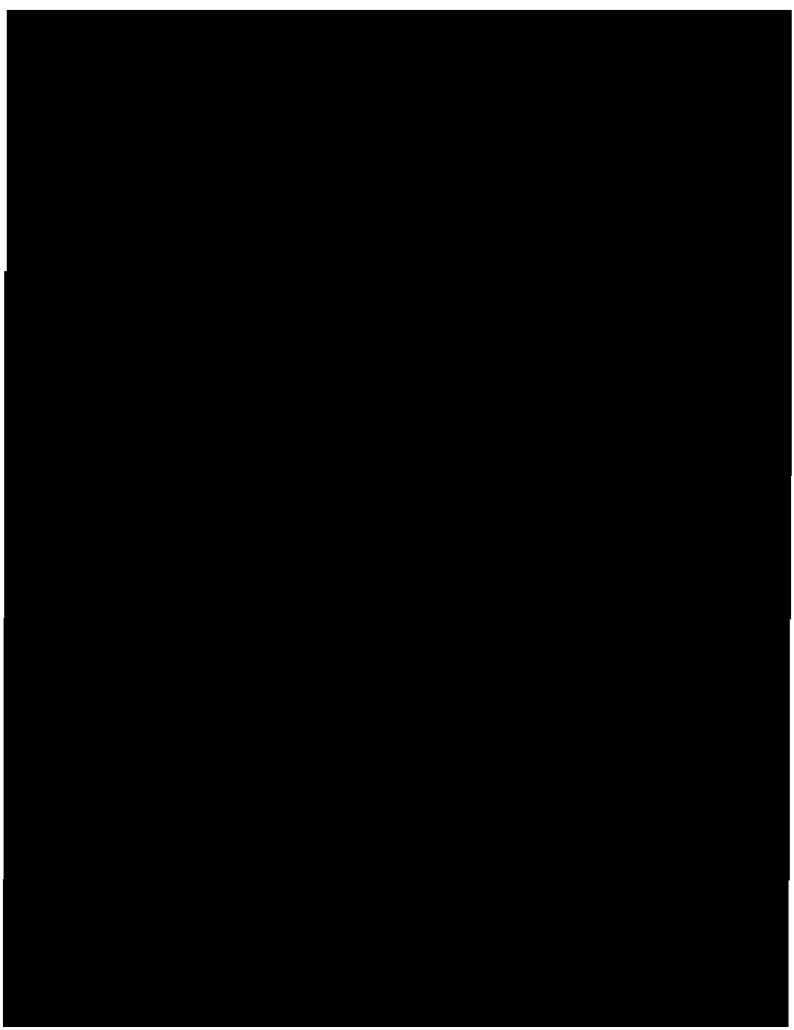
Reversed and remanded.

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

ST. VINCENT INFIRMARY MEDICAL CENTER *v.*
Constance BROWN

CA 95-462 917 S.W.2d 550

Court of Appeals of Arkansas
Division III
Opinion delivered March 20, 1996



Jack, Lyon & Jones, P.A., by: *John W. Fink*, for appellant.

The Whetstone Law Firm, by: *Gary Davis*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from an order of the Workers' Compensation Commission which affirmed and adopted the administrative law judge's decision. The law judge found that the appellee proved by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on October 8, 1993, and that she was temporarily totally disabled from October 9, 1993, to February 14, 1994. The law judge also found that the appellant failed to prove by a preponderance of the evidence that the appellee misrepresented her physical condition when applying for employment.

The appellee is a twenty-nine-year-old nurse. On October 8, 1993, she went into a patient's room to lower the bed with the electric button, but the bed did not go down. She reached under the bed, in a squatting position reaching forward with her right arm, to find a lever to lower the bed, and her right shoulder dislocated. The appellee testified that, because she is a medical person and knew what to do, she put the shoulder back in place. The appellee worked about two more hours and then, because of

the pain, went to the emergency room.

The appellee testified that in the past she had problems with her right shoulder. In August 1992, her shoulder dislocated while she was skydiving, and she had to go to the emergency room to have it put back in place. Ten days later she was fine, and a week later she was not having any real problems with her shoulder. In January 1993, the appellee's shoulder dislocated again when a man with whom she was country dancing grabbed her and yanked her shoulder out. The appellee put it back in and was fine a few days later.

The appellee testified that she had no problems with her shoulder from a week after the 1992 incident until January 1993; that she never had any problems with her shoulder between April and June 1993 in her duties as a housekeeper; and that she had no problems between June 1993, when she began working at Doctors Hospital and later at St. Vincent, up through October 8, 1993. The appellee testified further that in June 1993 her shoulder was not a concern; it had never really hindered her life. The appellee testified that the incident at St. Vincent was much more painful than the previous incidents and that, on a scale from one to ten, the previous incidents rated a two or three, but the October incident was an eight or nine.

Appellant's first two arguments contend that the appellee's injury is not compensable. Appellant argues that the appellee's injury is not compensable because it does not meet the definition of a compensable injury as defined by Act 796 of 1993, codified as Ark. Code Ann. § 11-9-102 (Supp. 1995), which must be "strictly" construed, Ark. Code Ann. § 11-9-704(c)(3) (Supp. 1995), and because the incident only made her pre-existing condition symptomatic.

Appellant contends that the incident at work caused no physical harm to the appellee's body; that the incident did not change the underlying shoulder condition; and that it was merely coincidental that the injury occurred at work. Appellant says the appellee had a pre-existing condition making her shoulder apt to dislocate at any time.

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 issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

Arkansas Code Annotated § 11-9-102 (Supp. 1995) provides:

> (5)(A) "Compensable injury" means:
>
> (i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place or occurrence[.]

Here, there is evidence that the appellee dislocated her shoulder on October 8, 1993, while reaching under a patient's bed. The appellee continued to work for no more than two hours and then went to the emergency room where she was given medicine for pain and a sling. The appellee testified that the pain from the dislocation was 8 or 9 on a scale of 10. Although appellee had other episodes in her past when her shoulder popped out, the employer "takes the employee as he finds him," and employment circumstances that aggravate pre-existing conditions are compensable. *Public Employee Claims Division* v. *Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

In discussing the compensability of the appellee's injury the law judge stated:

> Had respondent shown that claimant was continuously symptomatic from January 1993 until October 1993 or that she received medical care on several occasions between these dates, I might be inclined to find that the October 8, 1993, incident was a recurrence of a non-compensable, pre-existing condition stemming from the August 1992 or January 1993 injuries. No such evidence was introduced, however. The case therefore appears to be one in which a claimant with a pre-existing infirmity is injured as a result of

> employment activities that probably would not have caused injury to someone without the pre-existing disorder. Such injuries remain compensable under Arkansas's new workers' compensation law.

Based on the evidence and considering the new law, we think the Commission's decision is supported by substantial evidence.

Appellant also argues that the appellee is not entitled to workers' compensation benefits because she misrepresented her physical condition on her employment application, and her claim for benefits is therefore barred by the rule of law adopted in *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). The appellant argues that the appellee revealed her complete medical history except her right shoulder problem and that Marilyn Masingill, who made the decision to hire the appellee, testified that had she been aware of appellee's shoulder problem, she would not have hired her if accommodations could not have been made for the appellee to meet her job requirements.

In *Shippers* our supreme court held that a false representation on a employment application bars recovery under our workers' compensation law when three factors are established: (1) the employee must have knowingly and wilfully made a false representation as to her physical condition; (2) the employer must have relied upon the false representation, and this reliance must have been a substantial factor in the hiring; and (3) there must have been a causal connection between the false representation and the injury.

Here, the medical history form which was completed by the appellee asked:

> 5. Have you had any serious injuries, including broken bones, head injuries, back strain or recurring pain in back or neck? If "Yes," explain, giving approximate date of onset and recurrences.
>
> . . . .
>
> 7. Do you have any physical limitations in regard to movement of fingers, hands, arms, legs, back? Have you ever worn a back brace? Have you worn a knee brace?

In response to question 5, the appellee disclosed that she had ruptured her flexor tendon on the right hand and had sustained a wrist injury, both of which required surgery. Question 7 was answered in the negative.

The appellee testified that the document did not specifically ask anything about a shoulder injury and that at the time she filled out the application she was not having any problems with her shoulder. She testified that after the first incident in 1992 she had no problems until January 1993 and that she experienced no problems with her shoulder between April and October 1993. She said she did not believe that her shoulder was really a concern and that it had never really hindered her life. The appellee testified further that, to her, a serious injury requires surgery, hospitalization and/or extensive rehabilitation. She said that when she was interviewed by Marilyn Masingill her physical condition was not the focus of any part of the verbal interview and she was not asked about any shoulder problems.

The administrative law judge, in an opinion which was affirmed and adopted by the full Commission, held that the evidence did not prove that the appellee knowingly and wilfully made a false representation on the employment application with respect to her physical condition.

We cannot conclude that reasonable minds, with the same evidence before them, could not reach the Commission's conclusion.

Affirmed.

STROUD and NEAL, JJ., agree.

James Eldridge PHILLIPS *v.* STATE of Arkansas

CA CR 95-379 918 S.W.2d 721

Court of Appeals of Arkansas
Division III
Opinion delivered March 20, 1996

Robert Meurer, for appellant.

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

JOHN F. STROUD, JR., Judge. James Phillips was charged with possession of a controlled substance, methamphetamine. After a pretrial motion to suppress evidence was denied, Phillips entered a conditional plea of guilty under Ark. R. Crim. P. 24.3(b). He was sentenced to three years' imprisonment with eighteen months suspended.

Phillip Hydron, a White County Deputy Sheriff, testified at

the suppression hearing. He stated that on November 25, 1993, he was on patrol near Higginson when he saw a van stopped in the middle of the road. He said that the van appeared to have a problem, so he stopped to investigate. When appellant rolled down the driver's side window, Officer Hydron smelled marijuana.

Officer Hydron asked appellant for his driver's license, and appellant began flipping through his billfold to retrieve it. Hydron said that he saw a plastic package rolled up in appellant's wallet. When asked what was in the package, appellant shrugged his shoulders. Then the officer asked about the smell of marijuana and appellant said that he and his buddy had smoked some earlier that day. Officer Hydron asked for the plastic package, and appellant gave it to him. There was what appeared to be marijuana inside the package. Hydron read appellant his Miranda rights and arrested him for possession of a controlled substance.

After he placed appellant in the patrol car, Officer Hydron conducted a search of the van. In a jacket, he found a pipe used for smoking marijuana. In another jacket, he found a syringe, a spoon, some cotton, and a white plastic package filled with white powder.

At the detention center, appellant was again advised of his rights. Appellant then gave a statement in which he admitted that the marijuana and the drug paraphernalia were his. He also admitted that the white powder was his and that it was methamphetamine.

Appellant argues that the trial court erred in refusing to grant his motion to suppress the evidence discovered by the officer because he had not been lawfully detained or arrested prior to the discovery of the marijuana in his wallet. He also argues that the evidence should have been suppressed because the searches of both his wallet and his van were unlawful.

■ In reviewing a trial court's denial of a motion to suppress evidence, we make an independent determination based on the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Roark* v. *State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994); *Bond* v. *State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994).

We first address appellant's contention that he was illegally detained by Officer Hydron. Appellant argues that Ark. Code Ann.

§ 16-81-204(a) (1987), Ark. R. Crim. P. 3.1, and the Fourth Amendment require that an officer must reasonably suspect that a person is committing, has committed, or is about to commit a crime before he can detain that person. However, not all personal intercourse between policemen and citizens involves "seizures" of persons under the fourth amendment. *Thompson* v. *State*, 303 Ark. 407, 797 S.W.2d 450 (1990). Likewise, not all personal intercourse between policemen and citizens involves a detention under Ark. Code Ann. § 16-81-204(a) (1987) and Ark. R. Crim. P. 3.1. *See Thompson, supra*; *Adams* v. *State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988); and Ark. R. Crim. P. 2.2(a).

Although Officer Hydron testified that he would have been suspicious if appellant had attempted to leave after Hydron stopped and walked toward appellant's van and that he would still have wanted to question him, the officer's subjective intention is not dispositive of whether there has been a seizure. Whether a person has been seized within the meaning of the Fourth Amendment depends on whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Smith* v. *State*, 321 Ark. 580, 906 S.W.2d 302 (1995) (citing *United States* v. *Mendenhall*, 446 U.S. 544, *reh'g denied*, 448 U.S. 908 (1980)). We find this reasoning persuasive and hold that this is also the standard to determine whether a person has been detained under Ark. Code Ann. § 16-81-204(a) (1987) and Ark. R. Crim. P. 3.1.

The result in this case is controlled by the holding in *Thompson* v. *State*, 303 Ark. 407, 797 S.W.2d 450 (1990), in which the Arkansas Supreme Court found that it was not a seizure under the Fourth Amendment for a police officer to approach a car parked in a public place to determine whether there was anything wrong. Just as in *Thompson, supra*, there is no evidence in the record indicating that the officer restrained the liberty of the appellant by means of physical force or a show of authority. Thus, there was no "seizure" under the fourth amendment and no detention under Ark. Code Ann. § 16-81-204(a) (1987) and Ark. R. Crim. P. 3.1 until after the van window was rolled down and Officer Hydron smelled marijuana.

Once appellant had rolled down the window and Officer Hydron smelled marijuana, the officer had a reasonable suspicion that the occupants of the van were committing, had committed, or

were about to commit a crime. This authorized the officer to detain them for a reasonable time under Ark. R. Crim. P. 3.1 in order to verify their identification or determine the lawfulness of their conduct. *Adams, supra.* Thus, appellant's claim that he was illegally detained is without merit.

Appellant's second contention is that the trial court should have suppressed the evidence because the officer did not articulate any of the factors contained in Ark. Code Ann. § 16-81-203 (1987) as a basis for his seizing and searching the cellophane which he had observed in appellant's wallet. Ark. Code Ann. § 16-81-203 allows police officers to conduct a warrantless search of a person who has been detained if he reasonably suspects that the person is armed and presently dangerous to the officer or others. Although it is true that Ark. Code Ann. § 16-81-203 would not justify a warrantless search in this case, the plain-view exception to the warrant requirement rendered the warrantless search lawful.

Under the plain-view doctrine, seized evidence is admissible when the initial intrusion was lawful, the discovery of the evidence was inadvertent, and the incriminating nature of the evidence was immediately apparent. *Bond, supra.* As previously discussed, Officer Hydron's intrusion was lawful. He stated that he noticed the cellophane package rolled up in appellant's wallet when appellant was flipping through it to find his driver's license; therefore, the discovery was inadvertent. The incriminating nature of the package was immediately apparent in light of the fact that the officer smelled marijuana, the fact that appellant admitted to having smoked marijuana earlier in the day, and the fact that a suspicious packet was rolled up in appellant's wallet. *See Washington* v. *State,* 42 Ark. App. 188, 856 S.W.2d 631 (1993). Therefore, the trial court did not err in failing to grant appellant's motion to suppress the marijuana.

Appellant's final contention is that the trial court erred in refusing to suppress the methamphetamines seized when Officer Hydron searched the van and to suppress the confession given by appellant after his arrest. Appellant contends that the officer's warrantless search of the van violated his Fourth Amendment rights because the officer did not articulate any reason to suspect that the van contained items subject to seizure or that the van contained weapons. This argument fails because an officer, incident to a lawful custodial arrest of the occupants of a vehicle, may contemporane-

ously search the passenger compartment and any containers found within the passenger compartment of the vehicle. *Stout* v. *State*, 320 Ark. 552, 898 S.W.2d 457 (1995); *Miller* v. *State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993).

Affirmed.

MAYFIELD and NEAL, JJ., agree.

Walter CRESON *v.* Brenda Sue CRESON

CA 95-79 917 S.W.2d 553

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1996

Nolan, Cadell & Reynolds, P.A., by: *Fred Caddell*, for appellant.

Gean, Gean, & Gean, by: *Roy Gean, Jr.*, for appellee.

WENDELL L. GRIFFEN, Judge. Walter Creson has appealed the August 22, 1994, decree entered in the Sebastian County Chancery

Court on October 12, 1994, that divided real and personal property between him and his ex-wife due to their divorce. Appellant also challenges the chancellor's findings regarding child support that he has been directed to pay. We have conducted a *de novo* review of this case, and conclude that the chancellor's findings are not clearly erroneous. Therefore, we affirm the decree.

The parties were married on November 27, 1976, were separated on April 25, 1994, and are parents of two children named Ellen Creson (born September 27, 1977) and Caleb Creson (born May 27, 1980). Appellee filed for divorce on May 11, 1994, on the grounds of general and personal indignities, and was granted a divorce upon her petition. She was awarded custody of the children, and appellant was ordered to pay child support at the rate of $102.00 per week. The divorce decree also dissolved the tenancy by the entirety by which the parties held their marital residence, and granted appellee possession and use of the residence until any of three events occurs: (a) the youngest child graduates from high school; (b) appellee ceases to live in the residence; or (c) appellee cohabits there with someone to whom she is not married. In any event, the decree provides that the residence will be sold with the equity being divided equally. Appellee will receive credit for one-half of the principal reduction that occurs from the time of entry of the decree until the sale of the residence. Appellee was awarded title to the 1987 Honda Accord automobile that was debt-free; appellant was awarded title to the 1992 Toyota truck that was subject to a debt of almost $10,000, and the parties were awarded joint ownership of the 1980 Dodge Omni automobile driven by their daughter.

One aspect of appellant's challenge to the property distribution made by the chancellor pertains to $3,800 that has been described as "inherited property." Appellant inherited approximately $27,000 after his parents died. The money was placed in a joint account in the names of appellant and appellee. When the divorce decree was issued, approximately $3,800.00 remained in the account. Appellant argues that the chancellor erred in finding that this sum became joint property that could be distributed equally between the parties upon their divorce.

Appellant's contention requires that we determine whether he produced clear and convincing evidence that he did not intend to bestow a gift of the inheritance money to rebut the presumption of gift that arises whenever one spouse places property

in a joint account with the other spouse. *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). Similarly, the law presumes that when personal property is placed in the names of both husband and wife, the property is held by them as tenants by the entirety. *Boggs* v. *Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). To support a finding that such property is "separate property" for purposes of property distribution upon divorce, the party seeking to rebut either presumption must present clear and convincing evidence that the property was separately owned. In either event, the requirement of clear and convincing evidence means that the proponent seeking to rebut the presumption must do so by 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. Clear and convincing evidence 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 defined clear and convincing evidence as:

> evidence by a credible witness whose memory of the facts about which he 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.

36 Ark. App. at 199-200.

■ We agree with the chancellor that appellant failed to produce clear and convincing evidence to rebut the presumption, and therefore conclude that the chancellor's finding is not clearly erroneous. The record shows that although appellee did not deposit or withdraw funds from the joint account that contained the $3,800 balance, appellant engaged in several actions that support a finding that he either bestowed a gift of the money to appellee, or created a tenancy by the entirety in it. He deposited the money in a joint account with her after his mother died. When the parties later decided to refinance the residence that was acquired during their marriage and, therefore, held by them as a tenancy by the entirety, appellant withdrew $22,000 of the money from the joint account and paid it toward the refinancing. He contends that this money was separate property because appellee agreed that he would be repaid that amount whenever the residence was sold. Appellee

concedes that she told him that the money would be repaid when the resale occurred. The chancellor, however, found that the funds had been so intermingled as to become a gift. We do not consider that finding to be clearly erroneous given that the record shows that the "inheritance money" was deposited in a joint account and was deliberately invested in the marital residence by the refinancing transaction. There was also proof that appellant used money from the joint account on other purchases, such as video equipment, which became marital property. We hold, therefore, that the chancellor's finding that the $3,800 balance should be divided equally is not clearly erroneous.

We uphold the chancellor's finding on this point, mindful that the parties testified at trial to an agreement between them that appellant would be repaid the $22,000 that was used from the joint account to refinance their marital residence. Appellant argues that their agreement was clear and convincing proof that the money was separate property. While appellee conceded that she agreed that the $22,000 would be repaid when the marital residence was resold, she argues that this agreement was merely to accommodate appellant and avoid further discussions. The chancellor had this proof before him when he made the finding regarding the joint account, and he resolved the credibility questions concerning it. We do not find his reasoning clearly erroneous. Indeed, appellant's argument is unconvincing when one considers that he took admittedly separate property inherited from his parents, deposited it in joint property—an account—with appellee, then withdrew $22,000 of it to invest in more joint property—their residence—that he knew was property held as a tenancy by the entirety.

Appellant also challenges the chancellor's decisions concerning the use of the marital residence, and the distribution of automobiles that the parties own. As stated earlier, appellee was awarded possession of the residence until the younger child completes high school, she (appellee) ceases living in the residence, or she cohabits there with someone to whom she is not married. In any event, the residence shall be sold, the equity divided equally, and appellee is to be credited with half the reduction on the principal owed from the date of the divorce decree until the date of sale. Appellant argues that because the outstanding indebtedness is only $22,000, appellee could conceivably make a substantial reduction in the principal during this time period that would effectively increase her financial

position, while appellant will not receive a similar benefit from the rent that he pays for his residence over that time span. He contends that, upon the divorce, the chancellor should have directed that the residence be sold, and that the sale proceeds be divided equally so that the parties could each use them to acquire their own residences.

It is true that all marital property is to be divided equally between the divorcing parties pursuant to Ark. Code Ann. § 9-12-315(a)(1)(A), and that the chancellor must state in the order or decree dealing with the property division why property is not distributed equally. However, the residence is property that was held as a tenancy by the entirety, a fact conceded by counsel for appellant during oral argument. As such, that estate was automatically dissolved when the final decree was rendered, unless the chancellor specifically provided otherwise, pursuant to Ark. Code Ann. § 9-12-317 (Supp. 1995).

In this case, subject to the conditions already mentioned, the chancellor gave appellee possession of the marital residence. We find no error in that decision, or in the property distribution whereby appellee will be credited with the reduction in the principal owed on that property before the proceeds of its sale are divided between the parties, whenever the sale occurs. Appellee does receive a benefit, to some extent, that appellant will not enjoy. However, she must also bear a burden that he does not undertake. The chancellor decreed that appellee shall be responsible for all mortgage payments, taxes, insurance, and upkeep costs for that property during the time that she enjoys possession. Those costs are predictable insofar as the mortgage payments and taxes are concerned, less predictable as far as insurance costs are concerned, and wholly unpredictable concerning upkeep. Whether the costs will involve plumbing bills incurred because of frozen water pipes, repairs to the residence after a natural disaster, expenses incurred to maintain the appearance and marketability of the residence, or any of the other foreseeable events incidental to home ownership, the chancellor has placed the entire burden of meeting them on appellee. The decree does not require appellant to contribute any part of those costs, either at the time they are incurred or by debiting his share of the equity whenever the house is sold. If those costs exceed whatever benefit appellee is deemed to gain from the property distribution method adopted by the chancellor, appellant has no

obligation to even the burden. We do not find that result clearly erroneous.

We also find no error in the chancellor's decision awarding appellee the Honda Accord that was debt-free, while awarding appellant the Toyota truck with its indebtedness. We do not view Ark. Code Ann. § 9-12-315 (Supp. 1995) to compel mathematical precision in property distribution, only that marital property be distributed equitably. The chancellor is vested with a measure of flexibility in apportioning the total assets held in the marital estate upon divorce, and the critical inquiry is how the total assets are divided. *See Canady* v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986). The chancellor is given broad powers, under the statute, to distribute all property in divorce cases, marital and non-marital, in order to achieve an equitable distribution. *Smith* v. *Smith*, 32 Ark. App. 175, 798 S.W.2d 442 (1990). The vehicle that appellant was awarded has the burden of its indebtedness and the benefit of being a 1992 model, contrasted to the 1987 model vehicle that appellee was awarded. The chancellor was entitled to take that issue, among others, into account when making the property distribution, and we do not find his decision to be clearly erroneous.

Finally, appellant argues that the chancellor miscalculated his take-home pay, and that the miscalculation resulted in an inflated child support payment. The chancellor based the decision to require child support payments of $102.00 per week after analyzing appellant's wage earnings over a thirty-one-week period of time. Appellant contends that the chancellor should have used a twelve-week period to determine his earnings for purposes of the child support award. The two methods produce a twelve dollar difference per week in the child support obligation ($102.00 per week using the thirty-one-week calculations versus $90 per week using the twelve-week method).

The amount of child support lies within the sound discretion of the chancellor, and his finding will not be disturbed on appeal, absent a showing that he abused his discretion. *Scroggins* v. *Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). The chancellor made the child support order after receiving evidence of appellant's earnings from his job, as well as proof that he earned income from separate property held with his sisters. We find no abuse of discretion in the decision to consider the longer period of thirty-one

weeks in order to obtain a better perspective of appellant's earnings.

Affirmed.

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

Geraldo RAMIREZ *v.* HUDSON FOODS, INC.

CA 95-242 918 S.W.2d 207

Court of Appeals of Arkansas
Division I
Opinion delivered March 27, 1996

Wilson, Walker & Short, by: *Joe C. Short*, for appellant.

Duncan & Rainwater, by: *Robert A. Russell, Jr.*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Geraldo Ramirez, appeals from a decision of the Arkansas Workers' Compensation Commission which denied his claim for benefits after he sustained an injury as a result of an encounter with a co-employee.

The Commission held that appellant's right-eye injury was noncompensable. Arkansas Code Annotated § 11-9-401(a)(2) (1987) states that an injury is noncompensable if "substantially occasioned . . . by willful intention of the injured employee to bring about the injury or death of himself or another." Appellant argues that the Commission's decision is not supported by substantial evidence as there is nothing to indicate that he had a willful intention to injure a co-worker.

Appellant worked in the sanitation area of appellee's processing plant washing machinery with a water hose. Appellant's co-worker, Chester Moore, testified that he and appellant worked adjacent to each other and that Moore had reported to his supervisor an ongoing problem of co-workers spraying him with water. On March 22, 1993, Moore said that appellant sprayed him with water, but Moore did not think it was deliberate. Moore testified that he told appellant to stop getting him wet. When Moore continued to get sprayed with water, Moore aggressively warned appellant to stop getting water on him. Appellant, who has limited English and education, acted as if he did not understand. Appellant then struck Moore on his left cheek with an open hand. Moore said that the blow was not forceful enough to knock him down, to cause him to rock back, or to injure him. Moore then hit appellant in the right eye, causing serious injury.

Appellant denied hitting Moore. Appellant stated that he was injured when he was pushed from behind, which caused him to fall forward and strike his face on the machinery.

For appellant's injury to be found noncompensable under Ark. Code Ann. § 11-9-401(a)(2) (1987), appellant must

have had a "willful intention" to "injure" himself or another.[1] A willful intention to injure denotes "premeditated or deliberate misconduct," rather than a sudden or impulsive act, and includes a physical force that is designed to inflict "real injury." *Johnson* v. *Safreed*, 224 Ark. 397, 273 S.W.2d 545 (1954). A willful intent to injure obviously contemplates behavior of greater gravity and culpability than what may be characterized as aggression. *Id.* (quoting 1 A. Larson, *Workmen's Compensation Law* § 11.15(d)).

The Commission found that appellant's conduct was premeditated and rose to willful misconduct; thus, appellant's injury was noncompensable. On appeal of a workers' compensation case, we review the evidence in the light most favorable to the Commission's decision and affirm if it is supported by substantial evidence. *Plante* v. *Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994). Substantial evidence exists if reasonable minds could have reached the same conclusion. *Id.* Thus, before we reverse the Commission's decision, we must be convinced that fair-minded persons considering the same facts could not have reached the conclusion made by the Commission. *Id.*

In *Johnson, supra*, a dispute arose between the claimant and a co-worker. The claimant stated that he struck his co-worker because he felt threatened. The court held that the injury was compensable because the claimant's action was an impulsive light blow given in an attempt to protect himself and was not "of that serious or deliberate character necessary or essential to evince a willful intention" to injure. *Johnson*, 224 Ark. at 405. Although *Johnson* was decided before § 11-9-401 was enacted, we find its reasoning controlling. Arkansas Code Annotated § 11-9-401 does not define "injury." However, *Johnson, supra*, speaks of a "real injury," and one of "serious or deliberate character." Here, appellant's actions do not warrant a denial of benefits. Because we conclude that the Commission's decision is not supported by substantial

[1] Arkansas Code Annotated § 11-9-401(a)(2) (Supp. 1995), applicable to injuries sustained after July 1, 1993, states that there shall be no liability when the injury was "substantially occasioned by the willful intention of the injured employee to bring about such compensable injury."

evidence, we reverse and remand for an award of benefits.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

Ricky Darnell WILKERSON *v.* STATE of Arkansas

CA CR 95-89 920 S.W.2d 15

Court of Appeals of Arkansas
En Banc
Opinion delivered March 27, 1996
[Petition for rehearing denied June 26, 1996.*]

Robert P. Remet, for appellant.

*COOPER and MAYFIELD, JJ., would grant.

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

JOHN MAUZY PITTMAN, Judge. The appellant, Ricky Darnell Wilkerson, pleaded guilty on January 18, 1993, to burglary and theft of property and was placed on probation for a period of three years. In February 1994, the prosecuting attorney filed a petition alleging that appellant had violated several conditions of his probation. After a hearing, the trial court found that appellant had violated certain terms of probation, revoked his probation, and sentenced him to five years' imprisonment in the Arkansas Department of Correction, with four years suspended on each charge. Appellant argues that the revocation petition should have been dismissed for failure to have a timely hearing. We affirm.

Arkansas Code Annotated § 5-4-310(b)(2) (Repl. 1993) provides that a revocation hearing shall be conducted within a reasonable period of time, not to exceed sixty (60) days after the defendant's arrest. The record indicates that appellant was arrested for violation of probation on March 2, 1994. On May 2, 1994, a hearing on the revocation petition was continued to May 27, 1994, at the State's request and without objection from appellant, to permit appellant to assemble his witnesses. At the May 27, 1994, revocation hearing, after all the testimony was presented, appellant moved to dismiss the petition on the basis of § 5-4-310(b)(2) for lack of a speedy hearing. The court found that appellant waived his objection by failing to move for dismissal prior to the hearing and revoked his probation.

We agree with the trial court's ruling. The State has a right to be notified prior to the hearing that a defendant will raise a speedy-hearing objection, and appellant waived his objection by failing to move for dismissal of the petition prior to the hearing. *Summers* v. *State*, 292 Ark. 237, 729 S.W.2d 147 (1987). In *Summers*, *supra*, the Arkansas Supreme Court applied to a revocation proceeding Arkansas Rule of Criminal Procedure 28.1(f), which states that a defendant's failure to move for dismissal of a charge for lack of a speedy trial prior to trial results in a waiver.

Appellant's counsel argues that he moved for dismissal as soon as he became aware that appellant's March 2 arrest was for the probation violation, rather than on the underlying felony charges.

However, counsel had access to this information prior to the hearing, and has not demonstrated a good reason why the motion was not filed before the hearing. *Id.* We find no error and affirm the revocation of appellant's probation.

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

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge. I cannot agree with the majority opinion in this case. The opinion recognizes that Ark. Code Ann. § 5-4-310(b)(2) (Repl. 1993) provides that a revocation hearing shall be conducted within a reasonable period of time, not to exceed sixty (60) days, after the defendant's arrest, but by reliance upon *Summers* v. *State*, 292 Ark. 237, 729 S.W.2d 147 (1987), the majority holds that the appellant failed to move for dismissal prior to trial and that this resulted in a waiver of the sixty-day hearing requirement.

The first problem I have with the majority's thesis is that our examination of the issue involved should start with the appellant's *first* appearance before the court after his arrest for violation of probation. This appearance was pursuant to an order setting a preliminary revocation hearing. The order shows it was signed by the judge on March 2, 1994, and the hearing was set for March 29, 1994.

At that hearing, as shown by the record and appellant's abstract, the appellant was brought before the judge and the following proceedings, relevant to the issue now on appeal, occurred:

> *Court*: All right, Mr. Wilkerson, one thing seems clear, you don't have any ability to hire a lawyer, do you?
>
> *Defendant*: No, sir.
>
> *Court*: The Court's going to appoint the public defender's office to represent you, sir, in your revocation hearing set for May the 2nd.
>
> *Defendant*: Now, what — That will be — A revocation is like to tell me if I'm violated.
>
> *Court*: Yes, sir.
>
> *Defendant*: Shouldn't we go to trial first? I mean, I'm not trying to be smart, but —

Court: That's up to the State. They may not be ready for you then. They may come back and file charges —

. . . .

Defendant: But I'm sitting down there. I have no bail because it makes it look like, on paper, it makes it look like I'm Al Capone. And I'm sitting down here in this jail house for what? They could hold me nine months, ten months,

Court: No, sir. They won't hold you that long or they're going to have to file on you.

Defendant: So the charges aren't filed yet?

Court: The new felony charges that Mr. Wray has referred to apparently are not yet filed, at least I don't know about them. The revocation petition has been filed and may well be amended before May 2nd. See, we don't have to try the new charges before we have a revocation hearing on probation.

At this point we need to look at the dates involved. It appears from an exchange between the court and appellant at the beginning of the preliminary hearing that the appellant had been in jail in Hamburg, Arkansas, since March 2, 1994. However, at the revocation hearing it was stipulated — and this is clearly abstracted in appellant's brief — that the appellant was arrested on March 1, 1994, at 9:40 p.m. The stipulation also agreed that appellant was arrested for probation violation only — pursuant to a telephone call by Debbie Hancock, probation officer.

This information is important because it shows that whether the arrest occurred on March 1 or March 2, sixty days from those dates would be either April 30, 1994, or May 1, 1994. Of course, the revocation hearing set for May 2, 1994, was set more than sixty days after appellant's arrest regardless of whether the arrest was made on March 1 or March 2. However, April 30, 1994, fell on a Saturday and May 1, 1994, fell on a Sunday. Under Rule of Criminal Procedure 1.4 when the last day of the time period to do an act provided by a statute governing criminal procedure falls on a Saturday or Sunday the period shall run until the end of the next day which is neither a Saturday or Sunday, nor a legal holiday. Therefore, the revocation hearing held on May 2, 1994, was within sixty days after appellant's arrest.

However, I do not believe that the time computation provisions of Ark. R. Crim. P. Rule 1.4 answers the question presented in this case. The simple fact is that the last day to hold the revocation was May 2, 1994, and the hearing was not held on that date. Instead, on the State's motion, the hearing was continued until May 27, 1994, and appellant's attorney did not object to the continuance. If there was a waiver of the sixty-day time limit for holding the hearing, it had to occur when the hearing was continued on May 2; therefore, the case of *Summers* v. *State*, *supra*, does not really apply to this case. That case held that a waiver of the time limit occurred because the State was not put on notice that the sixty-day statutory period would be invoked. The court said that this lack of notice prevented the State from having the opportunity to present evidence regarding whether there was a delay in returning Summers to Arkansas which would prevent the running of the time period. No such problem is involved in this case.

Actually, the case of *Haskins* v. *State*, 264 Ark. 454, 572 S.W.2d 411 (1978), relied upon by the State, is really more in point here. In *Haskins* there was no objection at all in the trial court to the fact that the revocation hearing was held more than sixty days after the arrest of Haskins. Here, of course, there was an objection — and motion to dismiss — but after the sixty-day period had run. The State in its brief recognizes that neither *Summers* nor *Haskins* really controls the present case, and its brief states, "These precise facts seem to constitute a case of first impression."

When we start with the appellant's *first* appearance before the court — the preliminary hearing provided by Ark. Code Ann. § 5-4-310(a) (Repl. 1993) to determine whether there is reasonable cause for further revocation proceedings — we see that the revocation hearing was set for the sixtieth day thereafter, as computed by Ark. Rule. Crim. 1.4. Thus, under the "precise facts" in this case, the crucial point, as to waiver of the time limit for holding the revocation hearing, was May 2, 1994, at which time the hearing was continued and reset for May 27, 1994, and it is a mistake to rely on *Summers* v. *State* and hold that the failure to make the motion until after the hearing started on that day constituted a waiver of the sixty-day time limit. The reasoning in *Summers* does not apply here because the sixty-day period had already expired by May 27, 1994.

Therefore, I think we must look to May 2, 1994, for our answer under the precise facts in this case. Now it is clear that a

defendant has a constitutional right to counsel at a revocation hearing. *See Furr* v. *State*, 285 Ark. 45, 685 S.W.2d 149 (1985) (holding that under *Mempa* v. *Rhay*, 389 U.S. 128 (1967), counsel is required at every stage of a criminal proceeding where substantial rights of a defendant may be affected). The record and appellant's abstract show that on May 2, 1994, the hearing began by the court announcing that "Ricky Wilkerson is in jail." The State then informs the court that the State is anticipating filing an amended petition for revocation and asked for a continuance. The court then called for "response from the defense," and appellant's appointed attorney said, "I've got no objection to that, Your Honor." The court then said, "All right, Reset May 27."

Now the second problem I have with the majority's decision in this case results from the fact that the appellant at the preliminary hearing was clearly unhappy with the fact that he was going to have to sit in jail until his revocation hearing sixty days later, and both the court and appellant's counsel, appointed and present at the preliminary hearing, knew that. However, on May 2, 1994, while the appellant was in jail and not in court, the judge granted (and appellant's counsel said he had no objection) a continuance and resetting which extended the sixty-day period in which to have the revocation hearing by a period of twenty-five days. One of two things seems clear to me: either counsel had a good reason for not objecting to the continuance, or he failed to provide effective assistance to appellant.

Both this court and our supreme court have looked to the rules providing for speedy trial of criminal charges for guidance in cases involving the application of the statutory sixty-day period for revocation hearings. *See Lark* v. *State*, 276 Ark. 441, 637 S.W.2d 529 (1982); *Cheshire* v. *State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985). And in this regard, in the case of *Hall* v. *State*, 281 Ark. 282, 663 S.W.2d 926 (1984), an appeal from the trial court's refusal to grant post-conviction relief, the Arkansas Supreme Court held that the failure of appellant's counsel to move for dismissal at the time the prosecution was barred by the speedy-trial rule constituted ineffective assistance of counsel. Even though the defendant had waived his right to a speedy trial and entered a plea of guilty, our supreme court said, "counsel at the time of the plea offered no testimony of trial strategy or other reason for the failure to assert the right to a speedy trial, and the appellant did not knowingly and

intelligently waive his right to a speedy trial." And based on the same reasoning, in *Walker* v. *State*, 288 Ark. 52, 701 S.W.2d 372 (1986), the Arkansas Supreme Court granted post-conviction relief where the speedy-trial time had expired and concluded as follows:

> We thus hold the failure to make the dismissal motion was ineffective assistance of counsel, the defendant suffered prejudice from it, and we have no alternative but to reverse the conviction and dismiss the case.

See also Clark v. *State*, 274 Ark. 81, 621 S.W.2d 857 (1981).

It is, of course, true that this case is not a Rule 37 post-conviction case. But under the precise facts in this case, I would hold that the appellant did not waive the sixty-day period for his revocation hearing. It is clear that he was not consulted about the matter when the State asked for a continuance on May 2, 1994. Since that was the last day of the sixty-day period and the State asked for the continuance, I would hold that because the record shows nothing from which we can find that the appellant actually knew that his attorney waived the right to have the hearing within the sixty-day period, his counsel's waiver was not sufficient.

As the majority opinion states, appellant's counsel argued to the trial court, after the motion to dismiss was finally made, that under the confusing circumstances present in this case, he made the motion to dismiss as soon as he became aware that appellant's arrest was for probation revocation. I do not fault the trial court's finding that this was not a good excuse. But I do think that the trial court should have granted the motion to dismiss because on the facts in this case the appellant did not waive the right to have his revocation hearing within sixty days of his arrest.

I would reverse and dismiss the petition for revocation.

COOPER, J., joins in this dissent.

JAMES RIVER CORPORATION *v.* Terry J. WALTERS

CA 95-551 918 S.W.2d 211

Court of Appeals of Arkansas
Division I
Opinion delivered March 27, 1996

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

Walker Law Firm, by: *Eddie H. Walker, Jr.*, and *R. Scott Zuerker*, for appellee.

JOHN B. ROBBINS, Judge. Appellant James River Corporation appeals from a decision of the Workers' Compensation Commission which awarded appellee Terry Walters benefits as the result of a work-related injury. Appellant contends on appeal that the Commission erred in finding that it had failed to meet the second part of the *Shippers Transport* defense to this claim. We find no error and affirm.

In *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979), the court adopted the rule that a false representation as to one's physical condition on an employment application will bar recovery under our Workers' Compensation Act if the employer meets the following three-part test. The employer must show that:

> 1) the employee knowingly and wilfully made a false representation as to his physical condition;
>
> 2) the employer relied on his false representation, which reliance was a substantial factor in the employment; and
>
> 3) there was a causal connection between the false representation and the injury.

Shippers Transport, 265 Ark. at 369, 578 S.W.2d at 234.

In the present case the Commission held that the appellant failed to prove by a preponderance of the evidence that it relied upon false representations made by appellee in deciding to hire the appellee. The appellant argues on appeal that the Commission

erred in finding that it failed to prove reliance on these false representations, essentially contending that the Commission's opinion is not supported by substantial evidence.

The evidence before the Commission showed that the appellee sustained a work-related injury to his back on June 29, 1993, which appellant initially accepted as compensable. The appellant later denied the claim contending that appellee had a long history of back problems that pre-dated his employment with appellant. Appellant contended that, because appellee falsified information on his employment application, the *Shippers Transport* defense barred his claim.

The evidence presented to the Commission showed that the appellee filled out an employment application with the appellant on May 14, 1987, and was hired on May 18, 1987. The Commission found that several tacit false representations were made on the application. However, the appellant was not sent to the company physician for a pre-placement health examination until September 21, 1987. Three documents, which the appellant claims were either completed by the appellee or by someone else at his direction, were introduced into evidence. Those documents were: the employment application dated May 14, 1987, and signed by the appellee; a personal history form dated September 21, 1987, which was not signed by appellee; and the pre-placement health examination form. The Commission found that each document was in a different handwriting from the others, and that the personal history and pre-placement documents were not completed by the appellee. Appellee testified that when he was hired in May 1987, the personal history and pre-placement examination documents were not part of his employment application. Appellee admitted that the personal history form contained incorrect information, but stated that he did not fill out this document.

Appellant's personnel department representative, Jonathan Wright, testified that the appellant relied on the false representations contained in the health questionnaires, but failed to state that it relied on the appellee's employment application at all. The Commission found it difficult to believe that, when appellant hired appellee in May, it relied on falsehoods in the personal history and pre-placement examination forms because these documents were not filled out until four months after appellee had been hired. Had the appellant presented proof that the appellee had indeed filled out

these forms, and that they were completed in May 1987, the Commission may well have decided differently.

Where the sufficiency of the evidence is challenged on appeal in a workers' compensation case, this court reviews the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, and will affirm if those findings are supported by substantial evidence. *Newsome* v. *Union 76 Truck Stop*, 34 Ark. App. 35, 805 S.W.2d 98 (1991). The issue on appeal is not whether the evidence would support findings contrary to those made by the Commission or whether we would have reached a different result had we tried the case on its merits; if reasonable minds could arrive at the conclusion reached by the Commission, we must affirm. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). It is well established that the credibility of witnesses and the weight to be given to their testimony are matters exclusively within the province of the Commission. *Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989).

The appellant failed to present testimony that it relied on the false representations contained in the appellee's employment application[1] and only presented testimony that it relied on documents which, as the Commission found, appear to have been filled out by someone other than the appellee some four months after the appellee was hired. Appellee admitted that two documents contained incorrect information but denied that he filled out these documents and denied that they were part of his employment application. The Commission's finding that appellant failed to prove that it relied on false representations made by the appellee when it decided to hire him is supported by substantial evidence. As the Commission pointed out, how could the appellant have relied on these false representations when the documents indicate that they were filled out four months after the appellee was hired. There is substantial evidence that appellant failed to prove that it was entitled to rely on the *Shippers Transport* defense.

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[1] A question on the appellant's application form states, "Do you have any physical condition that may limit your ability to perform the job applied for?" This same question was held to be too broad and general to support the *Shippers Transport* defense in *Knight* v. *Industrial Electric Co.*, 28 Ark. App. 224, 771 S.W.2d 797 (1989).

Affirmed.

COOPER and STROUD, JJ., agree.

Jackie S. WILLIAMS and Thomas L. Williams *v.* STATE of Arkansas

CA CR 95-484 918 S.W.2d 209

Court of Appeals of Arkansas
Division I
Opinion delivered March 27, 1996

W.Q. Hall and *Joanna P. Boyles*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellants Jackie S. Williams and Thomas L. Williams entered conditional pleas of guilty to the manufacture of marijuana, possession of a controlled substance, and possession of drug paraphernalia pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. Both Mr. Williams and Mrs. Williams received two years' probation and were fined $2,000.00. They have filed a single appeal, in which they assert that the trial court erroneously refused to suppress the incriminating evidence that the police seized from their home. We find no error and affirm.

The evidence shows that Officer Earl Hyatt interviewed Alan Hudson after Mr. Hudson was arrested on July 8, 1992. Officer Hyatt testified that Mr. Hudson told him that he had been living

with Mr. Williams and that some marijuana plants were growing on the second floor of the residence. Based on this information, Officer Hyatt and Officer Archie Rousey proceeded to the Williams' home for observation. The officers stopped on the highway in front of their house and used binoculars to look through an upstairs window, but were unable to identify anything that resembled marijuana.

On the following morning, Officers Hyatt and Rousey returned to the highway in front of the Williams' property. They again attempted to locate contraband by looking into the upstairs window through binoculars. This time the officers were able to see a plant inside the window, but could not determine whether it was a marijuana plant. In order to get a closer look, the officers moved to what Officer Hyatt described as "a common driveway that appeared to be shared by three residences off Highway 412, including the Williams' residence." However, upon further observation from this location, they were still unable to identify the plant.

While on the "common driveway," Officer Hyatt noticed someone looking at him from another window of the Williams' residence. At this time, he decided to approach the house and attempt to speak with this person. Upon arriving at the front door, Officer Hyatt was met by the Williams' fifteen-year-old son, Patrick. He asked Patrick whether his parents were growing marijuana upstairs and Patrick replied that he did not know because he was not allowed to go there. The officers expressed doubt about this and again asked if Patrick was aware of any marijuana in the house. This time, Patrick looked down, nodded his head, and admitted that two or three marijuana plants were growing in the upstairs area of the house.

Based on the above information, Officer Rousey left to obtain a search warrant. Another officer was called to the scene while Officer Rousey was away, and he and Officer Hyatt watched over Patrick during this two-hour period. Officer Rousey testified that he was with Patrick on the porch, and that he followed him inside and sat beside him on the couch while Patrick watched television. Patrick would occasionally get up and go into the kitchen and get something to drink. Officer Hyatt followed and watched him on these occasions. Based on an affidavit prepared by Officer Rousey, Officer Rousey obtained a search warrant, and upon returning to the Williams' home a search was executed. During the search, the

officers seized four marijuana plants, a pipe, and some poppies believed to belong to the opiate family.

For reversal, the appellants argue that the incriminating evidence was seized pursuant to an unreasonable search and that it should have been suppressed. The appellants specifically contend that it was unreasonable for the officers to look through the upstairs window with binoculars; that the officers' warrantless search of the house was not justified; and that the officers' entry into the house was unlawful. The appellants further assert that the search warrant was based on illegally obtained information, and thus all items seized were inadmissible as the fruits of a poisonous tree.

When this court reviews a trial court's ruling on a motion to suppress evidence, we make an independent determination based on the totality of the circumstances. *Freeman* v. *State*, 34 Ark. App. 63, 806 S.W.2d 12 (1991). We will reverse a trial court in this regard only if the ruling was clearly erroneous. *Id.*

Initially, we find that any asserted impropriety regarding the officers' use of binoculars has not been preserved for our review. This is because, at the suppression hearing, the appellants never raised this issue as a ground on which to suppress the evidence. It is well established that we will not address arguments raised for the first time on appeal. *Oliver* v. *State*, 322 Ark. 8, 907 S.W.2d 706 (1995). The appellants contend that this issue was raised before the trial court, but in light of our review of the record we cannot agree. The appellants also assert that it was not necessary to raise this argument in the trial court because, as our supreme court stated in *Scroggins* v. *State*, 276 Ark. 177, 633 S.W.2d 33 (1982), "it is elementary that the State must prove that a warrantless intrusion. . .was not in violation of the Fourth Amendment." Even in light of the above standard we believe that, in order to preserve its argument for review, the appellants were required at least to inform the trial court of its contention that the officers' use of the binoculars constituted a search or intrusion.

We next address the appellants' assertion that the officers conducted an unlawful search when they entered the Williams' home to keep Patrick under observation and ensure that no evidence was destroyed. We hold that, even if the officers' entry into the home was without consent, this would not warrant suppression of any evidence because the officers never conducted any search or

discovered any contraband until Officer Rousey returned with the search warrant and a search was conducted pursuant to the warrant. Probable cause for the issuance of the search warrant was premised on evidence obtained prior to the officers' entry into the home, and thus the entry was wholly unrelated to information upon which the search was based. *See Segura* v. *United State*, 468 U.S. 796 (1984). The appellants have failed to demonstrate that any harm resulted from the officers' warrantless entry, and we find that the trial court did not err in refusing to suppress evidence on this basis.

From our review of the record, we hold that the police officers in the instant case acted lawfully with regard to all remaining aspects of the search in question. The appellants concede in their brief that the officers had the right to enter the common driveway in front of the house. After doing so, the officers noticed someone looking at them through a window, and met this person at the front door. Upon discovering that he was the Williams' son, the police informed him that they had information regarding illegal activities at the house, and Patrick admitted as much. We cannot find that these steps taken by the police were unreasonable.

Once Officer Hyatt obtained the incriminating admission from Patrick, Officer Rousey used this information, along with the accusation by Mr. Hudson and the officers' observation of the plants, in order to obtain a search warrant. The above information constituted probable cause to support the warrant, and thus the warrant was properly issued and executed.

We find that the trial court's failure to suppress the contested evidence was not clearly against the preponderance of the evidence. Therefore, we affirm.

Affirmed.

COOPER and STROUD, JJ., agree.

Kenneth Ray NOVAK *v.* STATE of Arkansas

CA CR 95-1109 918 S.W.2d 218

Court of Appeals of Arkansas
En Banc
Opinion delivered April 3, 1996

Appellant, no response.

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

JAMES R. COOPER, Judge. The appellee has moved to waive the abstracting requirement regarding the contents of a 911 tape that was introduced into evidence at trial. The appellee notes that no transcription of the tape was introduced at trial, and asserts that although the appellant failed to abstract the tape, the contents of the tape itself are necessary for a determination of the issues at hand.

Rule 4-2(a)(6) of the Arkansas Supreme Court and Court of Appeals provides that, whenever an exhibit which cannot be abstracted in words must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by a suitable process and attach it to the abstract. However, the Rule also permits the appellate court to waive this requirement where it would be impractical. The appellee asserts in its motion that it would be impractical to abstract the tape and, in the absence of any opposition from the appellant, we grant the appellee's motion.

Motion to waive abstracting requirement granted.

JENNINGS, C.J., and MAYFIELD, ROGERS, and NEAL, JJ., agree.

ROBBINS, STROUD, and GRIFFEN, JJ., would remand.

PITTMAN, J., dissents and would deny the motion on the ground that the State has failed to allege any facts that would show, as required by Ark. R. Sup. Ct. 4-2(a)(6), either that the contents of the audiotape cannot be abstracted in words or that it would be impractical to reproduce the exhibit and attach copies to each copy of the abstract.

Shuntae INGRAM *v.* STATE of Arkansas

CA 95-248 918 S.W.2d 724

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 1996

Arkansas Public Defender Comm'n, by: *Elizabeth S. Johnson*, for appellant.

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

JOHN B. ROBBINS, Judge. On August 2, 1994, appellant Shuntae Ingram, twelve years old, was charged as being a delinquent for allegedly having participated in a capital felony murder. The State alleged that, on July 29, 1994, Shuntae attempted to commit aggravated robbery, and in the course of the felony caused the death of Susan Harris under circumstances manifesting extreme indifference to the value of human life. The day following this homicide, Shuntae gave a statement to the police. Shuntae later moved to suppress this statement on the grounds that he did not voluntarily, intelligently, or knowingly waive his rights prior to giving the statement and on November 18, 1994, a hearing was held on the motion to suppress. The motion to suppress was denied, and Shuntae was thereafter adjudicated delinquent and committed to the Department of Youth Services. Shuntae now appeals, arguing only that the trial court erred in admitting his statement into evidence.

A defendant may waive his right to remain silent and his right to counsel only if the waiver is made voluntarily, knowingly, and intelligently. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Custodial statements are presumed involuntary and the State has the burden of proving otherwise. *Johnson* v. *State*, 307 Ark. 524, 823 S.W.2d 440 (1992). Factors to be considered in determining the voluntariness of a custodial statement are the age, education, and intelligence of the accused, the length of the detention during which the statement was given, the use of repeated or prolonged questioning, the use of mental punishment or coercion, and the advice or lack of advice of an accused's constitutional rights. *Shaw* v. *State*, 299 Ark. 474, 773 S.W.2d 827 (1989). In reviewing the trial court's denial of a motion to suppress a custodial statement, this court makes an independent determination based on the totality of the circumstances and will reverse the trial court only if the decision was clearly against a preponderance of the evidence. *Ryan* v. *State*, 303 Ark. 595, 798 S.W.2d 679 (1990). The credibility of the witnesses, who testify to the circumstances surrounding the defendant's custodial statement, is for the trial court to determine. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

When, as in the case at bar, the custodial statement at issue was elicited from a juvenile, certain additional precautions must be taken with respect to the juvenile's waiver of his right to counsel. These are enumerated in Arkansas Code Annotated § 9-27-317 (Repl. 1993), which provides:

> (a) Waiver of the right to counsel shall be accepted only upon a finding by the court from clear and convincing evidence, after questioning the juvenile, that:
>
> (1) The juvenile understands the full implications of the right to counsel;
>
> (2) The juvenile freely, voluntarily, and intelligently wishes to waive the right to counsel; and
>
> (3) The parent, guardian, custodian, or counsel for the juvenile has agreed with the juvenile's decision to waive the right to counsel.
>
> (b) The agreement of the parent, guardian, custodian, or attorney shall be accepted by the court only if the court finds:

(1) That such person has freely, voluntarily, and intelligently made the decision to agree with the juvenile's waiver of the right to counsel;

(2) That such person has no interest adverse to the juvenile; and

(3) That such person has consulted with the juvenile in regard to the juvenile's waiver of the right to counsel.

(c) In determining whether a juvenile's waiver of the right to counsel was made freely, voluntarily, and intelligently, the court shall consider all the circumstances of the waiver, including:

(1) The juvenile's physical, mental, and emotional maturity;

(2) Whether the juvenile and his parent, guardian, custodian, or guardian ad litem understood the consequences of the waiver;

(3) Whether the juvenile and his parent, guardian, or custodian were informed of the alleged delinquent act;

(4) Whether the waiver of the right to counsel was the result of any coercion, force, or inducement;

(5) Whether the juvenile and his parent, guardian, custodian, or guardian ad litem had been advised of the juvenile's right to remain silent and to the appointment of counsel.

(d) No waiver of the right to counsel shall be accepted in any case in which the parent, guardian, or custodian has filed a petition against the juvenile, initiated the filing of a petition against the juvenile, or requested the removal of the juvenile from the home.

(e) No waiver of the right to counsel shall be accepted in any case where counsel was appointed due to the likelihood of the juvenile's commitment to an institution under § 9-27-316(d).

(f) All waivers of the right to counsel shall be in writing and signed by the juvenile and his parent, guardian, or custodian.

Officer Scott Armstrong of the North Little Rock Police Department testified that, at about 2:00 p.m. on July 29, 1994, Shuntae and his mother arrived at the police station for questioning. Using a standard Statement of Rights form, Officer Armstrong read each right to Shuntae, and Shuntae initialled and represented that he understood each right. Officer Armstrong stated that Shuntae was very attentive, did not appear to be under the influence of alcohol or drugs, and did not appear unwilling to waive his rights. Shuntae's mother was present at all times during the explanation of Shuntae's rights and during his statement, and prior to the statement she signed a rights waiver form and consented to him giving a taped account of the events of the previous day.

Officer Jim Chapman was also present during the questioning of Shuntae. He stated that he recorded Shuntae's statement and that the statement was given without objection by either Shuntae or his mother. The taped statement lasted from about 4:51 p.m. until 5:31 p.m. According to Officer Chapman, Shuntae was not coerced and, as far as he could tell, his statement was voluntary. He further testified that he told Shuntae and his mother that they could have a lawyer, and that if they asked for a lawyer at any time he would stop the questioning. However, neither requested a lawyer nor asked that the questioning be terminated.

Shuntae's taped statement indicated that he had been involved in criminal activity on the previous day. He told the police officers that he and three other boys entered a North Little Rock residence in an attempt to rob a suspected drug dealer of drugs and money. According to Shuntae, he and the other boys tied shirts over their faces to hide their identity, and upon entering the house one of the boys pulled a gun and demanded money. The victim, Susan Harris, pulled a gun out of her purse in an attempt to defend herself, at which time a struggle ensued and Ms. Harris was fatally shot. After taking some money and drugs, the boys fled.

Shuntae's mother gave testimony regarding the custodial interrogation, and stated that the officers asked her if it was all right for Shuntae to answer some questions, to which she replied, "Yes." She testified that she wanted to know the truth, and advised Shuntae to tell the officers what had happened. Ms. Ingram acknowledged that she signed the waiver of rights form, that she was aware that anything Shuntae said could be used against him in court, and that the officers told Shuntae that he did not have to talk to them. She

also admitted that the police never threatened Shuntae. However, Ms. Ingram stated that both she and her son were scared and nervous during the interrogation.

Shuntae testified on his own behalf, and acknowledged that he signed the rights waiver forms. He stated that the officers told him if he did not tell the truth he could get the electric chair, but further stated "[t]he police didn't really threaten me." Shuntae asserted that he did not really understand his rights when he waived them. However, he remembered the officers telling him that he did not have to talk to them and that any statement he made could be used against him in court. He testified that he decided to tell the police what had happened because his mother advised him to do so.

For reversal, Shuntae contends that his statement was erroneously admitted into evidence because it was not a product of a voluntary, intelligent, or knowing waiver of his constitutional rights. He asserts that he and his mother were nervous when they agreed to cooperate with the officers, and that neither fully understood his rights. Shuntae further points out that he was only twelve years old at the time of the interrogation, and that he had below average comprehension and reading skills. Dorothy Wooley, an educational examiner, testified that Shuntae could read and write, but only on about a fourth-grade level. Ms. Wooley also diagnosed Shuntae with Attention Deficit Hyperactivity Disorder (ADHD), and she testified that the impulsiveness associated with this disorder could have impacted his signing of the waiver form. Finally, Ms. Wooley concluded that "I do not believe Shuntae's intellectual development is such that he could perceive the implications and consequences of signing [the] form after having it read to him."

We find that the State satisfied the requirements of Ark. Code Ann. § 9-27-317 (Repl. 1993) and that, based on the totality of the circumstances, the trial court's refusal to suppress Shuntae's confession was not clearly against a preponderance of the evidence. Shuntae and his mother signed the requisite rights waiver forms and both acknowledged that they understood that Shuntae did not have to give a statement and that anything he said could be used against him in court. Although Shuntae testified that the officers threatened him with the electric chair if he refused to give a statement, the trial court was not bound to believe this testimony. Significantly, both Shuntae and his mother agreed that his statement was not coerced. Rather, the statement was given because Shuntae's mother advised

him to tell the truth. Moreover, the evidence shows that Shuntae and his mother were repeatedly informed of his right to an attorney, and that if this right was invoked the questioning would stop. The officers indicated that Shuntae gave the statement voluntarily and noted that he was calm and attentive during questioning. The questioning lasted about three-and-one-half hours, and Officer Chapman stated that during this time he would have given Shuntae periodic breaks, but none were requested. On these facts, we find no error in the trial court's admission of the statement.

Shuntae makes much of the fact that he was only twelve years old at the time of his confession, possessed below-average mental abilities and was afflicted with ADHD. Nevertheless, Ms. Wooley acknowledged that he could read and write and the evidence showed that he had completed the sixth grade. Despite his alleged mental deficiencies, our supreme court has on numerous occasions upheld a suspect's waiver of *Miranda* rights even when the suspect was determined to be intellectually impaired. *See Hart* v. *State*, 312 Ark. 600, 852 S.W.2d 312 (1993); *Burin* v. *State*, 298 Ark. 611, 770 S.W.2d 125 (1989). Although Shuntae was twelve years old, youth alone will not prevent a voluntary confession or a knowing waiver of constitutional rights. *See Rouw* v. *State*, 265 Ark. 797, 581 S.W.2d 313 (1979). We find that Shuntae's age and mental capacity were factors to consider, but the trial court committed no error in concluding that these factors did not render his confession inadmissible.

Affirmed.

COOPER and STROUD, JJ., agree.

AMERICAN STATES INSURANCE COMPANY *v.*
SOUTHERN GUARANTY INSURANCE COMPANY

CA 95-138 919 S.W.2d 221

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 1996

[redacted]

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

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Micheal L. Alexander* and *Chris Gomlicker*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from a subrogation action brought by American States Insurance Company (American States) against Southern Guaranty Insurance Company (Southern Guaranty), the appellee. American States argues on appeal that the trial court erred in entering summary judgment in favor of Southern Guaranty. We find no error and affirm the trial court.

We discussed summary judgment in *Wozniak* v. *Colonial Insurance Co.*, 46 Ark. App. 331, 885 S.W.2d 902 (1994), as follows:

> The party moving for summary judgment must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Keller* v. *Safeco Ins. Co.*, 317 Ark. 308, 877 S.W.2d 90 (1994). All proof submitted must be considered in the light most favorable to the non-moving party, and any doubts or inferences must be resolved against the moving party. *Id.* On appeal, the court determines if summary judgment was proper based on whether the evidence presented by the movant leaves a material question of fact unanswered, *id.* at 311-12, and summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals an aspect from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. *Baxley* v.

Colonial Insurance Co., 31 Ark. App. 235, 240, 792 S.W.2d 355 (1990).

46 Ark. App. at 332.

The facts in this case are uncontroverted. In May 1992, the Hoffman-Henry Insurance Corporation of Pine Bluff acted as agent for both parties. On May 11, Pierre Welter obtained automobile insurance through the agency with Southern Guaranty. Welter returned on May 22 to obtain homeowner's coverage. After Southern Guaranty refused to write the coverage, the agency, by its employee Sandra Smith, called American States to obtain the homeowner's coverage. American States agreed to provide the insurance if Welter would also place his automobile insurance and life insurance with American States. Smith then informed Southern Guaranty that Welter's automobile insurance was being canceled so that he could place the insurance with American States and obtain homeowner's insurance. On May 23, Smith issued an oral binder for the automobile coverage with American States. Welter's wife was at fault in an automobile accident that occurred on May 27. American States paid damages of $9,414.28 and then filed a complaint against Southern Guaranty, asserting that Welter's automobile policy with Southern Guaranty was still in effect on May 27. Southern Guaranty specifically denied that the automobile insurance issued by it was in force and effect on that date. Southern Guaranty then moved for summary judgment, attaching the affidavit of Sandra Smith. The trial court granted summary judgment, finding that Southern Guaranty's policy had been canceled and was not in force and effect on May 27.

Where the operative facts of the case are undisputed, as here, this court simply determines on appeal whether the appellee was entitled to summary judgment as a matter of law. *Hertlein* v. *St. Paul Fire & Marine Ins. Co.*, 323 Ark. 283, 284, 914 S.W.2d 303 (1996); *Doe* v. *Central Arkansas Transit*, 50 Ark. App. 132, 136, 900 S.W.2d 582 (1995).

On appeal, American States argues that because there was no overt act by Welter to cancel the Southern Guaranty policy, there was not an effective cancellation of the policy. In support of this argument, American States relies on the supreme court's holding in *Yant* v. *Bowker*, 248 Ark. 826, 454 S.W.2d 84 (1970). In that case, an insurance company sought to collect an unpaid insurance premium.

The insured responded that the policy had been canceled pursuant to his statement to the insurance agent that he did not have the money for the insurance and that "he might as well go ahead and cancel it." 248 Ark. at 828. In finding that the insured failed to prove cancellation of the policy, the supreme court stated:

> In the case of *Commercial Union Fire Ins. Co.* v. *King*, 108 Ark. 130, 156 S.W. 445, the insurance company was defending a claim for loss due to fire on the ground that the insurance company had cancelled the policy before the fire. In that case the court said:
>
> > "The notice must be given to the insured, and it should state not merely *the intent to cancel*, if some condition be not complied with, but *it must be an actual notice of cancellation* within the meaning of the policy and so unequivocal in its form, that the insured may not be left in doubt that his insurance will expire on the time limited by the terms of the notice, and that the company will not be liable for any loss after the expiration of that time." (Emphasis supplied).
>
> No less notice should be required when the insured is the party attempting to cancel the policy. The appellant has the burden of proving the affirmative defense of cancellation of the policy in order to avoid payment of the premium, and the trial court found that the appellant failed in carrying that burden in the case at bar. The conversation of the appellant with the appellee, as testified by the appellant, indicates at most, a mere intention on the part of the appellant to cancel the policy. Certainly this is true in the absence of any showing by the appellant of any overt actions that he took in order to effectuate the cancellation of the policy.
>
> In Cooley's Briefs on Insurance, vol. 5, p. 4647, the following rule is stated:
>
> > ". . . even in case of a cancellation of the contract by the insured, the mere intention to cancel will not be sufficient without some overt act giving the company notice that the contract is at an end."

248 Ark. at 829.

American States interprets the court's ruling as requiring written notice before an insured can effectively cancel an insurance policy. We do not agree with this interpretation. Although the supreme court did not specify what kind of overt act was required to cancel the policy, we believe that the court was not saying that an insured is required to provide written notice but is required to follow the general rule found in 6A Appleman, *Insurance Law and Practice* § 4226 (Rev. ed. 1972): "A request for cancellation of a policy must be unequivocal and absolute." *See also* 45 C.J.S. *Insurance* § 513 (1993); 17 *Couch on Insurance 2d* § 67:144 (Rev. ed. 1983).

In the case at bar, American States presented the record of an interview with Sandra Smith in which she stated that on May 22, she explained the circumstances to Southern Guaranty; informed Southern Guaranty that Welter's automobile policy, which the agency had not received at that time, was being canceled effective May 23; and informed Southern Guaranty that when the policy was received, she would mark it "cancel effective May 23, 1992," and return it. Smith's affidavit provided in part:

> 8. Southern Guaranty did not have any policy of insurance in effect covering Mr. and Mrs. Welter at the time of the accident on May 27, 1992. Southern Guaranty had previously been verbally advised that their policy issued on May 11, 1992, was canceled "flat" at the request of Mr. Welter on May 22, 1992. The reason for the change was because Mr. Welter needed to obtain automobile and life insurance policies from American States before American States would cover his company-owned home as well. Southern Guaranty was verbally advised of the cancellation because, although we had previously ordered a policy issuing coverage to Mr. and Mrs. Welter, we had not received the policy in our office at the time of the "flat" cancellation.
>
> 9. A "flat" cancellation means that there was no earned premium. In other words, if an insured wishes to cancel a policy within the first thirty (30) days of coverage, as long as the insured has incurred no losses within that thirty day period, no premium is charged to the insured and he is given a full refund of any premiums he has paid.
>
> 10. There was no applicable grace period regarding the

> "flat" cancellation of Southern Guaranty's automobile policy. The policy was retroactively canceled back to May 11, 1992 (the initial date of coverage) and the entire premium was returned in full to Mr. Welter.

American States urges that Welter failed to take any overt action and "simply acquiesced to the advice of the agent that he should cancel his Southern Guaranty policy in favor of the policy with American States." Here, Smith conveyed Welter's notice of cancellation by telephone to Southern Guaranty in clear terms and specified the exact date of cancellation.

> A due request for, or notice of, cancellation made to the insurance company or its authorized agent may be sufficient to effect a cancellation of an insurance policy. Notice or request usually is necessary to effect a termination of the policy, and a communication concerning cancellation must be delivered to the company or its authorized agent. The insurance company must receive actual notice of the cancellation.

45 C.J.S. *Insurance* § 513 (1993). "Generally, a policy may be canceled by the insured or his proper representative only. Where an agent or broker has authority, either express or implied, to cancel a policy, a termination upon his request is valid." 6A Appleman, *Insurance Law and Practice* § 4224 (Rev. ed. 1972). We find that there was nothing uncertain about the notice set out in the case at bar. Southern Guaranty could not fail to understand that Welter had exercised his right to cancel the policy and had canceled it. The requirement of providing actual notice of cancellation set out in *Yant* v. *Bowker, supra,* the case relied on by American States, therefore was satisfied.

American States also argues that the cancellation was deficient because it was not in strict compliance with the policy provision on cancellation. This issue, however, was not preserved for appellate review. American States did not raise the issue at the trial level in the complaint, response to motion for summary judgment and countermotion for summary judgment, or brief in support of the motion. We have often stated that we will not address an issue on appeal that was not raised below. *Keesee* v. *Keesee*, 48 Ark. App. 113, 117, 891 S.W.2d 70 (1995); *Arkansas State Highway Comm'n* v. *Lee Wilson & Co.*, 43 Ark. App. 22, 27, 858 S.W.2d 137

(1993).

Affirmed.

PITTMAN and COOPER, JJ., agree.

Randy JOHNS *v.* Rachelle (McGilvray) JOHNS

CA 95-92 918 S.W.2d 728

Court of Appeals of Arkansas
En Banc
Opinion delivered April 3, 1996

Charles P. Allen, for appellant.

Ralph C. Murray, for appellee.

WENDELL L. GRIFFEN, Judge. Randy Johns appeals from the July 8, 1994, order by the Phillips County Chancery Court that he see that his two minor children attend Sunday School and church during his visitation every other weekend. Appellant and appellee were divorced November 10, 1988. The divorce decree awarded appellee permanent custody of the children subject to the reasonable visitation rights of appellant. On December 1, 1993, appellant filed a petition seeking a contempt citation against appellee for allegedly refusing to permit him visitation with the younger of the two children, Ryan Randall Johns. On January 7, 1994, appellee filed a response to that petition and asserted a counterpetition alleging, *inter alia*, that appellant had not complied with prior understandings regarding the children attending religious services during the time that they visited him. The chancellor conducted an evidentiary hearing on April 1, 1994, which resulted in the order to which appellant takes exception, specifically that portion of the order which reads as follows:

> . . . the Defendant, Randy Johns, is hereby Ordered to see that the children attend Sunday School and Church while they are in his custody during his visitation.

Appellant argues that the chancellor abused his discretion in rendering this order because there was, according to appellant, no material change in circumstances which justified an order that he see that the children attend Sunday School or church services. Next appellant contends that the appellee was not ordered to see that the children attend Sunday School or church services while they were in her custody. Finally, appellant argues that although church attendance may well be a positive factor, the constitutional guarantee of freedom of religion found in the First Amendment to the Constitution of the United States means that noncustodial parents may not be compelled to see that their children attend church

services and Sunday School during visitation.

This appears to be a case of first impression in Arkansas. However, the controlling principles of law that govern child custody and visitation disputes are well settled. Although this court reviews the evidence in appeals from chancery courts *de novo*, the decision of a chancellor is not reversed unless it is shown that it was clearly contrary to a preponderance of the evidence. *Burns* v. *Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993); *Larson* v. *Larson*, 50 Ark. App. 158, 902 S.W.2d 254 (1995); *Thigpen* v. *Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). Special deference is shown to findings and rulings made by chancellors in child-custody matters because of the special care that is required and the unique opportunity of the chancellor to evaluate the evidence and assess the credibility of witnesses. *Larson* v. *Larson*, *supra*; *Ideker* v. *Short*, 48 Ark. App. 118, 892 S.W.2d 278 (1995). And it is fundamental law in Arkansas that the primary consideration in both custody and visitation cases is the welfare and best interest of the child, with all other considerations being secondary. *Marler* v. *Binkley*, 29 Ark. App. 73, 776 S.W.2d 839 (1989); *Welch* v. *Welch*, 5 Ark. App. 289, 635 S.W.2d 303 (1982).

After conducting a *de novo* review of the evidence, consistent with the aforementioned principles of law, we conclude that the decision of the chancellor should be affirmed. Although the initial divorce decree and all other orders supplemental to it make no reference to church attendance, the record shows that appellee has been following a consistent course of religious instruction for the children at all relevant times since the divorce occurred. Appellee testified that the children had attended church with her on a regular basis, but that they do not attend church services when they visit appellant. Appellee also testified that when the older child, Casey, did not attend morning church services when she visited appellant,

> . . . it is kind of difficult on Sunday nights, because she is laxed (sic) all day. As they get older, I am concerned about the teenage years, when they start wanting to kind of do what they want to do. I want that to be—you know—in their life when they're little so they won't—you know—depart from that. I think it's very important that they have that in their life.

The chancellor was certainly justified in considering this concern

expressed by the custodial parent about the need for consistency in the church-attendance routine, especially where there was no indication that the routine was in any way detrimental to the health and welfare of the children. *See Clark* v. *Reiss*, 38 Ark. App. 150, 831 S.W.2d 622 (1992).

Appellant's argument that the chancellor abused his discretion by ordering appellant, and not appellee, to see that the children attend Sunday School and church services is unpersuasive because appellee testified that she had attended Sunday School and church services with the children for as long as they had been with her. That testimony was consistent and unrebutted. The chancellor had no reason to order the appellee to do what she had already undertaken to do, especially absent any proof that appellee would discontinue that practice. *See McFarland* v. *McFarland*, 318 Ark. 446, 885 S.W.2d 897 (1994).

Appellant's freedom-of-religion claim is without merit. The chancellor did not order him to attend religious services, but rather that he see that his children did so in order to maintain consistency in the religious regimen that their mother has set for them. Therefore, no limitation has been placed on appellant's freedom of religion. Because the chancellor's order imposes no duty on him to attend, appellant is free to attend or not attend the services with the children.

Appellant also argues that the chancellor's order constitutes an impermissible encroachment on his visitation rights by requiring him to devote part of his visitation time to activities instituted by the custodial parent. We do not agree with that premise. Even if the requirement to see that his children attend Sunday School and worship does inconvenience appellant, that inconvenience does not justify setting aside the chancellor's order when what the chancellor ordered is consistent with the best interest of the children. In visitation issues, the primary consideration is what is in the best interest of the children, not what is most convenient for the parent seeking to exercise visitation rights. Even parents who live with their children endure certain inconveniences and hardships related to the parenting function. The record contains no proof that the inconvenience appellant claims will ensue from complying with the chancellor's order would rise to the level of a deprivation of a protected right. Also, appellant has offered no proof to establish that consistent Sunday School and worship

attendance is contrary to the best interest of the children.

■ We note that there was no evidence disputing the testimony from appellee that appellant's refusal to see that the children attend Sunday School and worship services during his visitation has begun to have undesirable effects on one of the children. Moral instruction is, like every other aspect of education, the result of accumulated and consistent effort over time. Because appellant has the right to visit his children every other week, his refusal to see that they attend Sunday School and worship services would mean they would miss half of the possible opportunities for the moral instruction that their mother has been trying to instill. Although we express neither approval nor disapproval for whatever religious beliefs the children may be learning, the fact remains that appellant offered no alternative method for instructing his children in moral values during the time that they would have otherwise been receiving that instruction through Sunday School and church attendance. Under these circumstances, we find that the chancellor acted within the discretion afforded him in making his order.

We reach our decision mindful that there are numerous situations similar to the one involved in this case where divorced parents may differ concerning the routine that their children should follow. We recognize that the children will necessarily become the objects of those differences in some, if not many, instances, and that it is not possible for appellate courts to craft hard and fast rules in individual cases that will fit every situation. We are sensitive to the unique difficulties that these disputes present for chancellors faced with pleas by parents with many motivating influences and children whose lives will turn on the decisions that are reached. Nevertheless, until controversies of this nature cease it will be necessary for someone to decide them. Chancellors are accorded considerable deference in their decisions concerning these matters precisely because they are, in the vast majority of instances, familiar with the factual background and procedural history of the cases. Their decisions will not be infallible; they are reviewable *de novo* by this court and subject to reconsideration at the trial level upon proof of a change in circumstances. However delicate the area of controversy may be, it is the manifest duty of chancery courts to resolve these disputes, and the fact that their decisions will displease one or even both parties must not become a reason for judicial inertia at times when action is both necessary due to the disputing parents and vital

in order to protect the best interests of the children.

Affirmed.

STROUD, J., joins in this opinion.

PITTMAN, J., concurs.

COOPER, ROGERS and ROBBINS, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the decision reached by the prevailing opinion in the case at bar requiring the noncustodial parent to take the children to church and Sunday School while in his custody during visitation.[1] I do not believe that courts should engage in the enforcing of church attendance, even when it involves minors. "[I]ntervention in matters of religion is a perilous adventure upon which the judiciary should be loath to embark." *Wojnarowicz* v. *Wojnarowicz*, 48 N.J. Super. 349, 354, 137 A.2d 618, 621 (1958).

The First Amendment of the United States Constitution made applicable to the states through the Fourteenth Amendment commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *See also* Ark. Const. art. 2, § 24. This language has been interpreted as committing the states to a position of "neutrality" between religions. *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

Courts in other jurisdictions have refused to enforce orders requiring church attendance on constitutional grounds. The Court in *In re Marriage of Oswald*, 847 P.2d 251 (Colo. App. 1993), in reversing the trial court's order providing for the grandmother to take the children to church on Sundays, stated that "even if the mother was providing no religious instruction for the children, the trial court's order could not stand. Such an attempt to control religious decisions is constitutionally impermissible." 847 P.2d at 253. In *Watts* v. *Watts*, 563 S.W.2d 314 (Tex. Civ. App. 1978), the trial court conditioned the mother's visitation on taking the children to Sunday School and to a church of her choice during visitation. The father contended on appeal that the trial court's

[1] It is interesting to note that the prevailing opinion and the order of the trial court did not discuss the fact that the custodial parent is not herself required to take the children to church and Sunday School although she testified that she has regularly done so.

decision did not infringe on any constitutional right of the mother since she was permitted to take the children to any church and was not herself required to attend. The Texas Court of Appeals stated:

> Although this contention may be correct, we are concerned also with the constitutional rights of the children. It is commendable that the trial court wishes to insure proper religious training for the children, but it is conceivable that the children may decide they do not wish to receive religious training. This is a matter which the court should not attempt to control other than by its award of managing and possessory conservatorship. Any order specifically requiring religious observance or religious instruction is contrary to the basic principle embodied in Art. I, § 6, that religion is a matter of private conscience with which the state, by its courts or otherwise, is forbidden to interfere.

563 S.W.2d at 317.

Other courts have refused to impose upon the noncustodial parent the burden of policing the religious instructions of the custodial parent absent a showing of emotional or physical harm to the children. *See Brown* v. *Szakal*, 212 N.J. Super. 136, 514 A.2d 81 (1986) (citations omitted). Courts have refused to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices, absent a clear and affirmative showing that these religious activities will be harmful to the child. *Felton* v. *Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Murga*, 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (1980).

The case at bar is analogous to those cases in which there is a conflict between the divorced parents regarding the religious faith and training of the children. *See* Annotation, *Religion as Factor in Child Custody and Visitation Cases*, 22 A.L.R. 4th 971 (1983). In *Munoz* v. *Munoz*, 79 Wash. 2d 810, 489 P.2d 1133 (1971), the Court stated:

> The courts are reluctant * * * to interfere with the religious faith and training of children where the conflicting religious preferences of the parents are in no way detrimental to the welfare of the child. The obvious reason for such a policy of impartiality regarding religious beliefs is that, constitutionally, American courts are forbidden from interfering with religious freedoms or to take steps preferring one relig-

> ion over another.
>
> * * *
>
> Thus, the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.

79 Wash. 2d at 812-13, 489 P.2d at 1135 (citations omitted). This rule has been adopted to protect both parents' rights to expose their children to their religious beliefs. *Pater* v. *Pater*, 63 Ohio St. 3d 393, 588 N.E.2d 794 (1992).

Most disputes involve conflicting religious practices between the divorced parents, however, the same principles have been applied equally when one parent practices no religion. *See Khalsa* v. *Khalsa*, 107 N.M. 31, 751 P.2d 715 (1988); *Robert O.* v. *Judy E.*, 90 Misc. 2d 439, 395 N.Y.S.2d 351 (N.Y. Fam. Ct. 1977). Therefore, courts should not interfere when a parent has chosen not to participate in religious services during visitation with children any more than it should enjoin a parent from attending any particular denomination of religious service without a showing of harm to the welfare of the child to justify this intrusion into a parent's religious freedoms. A parent's rights should not be viewed differently in the event that they choose not to practice any religion or choose not to practice a specific religion on a regular basis.

I strongly believe that our courts should adhere to a policy of impartiality between any particular form of worship or lack of worship and should be reluctant to interfere with the religious faith and training of children. Should intervention be deemed necessary in this sensitive and constitutionally protected area, it should be done so only where there is a clear and affirmative showing of harm to the children and the remedy should be one which results in the least possible intrusion upon the constitutionally protected interests of the parents and children. *SeeLeDoux* v. *LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990).

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

Nadine SCHRAMM *v.* Horace PIAZZA

CA 95-1153 918 S.W.2d 733

Arkansas Court of Appeals
Opinion delivered April 3, 1996

Frances M. Finley, for appellant.

David H. Williams, for appellee.

PER CURIAM. Nadine Schramm has appealed from a judgment in favor of Horace Piazza in the amount of $4,500. The record in

this case has been filed with the clerk of this court, and appellant filed a motion asking that we stay proceedings on the judgment and accept a supersedeas bond in the amount of $4,500. We cannot approve a bond that has not been tendered, nor can we issue a stay until we approve the bond.

A supersedeas bond must be sufficient in amount to guarantee that appellant shall pay appellee "all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree or order of the trial court." Ark. R. App. P. 8(c). These costs and damages include interest on the judgment and all costs and damages for delay that may be adjudged against appellant on appeal or which may result from dismissal or affirmance of the decision appealed. Appellee has filed a response to appellant's motion suggesting that $5,500 would be an adequate amount to post as bond to cover the judgment, interest, and costs. We agree.

Appellant should file a supersedeas bond in proper form binding appellant together with a certificate of deposit, certified check, cash, bank money order, or corporate surety in the amount of $5,500 with the clerk of this court and then request approval of the bond and an order staying proceedings on the judgment.

Randall LOWE *v.* CAR CARE MARKETING

CA 95-468 919 S.W.2d 520

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 1996

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

Bailey, Trimble, Capps, Lowe, Sellars & Thomas, by: *Peter O. Thomas*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Randall Lowe, appeals from an order of the Arkansas Workers' Compensation Commission denying his claim for medical benefits and temporary total disability benefits. He contends that the administrative law judge's opinion, which the Commission adopted as its own, fails to set forth sufficient findings of fact to support the decision and that any findings that were made are not supported by substantial evidence. We agree with the first of these points, and we reverse and remand for the Commission to make specific findings of fact.

When the Commission denies compensation, it is required to make findings sufficient to justify that denial. *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). A satisfactory, sufficient finding of fact must contain all of the specific facts relevant to the contested issue or issues so that the reviewing court may determine whether the Commission has resolved these issues in conformity with the law. *Id.* The Commission must find as facts the basic component elements on which its conclusion is based. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992). While the Commission may specifically adopt the findings of fact made by the administrative law judge, it is necessary under such circumstances that the administrative law judge have made sufficient findings. *See Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991); *ITT/Higbie Mfg.* v. *Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991).

A finding of fact sufficient to permit meaningful review is a "simple straightforward statement of what happened." *Wright*, 18 Ark. App. at 21, 709 S.W.2d at 109. Neither "a statement that a witness, or witnesses, testified thus and so," *id.*, nor language by the Commission that is merely "conclusory and does not detail or analyze the facts upon which it is based" will suffice. *Cagle Fabricating & Steel, Inc.*, 309 Ark. at 369, 830 S.W.2d at 859. In the present case, the opinion adopted by the Commission consists almost entirely of a narration of the testimony followed by the statement that "[t]he claimant did not sustain an injury arising out of and during the scope of his employment on October 9, 1992."

Although labeled a finding of fact, the quoted statement was a conclusion of law. *See Cagle Fabricating & Steel, Inc.* v. *Patterson, supra.* A claimant is entitled to know the factual basis upon which his claim is denied, *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988), and cases lacking this degree of specificity will be remanded for a decision based upon a specific finding. *Belcher* v. *Holiday Inn*, 49 Ark. App. 64, 896 S.W.2d 440 (1995). Here, while it may be that the Commission determined that appellant, apparently the only witness to the alleged accidental injury, was not a credible witness, the opinion does not so state. As we are unable to determine the facts upon which the Commission relied in reaching

its conclusion, we reverse and remand for the Commission to make specific findings of fact.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

Windle Ray ARGO *v.* STATE of Arkansas

CA CR 94-1346 920 S.W.2d 18

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 1996

Eugene B. Hale, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted by a jury of being a felon in possession of a firearm. He was sentenced to six years in the Arkansas Department of Correction and fined $8,000. On appeal, he argues that the evidence is insufficient to support his conviction. We agree and reverse and dismiss.

In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *Bailey* v. *State*, 307 Ark. 448, 821 S.W.2d 28 (1991). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Kendrick* v. *State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Dennis James Washington, a detective with the Hope Police Department, testified that on August 14, 1993, he and Officer Jeffrey Neel encountered the appellant and his three brothers standing outside a housing complex. He testified that the appellant was standing on the sidewalk in front of a blue vehicle. The appellant was holding an ax handle which he surrendered peacefully to the officer. Detective Washington testified that the appellant's brother, Robert Argo, was standing near the vehicle holding a machete. He stated that Robert subsequently threw the machete in the back floorboard of the vehicle and sat down in the back seat on the passenger side. Detective Washington asked Robert to exit the vehicle and then retrieved the machete. Detective Washington also retrieved two billy clubs from the vehicle and observed a .16 gauge shotgun in the middle of the front seat. He retrieved the shotgun and discovered that it was loaded.

Detective Washington testified that no one was inside the vehicle when he retrieved the items. He testified that the appellant and his brothers were standing around outside of the vehicle, and that no one admitted to owning the shotgun and that the vehicle belonged to the wife of one of the brothers. He further testified that

the doors to the vehicle were not locked, that one door was open, that a window was down, and that all four individuals had access to the vehicle. He also testified that he did not see the appellant in actual possession of the shotgun. Detective Washington determined that all four brothers had felony records and arrested all of them as felons in possession of a firearm. Officer Neel's testimony was substantially the same as Detective Washington's testimony.

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

Here, the appellant was not occupying the vehicle where the gun was found, he did not have exclusive access to the gun nor did he exercise any control over it, the gun was not found on his person or with his personal effects, and he did not own the vehicle in question or exercise control over it. Thus, we find that the evidence is insufficient to show that the appellant constructively possessed the shotgun. *See Kastl* v. *State*, 303 Ark. 358, 796 S.W.2d 848 (1990). Therefore, we reverse the appellant's conviction.

Reversed and dismissed.

ROBBINS and STROUD, JJ., agree.

COLONIA UNDERWRITERS INSURANCE COMPANY *v.* WORTHEN NATIONAL BANK of Arkansas

CA 95-508 919 S.W.2d 515

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 1996
[Petition for rehearing denied May 22, 1996.*]

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

Wright, Lindsey & Jennings, by: *Harry S. Hurst, Jr.*, for appellee.

JOHN B. ROBBINS, Judge. On September 29, 1993, an automo-

*PITTMAN, ROGERS, NEAL, and GRIFFEN, JJ., not participating.

bile owned by Lucille and Henry McCane was damaged in an accident. The vehicle was insured by appellant Colonia Underwriters Insurance Company (Colonia). Appellee Worthen National Bank of Arkansas (Worthen) was the lienholder and filed a claim for recovery as loss payee. Colonia responded that it had denied coverage to the McCanes and that Worthen had no greater right to recover than the policy holders. Worthen then brought suit against Colonia, seeking the proceeds for the loss pursuant to the insurance policy. Subsequently, both Worthen and Colonia filed motions for summary judgment on the issue of liability. The trial court entered partial summary judgment in favor of Worthen on this issue, and a trial followed solely on the issue of damages. Worthen was ultimately awarded approximately $7,500 in damages plus attorney's fees. Colonia now appeals, arguing only that the trial court erred as a matter of law in granting Worthen's motion for summary judgment as to the liability issue. We agree and reverse.

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).

In the case at bar, it is undisputed that on November 11, 1992, Lucille and Henry McCane executed a retail installment contract and security agreement for the purchase of a Nissan Stanza automobile from Mike Baker Nissan. Mike Baker Nissan then assigned all its rights, title, and interest in the installment contract and vendor's lien to Worthen, representing and securing the deferred balance of $13,053.12 plus eight percent annual interest. On the same day, the McCanes obtained insurance on the vehicle from Colonia, which policy was renewed on June 25, 1993, for one year to expire June 25, 1994. Worthen was named as loss payee in the insurance policy.

After the automobile was damaged in the September 23, 1993, accident, the McCanes stopped making timely payments on the

installment note. Therefore, on January 26, 1994, Worthen repossessed the damaged vehicle and sought payment from Colonia pursuant to Ark. Code Ann. § 23-79-104 (Repl. 1992), which provides:

> (a) No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured at the time of the effectuation of the insurance and at the time of the loss.
>
> (b) "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.

Upon being notified of Worthen's claim, Colonia responded that neither Worthen nor the McCanes were entitled to recovery due to an exclusion under the policy. Colonia referred to an endorsement signed by Lucille McCane and an authorized insurance representative on June 25, 1991. This endorsement was captioned "EXCLUSION OF NAMED DRIVER" and provided that there would be no insurance coverage under the existing policy, and any subsequent or new policy, for any claim arising out of an accident where the vehicle was being operated by Henry McCane. A similar endorsement later excluded coverage where the vehicle was being driven by Lucille McCane. The apparent reason for these endorsements was because the couple was elderly and other family members were available who could drive them when necessary. Because Henry McCane was driving the car at the time of the September 29, 1993, accident, Colonia informed Worthen that there was no coverage because of the exclusion in the policy.

In its motion for partial summary judgment, Worthen acknowledged that an exclusion agreement had been executed between Colonia and the McCanes. However, Worthen asserted that the endorsement did not bar recovery because it was never made aware of this exclusion provision. Worthen stated that, when the policy for the Nissan Stanza went into effect on November 11, 1992, it was not informed of any such exclusion. Worthen further noted that, when the policy was renewed on June 25, 1993, Colonia provided it with a "declarations page," which named

Worthen as the loss payee but failed to disclose any exclusion agreement regarding Henry McCane. It was not until after the accident that Worthen learned of the exclusion agreement. The trial court was persuaded by Worthen's argument, and granted summary judgment for Worthen on the liability issue.

For reversal, Colonia asserts that Worthen, as loss payee, had the same rights under the insurance policy as the named insured. Colonia argues that, although it never directly informed Worthen of the exclusion provision, if Worthen had requested copies of all of the endorsements which accompanied the policy it would have discovered this information. Colonia points out that an insured has a duty to educate himself concerning matters of insurance coverage, *see Scott-Huff Ins. Agency* v. *Sandusky*, 318 Ark. 613, 887 S.W.2d 516 (1994), and submits that this rule should be extended to include a loss payee claiming under an insurance policy. Alternatively, Colonia contends that it is irrelevant that it failed to notify Worthen of the exclusion provision, given that the only notice required by statute arises when an insured's policy is canceled, after which the loss payee must be notified of such cancellation at least twenty days prior to its effect. *See* Ark. Code Ann. § 23-66-206(11)(B) (1987). Finally, Colonia argues that, even if it had a duty to disclose the disputed information and failed to do so, it should not be held liable to Worthen under the policy because Worthen has not established that it was prejudiced by the omission, given that it has not asserted that it would have acted any differently had the information been disclosed.

■ We find that there were no genuine issues of material fact presented before the trial court, but we also find that the trial court erred in finding that Worthen was entitled to judgment as a matter of law. Therefore, we reverse.

■ Although Colonia did not directly inform Worthen of the exclusion agreement pertaining to Henry McCane, we know of no law requiring such notification. This is particularly true in light of the fact that the exclusion endorsement was executed on an existing insurance policy held by the McCanes well over a year before Worthen obtained a security interest in the Nissan Maxima on November 11, 1992. More importantly, it is undisputed that, when the McCanes' insurance was renewed on June 25, 1993, Worthen received a "declarations page" in reference to the insur-

ance policy.[1] This document listed five endorsements which were incorporated into the policy. At the bottom of the "declarations page" is the following language:

> THIS DECLARATIONS PAGE WITH PERSONAL AUTO POLICY PROVISIONS OR POLICY JACKET AND PERSONAL AUTO POLICY FORM, **TOGETHER WITH ENDORSEMENTS,** IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETES THE ABOVE NUMBERED POLICY. (Emphasis added.)

One of the endorsements was labeled "AU 101" and represented an exclusion agreement. Although Worthen makes much of the fact that there were actually two exclusion agreements but only one endorsement listed for them, it could have reviewed the policy and all of the endorsements, which would have revealed the exclusion agreements as to Henry McCane and Lucille McCane. Had Worthen acted diligently, it would have easily become aware of all of the contents of the insurance policy, including its endorsements. Its failure to do so was not the fault of Colonia. The terms of the policy were clear, and Worthen was not entitled to recover as a matter of law because a plain reading of the exclusion agreement at issue barred recovery. Colonia's motion for summary judgment should have been granted.

Reversed and remanded.

COOPER and STROUD, JJ., agree.

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[1] We do not address in this opinion a situation where an insurer and insured enter into an agreement to exclude the insured as a driver, and the most recent "declarations page," or other statement of insurance coverage provided to the loss payee, does not include a reference to the exclusion agreement by endorsement number, or otherwise. That factual circumstance is beyond the scope of this opinion.

Donnie Eugene HUDSON *v.* STATE of Arkansas

CA CR 95-452 919 S.W.2d 518

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 1996

William R. Mayo, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Donnie Eugene Hudson was convicted by a jury on two counts of delivery of a controlled substance (prophylhexedrine) on September 22, 1994. He was sentenced as a habitual offender to five years in the Arkansas Department of Correction on each count, with the sentences to run concurrently. Appellant contends on appeal that the evidence was insufficient to support the jury's verdict and that the trial court erred in overruling his motion to dismiss. We find no error and affirm.

■ In reviewing the sufficiency of the evidence on appeal, we review the evidence in the light most favorable to the appellee and affirm if the verdict is supported by substantial evidence. *Ramey* v. *State*, 42 Ark. App. 242, 863 S.W.2d 839 (1993). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *McCullough* v. *State*, 44 Ark. App. 99, 866 S.W.2d 845 (1993).

Frankie Hart, Detective Sergeant of the Rogers Police Department, testified that in 1990 he was working undercover with the 19th Judicial Drug Task Force in the Siloam Springs area. He testified that he made contact with the appellant through a confidential informant, Lee Elmore, on October 8, 1990. On October 12, 1990, Detective Hart and the informant went to the apartment of Stacy Warder, the appellant's girlfriend, and discussed a drug transaction with the appellant. Detective Hart testified that shortly after he arrived the appellant mixed some water and a powdery substance in a spoon, drew some of the solution into a syringe, and injected the solution into appellant's left arm. Further testimony indicated that the appellant removed a plastic bag from a basket, located on a shelf in the living room, and handed it to Detective Hart. Hart testified that the bag contained an off-white powdery substance, which the appellant represented to be three-and-a-half grams of methamphetamine. Detective Hart paid the appellant $250.00 for this substance, which later test results revealed to be prophylhexedrine.

On October 22, 1990, Detective Hart informed the appellant that he was interested in purchasing "a couple of eight-balls" of methamphetamine. The appellant contacted Hart by calling him on Hart's pager the next day, October 23, 1990. Hart went back to Stacy Warder's apartment and made contact with the appellant.

Appellant went to the same shelf and basket in the living room and retrieved three plastic packets. Appellant stated that the packets weighed a total of eight-and-one-half grams. However, Detective Hart brought his own scales to weigh the substance because of the appellant "cheating or shorted" him in the past. Hart's scales revealed the substance only weighed five grams, and later tests revealed that substance was in fact prophylhexedrine. Hart paid the appellant $250.00 for three-and-one-half grams and the appellant gave Hart the other one-and-one-half grams to make up for another deal that was "short."

The appellant argues on appeal that the State's evidence was insufficient because it rested solely on the testimony of Detective Hart. He contends that the testimony of the confidential informant, Lee Elmore, and the appellant's wife, Retha Hudson, contradicted Hart's testimony, therefore the evidence was insufficient. However, decisions regarding the credibility of the witnesses, and the weight to be given their testimony, are for the trier of fact to resolve. *Neble* v. *State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988). We find that there was substantial evidence to support the jury's verdicts.

Appellant's second point is that the trial court erred in failing to dismiss the charges against him. He argues that because the legislature "dropped" prophylhexedrine from the statutory schedule of controlled substances after the date of the offense, the delivery of prophylhexedrine was effectively decriminalized and he could no longer be convicted of the charged offenses. Appellant failed to cite the previous or current statutes that he alleges were changed and "decriminalized" his conduct. We note on this point, however, that there is a general statute that deals with retroactivity, Ark. Code Ann. § 1-2-120(b) (1987), which states:

> (b) When any criminal or penal statute is repealed, all offenses committed or forfeitures accrued under it while it was in force shall be punished or enforced as if it were in force, notwithstanding the repeal, unless otherwise expressly provided in the repealing statute.

We find that appellant's argument has no merit and the motion to dismiss was properly denied.

Affirmed.

COOPER and STROUD, JJ., agree.

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

CA 94-1316 919 S.W.2d 522

Court of Appeals of Arkansas
En Banc
Opinion delivered April 24, 1996
[Petition for rehearing denied June 5, 1996.*]

*MAYFIELD, J., would grant.

Winston Bryant, Att'y Gen., by: *Shirley Guntharp*, Deputy Att'y Gen. and *Suzanne Antley*, Assistant Att'y Gen., for appellant.

Paul J. Ward, for appellee.

Southwestern Bell Telephone Co., by: *Garry S. Wann* and *Ivester, Skinner & Camp, P.A.*, by: *Edward Skinner*, for Southwestern Bell Telephone Co.

JOHN MAUZY PITTMAN, Judge. In this appeal, the Attorney General challenges orders of the Arkansas Public Service Commission (Commission) finding that the Attorney General's complaint failed to state a cause of action upon which relief could be granted and that the Commission lacked jurisdiction to hear the complaint. Because we find that the complaint failed to state a cause of action, we limit our discussion to the sufficiency of the complaint and do not reach the jurisdictional issue.

On August 8, 1994, the Consumer Utilities Rate Advocacy Division (CURAD) of the Attorney General's office filed a complaint "on behalf of and for" Arkansas utility ratepayers, alleging that Southwestern Bell Telephone Company (SWB) had been "unjustly enriched" by providing and charging customers for an optional service without authorization. The Attorney General asserted that he was charged with representing the interests of Arkansas utility ratepayers by Arkansas Code Annotated §§ 23-4-301 through 23-4-307 (1987), the statutes that created CURAD, and that he was authorized by Arkansas Code Annotated § 23-3-119 (1987), the statute that provides for the bringing of a complaint to the Commission by any entity or person unlawfully treated by a public utility, to bring the complaint on behalf of the affected Arkansas ratepayers. The Attorney General stated that SWB's trunk conditioning service had been unbundled from SWB's trunk rate [for PBX customers] in 1985 and that subsequently SWB's applicable tariff was revised to give the conditioning service a separate product code (LOS) and rate. The Attorney General then alleged:

> Despite the optional nature of conditioning service, SWB began charging certain customers the new separate rate for the service and failed to notify those customers of their right not to have the service. Moreover, the separate rate is not specifically stated on the face of the customers' bills; rather, it is included in an item that appears on the customers' bill simply as "monthly charge," which includes various charges.

The Attorney General concluded that "there may be numerous customers of SWB who are being wrongfully charged for LOS service and possibly for other optional services without authorization." The Attorney General sought discovery "to determine the extent of SWB's unauthorized and wrongful charging"; a public hearing on the issue of SWB's "unauthorized and wrongful charg-

ing"; a refund of all amounts wrongfully charged; and an order from the Commission for SWB to cease and desist from its unauthorized and wrongful charging for optional, unnecessary, or non-functional services.

SWB responded to the complaint with a motion to dismiss. In Order No. 2, the Commission found that the complaint could properly be dismissed for failure to state a cause of action and because it lacked jurisdiction to hear a class action. The Commission, however, held SWB's motion to dismiss in abeyance for thirty days in order to give the Attorney General the opportunity to amend his complaint to state a cause of action and to specify the individual SWB customers he represented.

In his amended complaint, the Attorney General again claimed that he was authorized to present a complaint on behalf of the affected ratepayers but failed to identify any specific SWB customers harmed by SWB's actions. The Attorney General alleged that: "In May, 1985, SWB began charging the trunk customers the new separate rate for the service, but failed to notify them of their right not to have the service, or of the advisability of consulting their vendors to determine whether the service was necessary." The amended complaint sought notice to Arkansas ratepayers who have PBX systems, a public hearing, refunds to customers charged without their authorization from May 1985, and cessation of the alleged unauthorized charging for LOS service. SWB filed a motion to dismiss the amended complaint, stating in part that the Attorney General had failed to set forth facts to support specifically alleged violations of law and specific individual customers who were aggrieved by the alleged violations.

On November 23, 1994, the Commission dismissed the amended complaint for failure to state a claim pursuant to Section 23-3-119 and Rule 10.02 of the Commission Rules of Practice and Procedure and as a class action complaint exceeding the scope of the Commission's jurisdiction. The Commission found that the Attorney General had not alleged or shown that SWB had violated any law that the Commission has jurisdiction to administer, or any order, rule, or regulation of the Commission. On appeal, the Attorney General argues that the Commission failed to pursue its statutory authority; that it erred in holding that the Attorney General was attempting to bring a class action; and that it erred in holding that the Attorney General's complaint failed to state a cause of

action.

Before we address the Attorney General's arguments, some discussion of the service in question is appropriate. The conditioning service was unbundled from, or separated from, SWB's trunk rate in the context of a 1985 SWB rate case. Although the record does not include a copy of the applicable tariff that resulted from that rate case, we have been able to glean information about the conditioning service from the record and discussion at oral argument. It is apparent that the service applies to the local loop portion of the trunk between SWB's central offices and the customers' premises. The service is designated a "special circuit" with guaranteed service parameters. Its purpose appears to be to control distortion and other inappropriate noise on the lines. Service customers receive priority handling through a special service center as to trouble reports, repair, and testing. The service is available to both residential and business customers but appears to be directed toward business customers that handle large volumes of calls, such as hospitals and hotels. The tariff provides that the service is "normally required when voice grade line is connected to customer provided switching systems." Apparently, the service is mandatory for systems using certain types of trunks.

We turn now to the sufficiency of the complaint filed by the Attorney General and the Commission's finding that the Attorney General failed to state a cause of action. We address this issue first because we find it dispositive of the rest of the appeal. The thrust of the Attorney General's amended complaint is that SWB is charging some of its customers for LOS service without having notified them that this coverage became optional in 1985. When the conditioning service was unbundled from SWB's trunk rate in the 1985 rate case, SWB was not specifically ordered by the Commission to advise its customers who had previously been receiving the service. The Attorney General does not contend that SWB failed to comply with statutory and Commission notice requirements attendant to the change in rates. Furthermore, there is no evidence that any party to the rate case asked the Commission to order individual notices or separate line item billing or that any party appealed from the rate case alleging that such action should have been taken.

In Order No. 2, the Commission noted that the Attorney General had neither identified any specific customers to whom its complaint referred nor stated any specific acts to support its com-

plaint. The Commission stated that Arkansas law requires fact pleading and concluded that the Attorney General's complaint failed to meet this requirement. The Commission, however, gave the Attorney General an opportunity to amend its complaint to name individual consumers who have specific complaints against SWB. The Attorney General failed to do this in his amended complaint. Instead, he generally alleged that "all customers who had voice grade conditioned trunks prior to the [1985 rate case] have been wrongfully charged for LOS service every month from and after May, 1985." In Order No. 4, which dismissed the Attorney General's amended complaint, the Commission held:

> The [Attorney General's] Amended Complaint states that the [Attorney General] is the Complainant but its Complaint is on behalf of utility ratepayers "who have been charged for LOS service without their authorization." Amended Complaint at 1. The [Attorney General] has failed to identify any entity or individual that fits within this classification in either the Complaint or Amended Complaint, nor has any individual or entity sought to join in the [Attorney General's] Complaint or Amended Complaint. The [Attorney General], the named Complainant in this Docket, does not allege that it has ever received or been charged for LOS service or that the [Attorney General] is a customer of [SWB].
>
> ....
>
> The [Attorney General] does not allege that [SWB] failed to comply with Commission Rules regarding publication of notice of proposed changes in rates in Docket No. 84-165-U, the Docket in which the rate was unbundled. The [Attorney General] does allege that [SWB] did not show LOS service as a line item on bills and that [SWB] did not inform each individual customer of the optional nature of LOS service after May, 1985. However, the [Attorney General] does not cite any requirement in law or Commission orders in Docket No. 84-165-U which required a special line item on bills for LOS service or personal notification of the change in LOS service. The [Attorney General] does not allege that any customer charged for LOS service has not been provided that service.

....

> The Amended Complaint of the [Attorney General] does not claim that [SWB] has violated any laws, orders, or rules and regulations which the Commission has authority to administer. Taken as true and correct, the Amended Complaint merely reflects that [SWB] charged for and provided one or more unnamed customers an optional service, LOS. Providing utility service pursuant to a filed tariff does not constitute a cause of action for a complaint.
>
> Ark. Code Ann. § 23-3-119(a)(1) and Rule 10.02 specify that a complaint must set forth clearly and fully the act or violation of any order, law or rule which is the subject of the complaint. In Order No. 2, the Commission advised the [Attorney General] that its Complaint failed to meet the requirements of the statute and rule and allowed the [Attorney General] time to amend the Complaint to cure the cited deficiencies. The [Attorney General's] Amended Complaint does not cure the cited deficiencies. In the Amended Complaint, the [Attorney General] failed to identify a complainant who is a customer of [SWB] and who allegedly has been unlawfully treated by [SWB], and the Amended Complaint fails to identify any violation or alleged violation of any law, order or rule arising from the public utility statutes. The Amended Complaint should be and hereby is dismissed.

We agree with the Commission's conclusion that the Attorney General's amended complaint failed to state a cause of action. Rule 10.02(c) of the Commission's Rules of Practice and Procedure requires that:

> Each formal complaint shall fully and clearly set out any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any order or rule of the Commission and the exact relief which is desired. The complaint shall contain facts and information sufficient to fully apprise the Commission and the respondent of the facts and issues involved and to enable the respondent to prepare its answer to the complaint.

This rule is a reflection of the clear standard adopted in Arkansas, which requires fact pleading: "[a] pleading which sets forth a claim

for relief ... shall contain (1) a statement in ordinary and concise language of facts showing that ... the pleader is entitled to relief ...." Ark. R. Civ. P. 8(a)(1). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted...." These two rules must be read together in testing the sufficiency of the complaint; facts, not mere conclusions, must be alleged. *Hollingsworth* v. *First Nat'l Bank and Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993); *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and pleadings are to be liberally construed. *Id.*

The Attorney General filed his complaint and amended complaint pursuant to Section 23-3-119, which provides in part:

> (a)(1) Any chamber of commerce or board of trade, mercantile, agricultural, or manufacturing association, any public utility, any municipality, any customer of a public utility, any person unlawfully treated by a public utility, or any public utility unlawfully treated by a customer, may complain to the commission in writing. The complaint shall set forth any act or thing done or omitted to be done by any public utility or customer in violation, or claimed violation, of any order, law, or regulation, which the commission has jurisdiction to administer.

This court must construe a statute just as it reads by giving the words their ordinary and usually accepted meaning. *Arkansas Vinegar Co.* v. *Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988). Viewed in this light, it is clear that to bring a complaint pursuant to this statute, the *complainant* must have been unlawfully treated by a public utility. This complaint is brought by the Attorney General who has not alleged that either he or the state has been unlawfully treated. Even if this court were to accept the Attorney General's second argument — that he can represent the affected ratepayers collectively — this statute requires a named complainant who has been unlawfully treated by the utility.

In his amended complaint, the Attorney General continued to assert that he was representing those Arkansas ratepayers charged for the service without authorization. He sought to cure the deficiencies in his complaint by alleging that some unnamed

SWB customers had requested and received termination of the conditioning service with no resulting impairment to the quality of service received. In addition, he alleged that SWB had only made partial refunds to those customers of the amount paid for the conditioning service since 1985. These generalities and conclusions are not sufficient to cure the fatal flaw in the complaint. The facts constituting a cause of action must be pled in direct and positive allegations, not by way of argument, inference, or belief. *Big A Warehouse Distrib., Inc.* v. *Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986). Statements of generalities and conclusions of law are not sufficient to state a cause of action. *Id.*

In denying the Attorney General's petition for rehearing in Order No. 5, the Commission further explained:

> The [Attorney General] continues to repeat its contention that the Commission has jurisdiction to hear the [Attorney General's] Complaint and Amended Complaint because the Commission can order a remedy in the form of refunds. However, the [Attorney General] has yet to even allege that [SWB] has violated any tariff, rule, law or order which is jurisdictional to the Commission and which would form the jurisdictional and legal basis for the Commission to consider a remedy. The [Attorney General] apparently believes that it can bypass any legal deficiencies in its pleadings by leaping to the remedy without stating a cause of action. The Commission has the authority to order refunds as a remedy when a consumer has been charged unlawfully by a utility but first there must be a complaint and proof of an unlawful charge before a remedy is imposed....
>
> A further flaw in the [Attorney General's] argument is that if the Commission were to consider the [Attorney General's] Amended Complaint, to whom would refunds be made and in what amount? A refund is the return of an amount paid. The [Attorney General] does not allege that its Amended Complaint is applicable to all [SWB] customers, but there is no named complainant who alleges it has been unlawfully charged in this Docket. The [Attorney General] does not allege that it has received or been charged for LOS service, nor does the [Attorney General] even allege that it is a [SWB] customer. No complainant has ever been named who allegedly received or was charged for LOS service.

> Without at least one such individual, no refund could be calculated or awarded by the Commission.

This court must examine the complaint in light of Section 23-3-119 and the well established rules previously set out. Simply put, the Attorney General has failed to identify a complainant who is a SWB customer and who allegedly has been unlawfully treated by SWB. Because the Attorney General has failed to conform with the minimal pleading requirements of Section 23-3-119 and Rule 10.02(c) of the Commission's Rules of Practice and Procedure, it is unnecessary for us to address the other points raised by the Attorney General. We affirm the Commission's dismissal of the complaint.

Affirmed.

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

ROGERS, J., concurs.

MAYFIELD, J., dissents.

JUDITH ROGERS, Judge, concurring. I agree that the Attorney General's claim must fail for the reasons given by the majority. I write only to express my concern about the Commission's apparent failure to prepare for the future. With the swift and inevitable move to a more competitive environment in the utility industry, utilities will be presenting more choices to their customers as "unbundling" continues. Based on the record in this case, there may be unique aspects to the unbundling process that warrant a change in the Commission's notice requirements. According to discussion at oral argument, the Commission has failed to initiate action in this regard but instead remains in a reactive mode. The Commission has at its disposal the power to investigate and promulgate rules if necessary. I would hope that the Commission would exercise that power.

MELVIN MAYFIELD, Judge, dissenting. I respectfully dissent. The majority has affirmed the Commission's dismissal of the Attorney General's complaint, finding that he failed to state a cause of action upon which relief could be granted. In doing so, the majority noted that the Attorney General had not identified any specific customers to whom his complaint referred nor had he stated any specific acts to support his complaint. I disagree with this conclusion.

The Attorney General states in his complaint that he represents all customers who had LOS service prior to the 1985 rate case and have been wrongfully charged for this service since that time without their authorization. He specifically alleges the following facts: that SWB's trunk conditioning service was unbundled from its trunk rate in 1985 and that SWB's tariff was revised to give the conditioning service a separate produce code (LOS); that SWB continued to charge certain customers for this service, despite the optional nature of the conditioning service, without notifying them of their right not to have this service; and that the separate rate for the LOS service is not stated on the face of the customer's bill but is included in the monthly charge along with various other items. The Attorney General concludes that there may be numerous customers of SWB who are being wrongfully charged for LOS service and seeks discovery in order to ascertain the extent of SWB's unauthorized and wrongful charging, a public hearing, and a Commission order for SWB to cease and desist from its unauthorized and wrongful charging for the optional service.

Rule 10.02(c) of the Commission's Rules of Practice and Procedure provides in part that the complaint shall contain facts and information sufficient to fully apprise the Commission and the respondent of the facts and issues involved and to enable the respondent to prepare its answer to the complaint. Arkansas Code Annotated § 23-3-119 (1987) allows a complaint to be brought to the Commission by any entity or person unlawfully treated by a public utility. This statute specifically includes "[a]ny chamber of commerce or board of trade, mercantile, agricultural, or manufacturing association, any public utility, any municipality, any customer of a public utility, any person unlawfully treated by a public utility, or any public utility unlawfully treated by a customer...." Moreover, Ark. Code Ann. § 23-2-304(a)(2) and (3) (Supp. 1993) provides that the Commission, upon complaint, shall determine the reasonable, safe, adequate, and sufficient service to be observed, furnished, enforced, or employed by any public utility and to fix this service by its order, rule, or regulation; and to ascertain and fix adequate and reasonable standards, classifications, regulations, practices, and services to be furnished, imposed, observed, and followed by any or all public utilities. In my opinion, the Attorney General's complaint satisfies the requirements for relief under these statutes and rule.

Furthermore, the CURAD statutes, Ark. Code Ann. §§ 23-

4-301 — 23-4-307 (1987), charge the Attorney General with the responsibility of representing the interests of Arkansas utility ratepayers. Section 23-4-305 provides:

> The Consumer Utilities Rate Advocacy Division shall represent the state, its subdivisions, and all classes of Arkansas utility rate payers and shall have the following functions, powers, and duties:
>
> (1) To provide effective and aggressive representation for the people of Arkansas in hearings before the Arkansas Public Service Commission and other state and federal courts or agencies concerning utility-related matters.
>
> (2) To disseminate information to all classes of rate payers concerning pertinent energy-related concepts.
>
> (3) To advocate the holding of utility rates to the lowest possible level.

In bringing his complaint, the Attorney General sought to protect the interests of specific Arkansas ratepayers who had been charged LOS service without their authorization or knowledge. These ratepayers are customers of SWB and therefore are entitled to bring a complaint to the Commission under Section 23-3-119.

It has repeatedly been held that, in testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint and pleadings are to be liberally construed. *Rabalaias* v. *Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). The complaint of the Attorney General sufficiently identifies the ratepayers that he is representing and pleads sufficient facts to fully apprise the Commission and SWB of the issues involved and the relief sought. I would reverse the dismissal of the Attorney General's complaint.

Laurie CLAFLIN *v.* DIRECTOR, Arkansas Employment Security Department

E 95-12 920 S.W.2d 20

Court of Appeals of Arkansas
En Banc
Opinion delivered April 24, 1996

JAMES R. COOPER, Judge. The appellant in this unemployment

compensation case was employed by Leather Brothers, Inc., buckling dog collars. After the appellant had been so employed for approximately one and one-half years, her foreman advised her that her hours would be reduced to half time. The appellant worked eleven and one-half hours the following week and, after the conclusion of her last work day, informed her foreman that she had located a full-time job and was quitting. Subsequently, she filed a claim for unemployment benefits which the Board of Review denied on the ground that she had quit her last work without good cause connected with the work. From that decision, comes this appeal.

For reversal, the appellant contends that the Board erred in finding that she quit her last job without good cause connected with the work.[1] We affirm.

Whether there was good cause for an employee to quit his job is a question of fact. *Morton* v. *Director*, 22 Ark. App. 281, 742 S.W.2d 118 (1987). In determining the sufficiency of the evidence to sustain the findings of the Board of Review, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings and affirm if they are supported by substantial evidence. *Perdrix-Wang* v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). Even when there is evidence upon which the Board might have reached a different decision, the scope of our judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

In the case at bar, the Board based its finding that the appellant lacked good cause for quitting on the appellant's failure to make further inquiries concerning her decrease in hours. In this context we think it significant that the appellant's supervisor originally informed her that the reduction in work hours was something that the employer wanted to "try," and that it was the employer's intention to move the appellant back to full-time employment after the week of half-time work.

"Good cause" depends not only on the good faith of

[1] Arkansas Code Annotated § 11-10-513 (1987) provides that an employee who left his last work voluntarily and without good cause connected with the work shall be disqualified for benefits.

the employee involved (which includes the presence of a genuine desire to work and be self-supporting), but also on the reaction of the average employee. *Perdrix-Wang* v. *Director, supra*; *see McEwen* v. *Everett*, 6 Ark. App. 32, 637 S.W.2d 617 (1982). Another element of "good cause" is whether the employee took appropriate steps to rectify the problem. *McEwen* v. *Everett, supra*. Given these considerations, we cannot say that the Board's finding that the appellant quit without good cause connected with the work is not supported by substantial evidence.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

ROGERS, STROUD, and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from the decision to affirm the Board of Review because I cannot agree that fair-minded persons faced with the evidence in this case could decide that Laurie Claflin voluntarily left her job *without good cause connected with the work*. The only proof is that Claflin left her job after the employer reduced her work hours to half time, and failed to indicate whether she would ever be returned to full-time duty. She worked the half-time schedule, found other full time employment, and told her foreman that she was quitting to take the full-time position. That was when the foreman told her that she could return to full-time duty. Because I am convinced that Claflin's conduct was wholly consistent with what any other reasonable and able-bodied worker would have done, and because I do not accept the view stated in the majority opinion that a worker in Claflin's position owes the employer a duty to track down unidentified management personnel superior to her foreman to obtain relief from a job decision that has caused economic injury, I write this dissenting opinion.

The Board of Review held that Claflin was disqualified from receiving unemployment benefits because she voluntarily left her job with Leather Brothers Inc., without good cause connected with the work. Arkansas Code Annotated § 11-10-513 (Repl. 1987) states, in pertinent part:

> (a)(1) If so found by the director, an individual shall be disqualified for benefits if he, voluntarily and without good cause connected with the work, left his last work.

> (2) The disqualification shall continue until, subsequent to filing a claim, he has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, another state, or the United States.

The term "good cause" means a justifiable reason for not accepting the particular job offered. To constitute good cause, the reason for refusal must not be arbitrary or capricious, and the reason must be connected with the work itself. The question of what is good cause must be determined in the light of the facts in each case. *Wacaster* v. *Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980). Although benefits will be denied an employee who leaves employment for general economic reasons not connected with some specific alleged unfairness perpetrated by her employer, where the employer does an act that does economic injury to the employee that act may be good cause connected with the work within the meaning of the statute. *Jackson* v. *Daniels*, 269 Ark. 714, 600 S.W.2d 426 (1980). And while allegations of substantial decrease in wages may be considered as good cause for voluntary departure from employment, complaints based primarily upon economic conditions beyond the control of the employer do not fit the statutory exemption from disqualification. *Armstrong* v. *Daniels*, 270 Ark. 303, 603 S.W.2d 481 (1980). We reaffirmed our view on this statute in *Perdrix-Wang* v. *Director, State Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993), when we observed that good cause means a cause that would reasonably impel the average able-bodied qualified worker to give up employment.

At the October 11, 1994, hearing before the appeals referee, Claflin admitted quitting her job with Leather Brothers after having worked there for two months through a temporary services agency, and for another year and several months as a direct employee. Claflin testified that her foreman told her that her work hours would be reduced to half-days because the employer had decided to try doing so. She worked a week under the half-day arrangement before accepting a full-time job for a different employer. Until she accepted the full-time job, nobody from Leather Brothers had informed her that she would be returned to full-time duty, or when that might happen, if it happened. On the day that Claflin quit the job, she finished her half-day schedule and waited for twenty minutes to talk with the foreman and tell him that she was quitting. Only then did the foreman tell her that she could return to full-

time work.

Jo Ann Robinette, Office Administrator for the employer, admitted that the employer had been changing its factory due to fluctuations in orders, and suggested that Claflin's foreman had contemplated relocating her to another work station to provide additional working hours. Robinette conceded that the foreman should have told Claflin that the employer intended to return her to full-time work the following week; nevertheless, there is no proof that the foreman or anybody else did so.

The Board of Review reasoned that Claflin lacked good cause connected with the work for quitting because she did not consult a higher manager than her foreman before quitting. There was no reason for Claflin to seek an audience from anybody else, however, when the person that the employer appointed to supervise her work and schedule her working hours had already told her that she was assigned to half-time work because the employer wanted to try that arrangement. Employees should be able to reasonably rely on the people that their employers employ as their supervisors to honestly and accurately communicate information as fundamental as when people will work, and for how long they will work each day. Here the undisputed proof is that Claflin was never told that the new work schedule was only temporary, and had no reason to expect to return to work full-time until after she had already sought, found, and told her foreman that she had accepted a full-time job elsewhere. The average able-bodied and qualified worker would have done precisely what Claflin did — try to find full-time work elsewhere — when faced with the prospect of being a half-time worker for an indefinite period of time.

The likely impact of the reasoning adopted by the majority opinion will be that employers who make decisions causing economic harm to their workers will cause those workers to be denied unemployment benefits because the workers somehow fail to protest the decision to the right management official. If that is the meaning of "good cause," none of our previous cases have suggested it. The employer in this case certainly produced no evidence that makes this new standard sensible, because there is no proof that the employer identified any type of appeal or grievance procedure that someone in Claflin's position would have known was available. There is no proof that the employer even identified anybody to whom Claflin could have appealed, assuming she had known that

an appeal of her half-time work assignment was possible. There is no proof that anybody in management even knew that the appeal process that the majority reasons Claflin ought to have attempted was possible. Nevertheless, today our court has decided that Claflin and all other similarly situated workers must somehow invent for themselves an ad hoc appeals process from the various economically harmful job decisions that their employers unilaterally make. The workers must select the persons to whom the appeals shall lie. The workers must determine the time span in which to effect the appeals. They must do these things despite having no authority or responsibility for the initial decisions that produce their economic injury, and despite having no ability to correct or otherwise adjust the effects of that injury. Meanwhile, employers may act to the economic peril of their workers without any accountability for instituting the very grievance or appeal procedure that the majority reasons that Claflin should have pursued, without telling the employees that there is a right to appeal, and without even identifying the person or persons to whom any appeal shall be taken.

The decision announced today certainly will not inspire an employer to institute an appeal process because there is no sanction for failing to do so. The workers will suffer if no process is instituted, if a process does not work properly, and if they somehow misjudge who in management is responsible for deciding whether past decisions that cause economic harm will be reversed or otherwise adjusted. It is difficult to imagine a more unjust and unreasonable result, or one having less of a factual basis.

Hopefully, Claflin will petition the Supreme Court of Arkansas to review the decision reached in her case. If the Supreme Court grants the petition for review, and reverses the result reached by our court, workers will be spared the hardships and unfairness that will otherwise flow from the decision we have made. If not, one shudders to think what our decision will mean for the workers who, like Claflin, are innocent of any misconduct related to their work, and are innocent and helpless bystanders to management decisions to change work schedules, close plants, reduce the number of people in a workforce, and the other decisions that can cause them economic injury. Meanwhile, our decision means that those workers will not be able to recover unemployment benefits unless they engage in the foreseeably futile exercise of hunting — and finding — some unidentified management official who might be able to

provide relief that only management can give, but which only workers are now obligated to create.

This result is unfounded, unreasonable, and unjust. I dissent.

ROGERS and STROUD, JJ., join in this opinion.

James M. GLENN, III *v.* STUDENT LOAN GUARANTEE FOUNDATION of Arkansas

CA 95-552 920 S.W.2d 500

Court of Appeals of Arkansas
Division I
Opinion delivered April 24, 1996
[Petition for rehearing denied May 29, 1996.]

Davidson, Horne & Hollingsworth, by: *Cyril Hollingsworth* and *William S. Roach*, for appellant.

Connie M. Meskimen, for appellee.

JAMES R. COOPER, Judge. The appellee, Student Loan Guarantee Foundation of Arkansas, filed suit against the appellant in the Circuit Court of Pulaski County, Arkansas, seeking to collect on student loan notes which were alleged to be in default. The appellant, a Tennessee resident, was served with a copy of the summons and complaint in Tennessee. The appellant filed a "special appearance" and moved to dismiss for lack of personal jurisdiction. The trial court subsequently entered a default judgment for the appellee. The appellant filed a motion to set aside the default judgment, again asserting lack of personal jurisdiction. The trial court denied the appellant's motion to set aside the default judgment on January 30, 1995. From that decision, comes this appeal.

For reversal, the appellant contends that the default judgment is void because the trial court lacked personal jurisdiction over the appellant. We agree, and we reverse and dismiss.

Jurisdiction in the case at bar is premised on Ark. Code Ann. § 16-4-101(C)(1) (Repl. 1994), which provides that a court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's transacting any business in this state. Our Supreme Court has stated

that the purpose of the "transacting business" provision of Ark. Code Ann. § 16-4-101(C)(1) is to permit Arkansas courts to exercise the maximum *in personam* jurisdiction allowable by due process. *Szalay* v. *Handcock*, 307 Ark. 232, 819 S.W.2d 684 (1991). Consequently, the question in the case at bar is whether the exercise of personal jurisdiction over the appellant comports with due process.

Under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), due process is satisfied where there exist such minimum contacts between the nonresident defendant and the forum state that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. In determining whether a nonresident's contacts with the forum state were sufficient to impose jurisdiction, we have considered (1) the nature and quality of the contacts with the forum state, (2) the quantity of the contacts with the forum state, (3) the relation of the cause of action to the contacts, (4) the interest of the forum state in providing a forum for its residents, and (5) the convenience of the parties. *Moran* v. *Bombardier Credit, Inc.*, 39 Ark. App. 122, 839 S.W.2d 538 (1992).

In the case at bar, the appellant filed with the trial court an affidavit stating that he was a Tennessee resident, that he never resided or engaged in business in Arkansas; that he signed the notes at issue in Tennessee; and that his children, for whose benefit the notes were executed, went to school in Tennessee. The appellee's assertion that the appellant transacted business in Arkansas is premised solely on two facts: (1) that the guaranteed student loan was made by an Arkansas bank, and (2) that the guarantor was an Arkansas corporation.

Although a single contract can provide the basis for the exercise of jurisdiction over a nonresident defendant if there is a substantial connection between the contract and the forum state, *CDI Contractors, Inc.* v. *Goff Steel Erectors, Inc.*, 301 Ark. 311, 783 S.W.2d 846 (1990), we think that the connection in the present case is too tenuous to support a finding of personal jurisdiction. As was the case in *CDI Contractors, supra*, the contract in the case at bar was signed by the appellant outside of Arkansas and provided only that payments be mailed to Arkansas. However, it has been held that the use of arteries of interstate mail and banking facilities, standing alone, is insufficient to satisfy due process in asserting long-arm jurisdiction over a nonresident. *CDI Contractors, supra*; *Mountaire Feeds, Inc.* v. *Argo Impex*, 677 F.2d 651 (8th Cir. 1982). Insofar as the

connection to Arkansas in the present case is premised solely upon the use of interstate mail and banking facilities, we hold that the trial court lacked personal jurisdiction over the appellant.

Reversed and dismissed.

ROBBINS and STROUD, JJ., agree.

Kenneth FLETCHER *v.* STATE of Arkansas

CA CR 95-475 920 S.W.2d 42

Court of Appeals of Arkansas
Division I
Opinion delivered April 24, 1996

Lea Ellen Fowler O'Kelley, for appellant.

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

JOHN B. ROBBINS, Judge. On January 8, 1992, a felony information was filed against appellant Kenneth Fletcher in Pulaski County Circuit Court, charging him with incest and rape. The information alleged that, over a period from May 12, 1985, until December 31, 1989, Mr. Fletcher engaged in sexual intercourse or deviate sexual activity with his adopted daughter. Pursuant to a plea arrangement, Mr. Fletcher pleaded guilty to incest and was sentenced on March 13, 1992, to ten years in the Arkansas Department of Correction.

On April 13, 1992, Mr. Fletcher was charged with four counts of incest in Lonoke Circuit Court. The information alleged that he engaged in sexual intercourse or deviate sexual activity with his adopted daughter on May 12, May 26, June 27 and November 19 of 1989. Mr. Fletcher moved to dismiss the charges, arguing that the Lonoke County charges were barred by former jeopardy because of his guilty plea and sentence in Pulaski County for con-

duct that occurred during the same time period. The Lonoke County Circuit Court denied Mr. Fletcher's motion to dismiss, and after a bench trial, he was found guilty of incest and sentenced to ten years imprisonment on each of the four counts. These sentences were to run concurrent, but consecutive to the ten-year sentence he received in the Pulaski County conviction.

Mr. Fletcher now appeals his convictions from Lonoke County. For reversal, he argues that the trial court erred in denying his motion to dismiss. Specifically, Mr. Fletcher contends that the Lonoke County charges were barred by double jeopardy, as well as the doctrines of collateral estoppel and res judicata. We find no error and affirm.

Prior to his conviction in Lonoke County Circuit Court, Mr. Fletcher agreed to certain stipulations. It was stipulated that he and the victim's mother were married in June 1975, and that the three lived together as a family until December 1989. Mr. Fletcher adopted his wife's daughter and began making sexual advances toward her when she was nine years of age. When the victim was approximately fifteen years of age, Mr. Fletcher began having sexual intercourse with her on a repeated basis. This sexual activity occurred in Pulaski County for about two years before Mr. Fletcher moved his family to Lonoke County in November 1988. While in Lonoke County, Mr. Fletcher had further sexual relations with the victim, and several of these incidents were recorded on video tapes. The victim lived with Mr. Fletcher in Lonoke County until December 1989, and Mr. Fletcher admitted to having sexual intercourse with the victim on May 12, May 26, June 27, and November 19 of that year.

For his double jeopardy argument, Mr. Fletcher cites the Fifth Amendment of the United States Constitution and Article 2, section 8, of the Arkansas Constitution, both of which guarantee that no person shall be twice put in jeopardy of life or liberty for the same offense. He contends that the incest against his adopted daughter was a single continuing offense, which was committed over a period of years in both Pulaski and Lonoke Counties, and that his guilty plea in Pulaski County encompassed all of his incestuous activity. Arkansas Code Annotated section 16-88-108(c) (Repl. 1993) provides:

> (c) Where the offense is committed partly in one

> county and partly in another, or the acts, or effects thereof, requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county.

Mr. Fletcher argues that, because his crime was a continuing one and occurred in both counties, Pulaski County rightfully assumed jurisdiction pursuant to the above statute. He submits that double jeopardy considerations barred any further prosecution.

In addressing Mr. Fletcher's double jeopardy argument, this court is aware of the fact that, pursuant to Ark. Code Ann. § 5-1-112(2) (Repl. 1993), a former prosecution resulting in a conviction is an affirmative defense to a subsequent prosecution for the same offense. We are also mindful of Ark. Code Ann. § 5-1-113(1)(B) (Repl. 1993), which provides that, after a conviction, a subsequent prosecution for a different offense is barred if the alleged offense was based on the same conduct giving rise to the conviction. However, in the instant case Mr. Fletcher's convictions in Lonoke County were not for the same offense committed in Pulaski County. Nor were the Lonoke offenses based on the same conduct for which he was convicted in Pulaski County. Therefore, we reject Mr. Fletcher's double jeopardy argument.

Incest is defined by Ark. Code Ann. § 5-26-202 (Repl. 1993), which provides that "A person commits incest if, being sixteen (16) years of age or older, he purports to marry, has sexual intercourse with, or engages in deviate sexual activity with a person he knows to be...[a] stepchild or adopted child...." Contrary to Mr. Fletcher's contention that incest is an ongoing crime for which he can only be prosecuted once, a reading of the above statute indicates that one commits the crime of incest each time he engages in sexual intercourse with an adopted daughter. In *Smith* v. *State*, 296 Ark. 45, 757 S.W.2d 554 (1988), the supreme court held that, unless a statute defines criminal activity as a "continuing course of conduct," a person may be prosecuted under the statute more than once if the crime has been repeated over a period of time. The incest statute at issue has no provision suggesting that a person who violates the statute may be prosecuted only once because the crime involves a "continuing course of conduct." Similarly, the supreme court held that rape is not a continuing offense but rather a single crime, *see Tarry* v. *State*, 289 Ark. 193, 710 S.W.2d 202 (1986), and we find by analogy that this rule applies to incest. Therefore, Mr. Fletcher could be prosecuted for each offense that he admitted to

committing in Lonoke County, given that these were not the same offenses and did not relate to the conduct for which he was convicted in Pulaski County.

Mr. Fletcher makes much of the fact that, in Pulaski County, he was charged with committing incest through December 1989, at which time the victim resided with him in Lonoke County. He asserts that, as such, he was under the assumption that his guilty plea in Pulaski County must have covered any and all incestuous activity. We disagree because the Pulaski County information charged Mr. Fletcher with committing incest "in Pulaski County," and he pleaded guilty to this charge. Indeed, Mr. Fletcher stipulated before the Lonoke County Circuit Court that he had engaged in sexual intercourse with the victim in Pulaski County before moving to Lonoke County. In addition, he acknowledged that he had sex with her in Lonoke County on four specific occasions. Because incest is not a continuing crime for which only one charge can be brought, Pulaski County Circuit Court had no jurisdiction over these four counts. Rather, these charges were for separate offenses committed in Lonoke County, and Lonoke County Circuit Court properly exercised its jurisdiction.

Mr. Fletcher's remaining argument is that the trial court erred in refusing to grant his motion to dismiss because the second prosecution was barred by collateral estoppel and res judicata. We agree with Mr. Fletcher's assertion that collateral estoppel and res judicata apply to criminal proceedings. *See Fariss* v. *State*, 303 Ark. 541, 798 S.W.2d 103 (1990). However, in the instant case the issues and claims brought in Lonoke County were entirely independent of the issues and claims decided in the Pulaski County proceedings. The Pulaski County case involved acts of incest committed in that county; the Lonoke County case pertained to four specific offenses which occurred in Lonoke County. For this reason, Mr. Fletcher's final argument fails.

Affirmed.

COOPER and STROUD, JJ., agree.

James E. COLE *v.* Laverne COLE

CA 95-335 920 S.W.2d 32

Court of Appeals of Arkansas
Division III
Opinion delivered April 24, 1996

Meredith Wineland, for appellant.

Sandra Tucker Partridge, for appellee.

MELVIN MAYFIELD, Judge. James Cole appeals from an order of the Saline County Chancery Court in a divorce action and argues that the chancellor erred in finding the proceeds in a Benton State Bank account, all property purchased by the appellee from this account, and the parties' home to be the separate property of the appellee, Laverne Cole.

The parties were married in August 1971, and separated on April 14, 1994. The divorce was granted on August 8, 1994, after a hearing which specifically reserved issues of alimony and the division of certain personal and real property which the appellee claimed as her separate property.

At the hearing on the reserved issues, the appellee testified that she owned the Hornet Cafe when they were married; that she made all the payments on the cafe from her earnings; that in October 1984, she put the appellant's name on the deed to the cafe on his promise to make a will leaving the property to her children; that appellant never made a will; and that in 1987, she sold the property, opened an account at the Benton State Bank in the name of James and Laverne Cole, and placed the money into that account.

In 1979, the appellee's mother made a gift of sixty acres of family property to her children; a trust was created; and the property was sold through Richardson Place, Inc. Trust. She said she received $258,529.33 from the trust between 1986 and 1993; that she deposited some of the proceeds into the Benton State Bank account, used others to pay directly on a loan, and placed the rest directly into Certificates of Deposit.

In December 1986, the parties purchased a lot and paid for it with Richardson Place money. They began to build a house on the lot in January 1987, and the appellee paid for everything out of the account in the Benton State Bank. The parties borrowed $50,000

from that bank to complete the house because the appellee, who was not working, could not get a loan. The loan proceeds were deposited in the Benton State Bank account and when appellee received a check from the trust she took the check and endorsed it over to that bank to repay the loan. Later, the appellee added to the note to buy a van and to pay the parties' income taxes, and the appellee is still paying on the note.

The appellant was laid off in 1989, and from then until October 1993, when he got a steady job, the appellee used substantial amounts of her distributions from the trust in order to support the parties.

On January 8, 1991, the appellee received a check from the trust in the amount of $15,000 made out to Laverne Cole and purchased a Certificate of Deposit in the names of Laverne or James Cole. On January 25, 1994, the appellee withdrew $17,027.81, representing the initial amount plus accrued interest, from the CD and placed it in a safe-deposit box in her name.

In 1993, the appellant received a settlement of a discrimination lawsuit and told the appellee to buy Wal-Mart stock. The appellee purchased 300 shares of Wal-Mart in their joint names for $8,176.25 and deposited $2,965.76 in the Benton State Bank. Later, appellant bought a riding lawn mower for about $2,000.

The appellee testified that the Benton State Bank account was just for Richardson Place money and the Hornet Cafe; that the parties referred to the account as the Richardson Place money; that she always treated the money as her money; and that until May 1993, when they deposited the "remains" of the settlement money in the account, the only money deposited in the account was the Richardson Place money and the Hornet Cafe money. The appellee said that the appellant's name was on the account so that if something happened to her, he would have something, but that appellant never deposited any money in the account and wrote, at most, four or five checks on the account and only with her permission. She said that the parties had a joint checking account at Superior Federal into which they deposited their wages and from which they paid their bills. However, no house payments were made from this account.

The appellee testified further that the parties always filed joint income tax returns; that the money she received from Richardson

Place had joint income taxes paid on it, but she paid all the taxes out of the Richardson Place money.

The appellant testified that he brought money into the cafe by working and that the appellee could not have made the payments on the cafe if he had not worked to keep "the rest of the place up." He said that he considered the Richardson Place money to be "ours" and that he did not think Richardson Place was a gift from appellee's mother, but thought the appellee and her sisters bought it from their mother.

On this evidence, the chancellor found:

> 7. That the Court finds that the home is the sole and separate property of the plaintiff, Laverne Cole. That Defendant deeded the home to the Plaintiff, Laverne R. Cole on September 23, 1992, Recorded in Book 364 Page 316, Records of Saline County Circuit Clerk; and there is no evidence to warrant setting aside the deed. That the description of said property is attached hereto as Exhibit "A".
>
> 8. That the Court finds that all proceeds from the Richardson Place Trust and the Hornet Cafe which were deposited into Benton State Bank Account Number 51-76387, as well as all property purchased by plaintiff through this account are plaintiff's separate property.
>
> 9. That the money defendant received from his settlement and the property that he purchased through this account, Benton State Bank Account Number 51-76387, are his separate property.
>
> 10. That the Court finds that even though both names are on the Benton State Bank Account No. 51-76387, it is clear that the plaintiff made the final decision on the use of the Richardson Place Trust funds and the Hornet Cafe funds, just as the defendant did his settlement funds. Even though there were times when plaintiff spent money on mutual family expenses, (income taxes and general living expenses while defendant was out of work), that decision was plaintiff's. . . . Another factor that supports this decision is that the parties had another checking account at Superior Federal Bank that they used for every day business and that they deposited their paychecks into. It appears either party used

this account as they saw fit.

11. That it was undisputed that when plaintiff added defendant to the Hornet Cafe, he was to execute a Will naming her children as his beneficiaries. Defendant never executed a Will naming the plaintiff's children as beneficiaries to complete his part of the agreement and therefore the proceeds from the sale of said property is the sole and separate property of the plaintiff.

Appellant's first argument on appeal is that the trial court erred in finding that the proceeds in the Benton State Bank account and items purchased from the account were non-marital property. Appellant says the parties treated the funds in the Benton State Bank account as marital property until marital difficulties arose and the appellee removed the remaining funds, placed them in a lock box, and claimed them as her own. Therefore, according to the appellant, the trial court should have found that the account, the proceeds removed from the account, and the items purchased from the account and used by the parties were marital property.

Once property, whether real or personal, is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety, and clear and convincing evidence is required to overcome that presumption. *McLain* v. *McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991); *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). Clear and convincing evidence is evidence so clear, direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitance, of the matter asserted. *Reed* v. *Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988). Tracing of money or property into different forms may be an important matter, but tracing is a tool, a means to an end, not an end in itself; the fact that one spouse made contributions to certain property does not necessarily require that those contributions be recognized in the property division upon divorce. *Canady* v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986).

On the evidence presented, we think the chancellor could have found that there was clear and convincing evidence to overcome the presumption that the Benton bank account was owned as tenants by the entirety. Because we review chancery cases de novo and reverse only if the chancellor's findings are clearly

erroneous or clearly against the preponderance of the evidence, we cannot say that the chancellor's finding to this effect should be reversed. *See Reed* v. *Reed, supra.*

Appellant also argues the chancellor erred in finding that the real property was the appellee's separate property.

The evidence shows that in 1991 the appellant, who was a truck driver, received a DWI charge. The appellee testified that the appellant had developed a drinking problem and she was concerned that he would be involved in an accident, that she would lose everything she had, that there would be nothing for the kids and not even a place for her. The appellee testified that she said:

> Jim, you're driving and you're drinking and you're going to have a wreck. We're going to lose everything—I'm going to lose everything we've—I've put into this house and there's going to be nothing left. Would you put the house in my name?

She said the appellant agreed. However, the appellant testified that he only "went along" with the appellee and that he did not realize he was signing his rights away to everything; that he did not understand what it meant; and that he just expected to get it out of his name in case he was sued.

Appellant argues on appeal that he transferred the property to the appellee only to protect their assets, not to release his interest in the property, and that the house is marital property.

Appellant cites *Crowder* v. *Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990), in support of this argument. *Crowder* also involved the division of real property in a divorce proceeding. In that case, Mr. Crowder executed a warranty deed on March 6, 1962, after he was involved in an automobile accident involving alcohol, transferring his interest in the property to his wife. Eight months later, he recorded the deed. The parties were divorced in 1989 and the chancellor found that, even though the husband signed the warranty deed, the property was marital property. Our supreme court affirmed the chancellor. The court held that a deed is inoperative unless there has been delivery to the grantee and a presumption of valid delivery attaches when the deed is recorded. This presumption is not conclusively established when there is proof of other factors pertaining to the deed which may rebut the presumption. The

court held the presumption of delivery was countered by Mrs. Crowder's testimony that they "figured" he would sign it over to save his place, and she could sign it back to him. The court also noted that the parties continued to live in the home until the divorce proceeding and paid taxes, insurance, maintenance, and subsequent construction costs on the property from a joint checking account containing contributions from both parties.

To the contrary, in the instant case the appellant signed the deed in September 1992 and it was filed for record in the same month. Although appellant continued to live in the house, the appellee paid all real estate and personal property taxes, insurance, and the mortgage on the home from the Richardson Place Trust money. Moreover, there is no evidence that the appellee ever said she would deed the home back to the appellant.

We cannot say the chancellor's finding that the real property is appellee's separate property is clearly erroneous.

On cross-appeal, the appellee asks that if we reverse the chancellor we grant her alimony. Because we hold that the chancellor did not err in finding that the proceeds in the Benton State Bank account, all property purchased by the appellee through this account, and the parties' home to be the appellee's separate property, we do not reach this issue.

Affirmed.

STROUD and NEAL, JJ., agree.

William BENTON *v.* Bill BARNETT

CA 95-480 920 S.W.2d 30

Court of Appeals of Arkansas
Division III
Opinion delivered April 24, 1996

Larry Dean Kissee and *Tom Garner*, for appellant.

Wilber Law Firm, P.A., by: *Norman C. Wilber*, for appellee.

JUDITH ROGERS, Judge. The appellant, William Benton, appeals from a $5,000 judgment in favor of appellee, Bill Barnett, which was entered upon a jury's verdict. For reversal, appellant contends that the trial court erred in denying his motion for a new trial. We affirm.

Appellant filed a complaint in battery against appellee for injuries he had sustained, alleging that appellee had attacked and beaten him without provocation during an altercation at a service station. Appellee answered and filed a counterclaim against appellant, contending that the allegations in appellant's complaint were knowingly false and that the suit was brought for purposes of "harassing, annoying, alarming, vexing, and causing financial loss" to him. Based on this claim, appellee sought "judgment over" against appellant, Rule 11 sanctions, punitive damages, costs and attorney's fees.

The case proceeded to trial. In summary, appellant testified

that he and appellee exchanged words and that appellee hit him as many as five times, knocking him backwards into a drink machine and causing his nose and face to bleed. Appellee, who was not injured in the fray, admitted hitting appellant but said that he did so only after appellant had attempted the first blow. The jury returned a verdict for appellee in the amount of $5,000.

Appellant filed a motion for a new trial pursuant to Rule 59 of the Arkansas Rules of Civil Procedure. In this motion, appellant contended that appellee "presented no evidence at trial of any damages he suffered" and that the award of "damages assessed by the jury ... was in error and clearly contrary to a preponderance of the evidence." The trial court denied the motion, stating in its order that there had been "testimony and certainly argument concerning the employment of counsel to defend this lawsuit." This appeal followed.

For reversal, appellant contends that appellee presented no evidence of damages in support of his claim. He further argues that appellee's counterclaim did not state a cause of action in tort. He maintains that the jury's verdict was essentially an award of attorney's fees and argues that attorney's fees are not a proper element of damages, since attorney's fees are not allowed unless expressly authorized by statute. *See Elliot* v. *Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991). In support of his arguments, appellant alludes to the testimony of appellee when he was asked by his own attorney what damages he was seeking, to which appellee replied, "Well, basically it's cost me quite a bit of money to put up with this for four years and finally come to this conclusion." Appellant also points to argument made in closing by appellee's counsel asking the jury to award appellee $5,000 for his attorney's fees "to send a message to" the appellant. In defense of the trial court's decision, appellee contends that appellant's arguments were not properly preserved for appeal. We agree.

It is obvious from a reading of appellant's motion for a new trial and his supporting brief that it was, and remains, appellant's contention that there was no evidence presented by appellee to justify the submission of the case to the jury. Appellant, however, failed to challenge the sufficiency of the evidence by motion for a directed verdict, as is required under Rule 50(e) of the Rules of Civil Procedure. Instead, he raised the issue by motion for a new trial under Rule 59. Although Rule 59 specifically states that a

motion for a new trial may be granted where the verdict is clearly contrary to the preponderance of the evidence, *Hall* v. *Grimmett*, 318 Ark. 309, 885 S.W.2d 297 (1994), such a motion, however, does not test the sufficiency of the evidence *to go to the jury. Id. See also Yeager* v. *Roberts*, 288 Ark. 156, 702 S.W.2d 793 (1986). A party must test the sufficiency of the evidence by motions for directed verdict and judgment notwithstanding the verdict, not by a motion for a new trial. *Majewski* v. *Cantrell*, 293 Ark. 360, 737 S.W.2d 649 (1987). Therefore, appellant's challenge to the sufficiency of the evidence must fail. We recognize that this distinction is a fine one indeed, but it is one that has been fashioned by the supreme court.

With regard to appellant's remaining arguments concerning the sufficiency of appellee's counterclaim and the verdict being tantamount to an award of attorney's fees, these matters were not included in his motion for a new trial. Moreover, at no time before trial did appellant complain by appropriate motion about any deficiencies with respect to appellee's complaint for damages. Neither did he raise any objection to the testimony offered by appellee relative to his claim, nor did he object to the argument of appellee's counsel. Likewise, appellant raised no objection to the jury being offered a verdict form allowing it to assess damages in appellee's favor. It is a well-settled rule that issues not raised in the trial court will not be considered for the first time on appeal. *Stacks* v. *Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996). Since appellant did not raise these issues in his motion for a new trial, we will not address them. It remains to be seen whether it would have been appropriate for appellant to have asserted these matters in a motion for a new trial, in the absence of any prior objection. *See Stacks* v. *Jones*, *supra.*, Newbern, J., concurring.

Affirmed.

JENNINGS, C.J., and NEAL, J., agree.

Reola HANCOCK *v.* FIRST STUTTGART BANK AND TRUST CO.

CA 94-1090 920 S.W.2d 36

Court of Appeals of Arkansas
En Banc
Opinion delivered April 24, 1996

[redacted]

Eugene Hunt and *Sandra Y. Harris*, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Reola Hancock, has appealed from a summary judgment in favor of appellee, First Stuttgart Bank and Trust Co., in which it was held that appellant's complaint for the tort of outrage was barred under the doctrine of *res judicata*. For reversal, appellant contends that the application of that doctrine was improper under the circumstances of this case. Because the specific argument raised by appellant is without merit, we affirm.

In February of 1994, appellant filed suit against appellee in federal court pursuant to 15 U.S.C.A. § 1691, the Equal Credit Opportunity Act (ECOA). She alleged that appellee had violated her right to be accorded equal credit opportunity in that appellee had rejected her request for a home mortgage loan because she was employed by the owner of Orbit Fluid Power Company. Appellant also complained that appellee's conduct was outrageous, malicious, and willful, and had caused her humiliation, degradation and emotional distress. She requested compensatory and punitive damages.

Appellee responded to this complaint by filing a motion to dismiss the federal cause of action pursuant to Fed. R. Civ. P. 12(b)(6), contending that the ECOA does not bar discrimination on the basis of an applicant's place of employment. By order of March 31, 1994, the district court dismissed appellant's complaint under the ECOA. The court agreed with appellee's assertion that an applicant's place of employment was not a protected category within the meaning of the Act.

On May 23, 1994, appellant initiated the present action, alleging essentially identical facts to those alleged in the federal court complaint. Appellant again alleged outrageous conduct on the part of appellee and demanded compensatory and punitive damages.

Appellee raised the affirmative defense of *res judicata* in its

answer and in a motion for summary judgment. In support of its motion for summary judgment, appellee submitted copies of appellant's complaint in federal court, the federal district judge's order setting out his findings, and the judgment dismissing appellant's complaint. In opposition to the motion for summary judgment, appellant argued that the federal court dismissal was not *res judicata* to this action because her state law tort claim had not proceeded to trial. Appellant argued that the only issue decided by the federal court was whether she was entitled to relief under the ECOA and that she had not had a full and fair opportunity to litigate her claim of outrageous conduct. The trial court entered summary judgment for appellee on June 21, 1994. This appeal followed.

On appeal, appellant directs our attention to the decision in *Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988), where the supreme court stated:

> The claim preclusion part of the doctrine of *res judicata* bars relitigation of a subsequent suit when (1) the first suit resulted in a judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action which was litigated or could have been litigated but was not; and (5) both suits involve the same parties or their privies.

Id. at 434, 748 S.W.2d at 661. In her brief, appellant concedes that the first suit resulted in a judgment on the merits; that the first suit was based upon proper jurisdiction; and, that both suits involved the same parties. Appellant's argument on appeal is directed only toward the third and fourth prongs of the test. Appellant maintains that the federal order of dismissal did not address her tort claim and that, as a consequence, that claim was not litigated in federal court. She then argues that the tort claim was not "fully contested in good faith" in federal court because appellee did not file an answer responding to the tort claim. She argues that appellee's failure to answer resulted in that issue not being joined, thereby depriving her of the opportunity to litigate that claim in the federal court.

The argument raised by appellant is a narrow one. It is premised on the assertion that appellee's failure to file an answer prevented litigation of the tort claim in federal court. We cannot agree that appellant was left without the opportunity to litigate the

tort claim in federal court for the reason advanced by appellant. In the first place, appellant has cited no authority and has provided no meaningful argument for the proposition that a party's failure to answer works as an impediment to obtaining relief on a claim. We will not address arguments unsupported by convincing argument or authority. *Hicks* v. *Madden*, 322 Ark. 223, 908 S.W.2d 90 (1995). Secondly, and more significantly, a federal court has the authority to entertain supplemental jurisdiction over pendent state claims even though it dismisses the claims over which it has original jurisdiction. 28 U.S.C.A. § 1367. It is recognized that pendent jurisdiction may continue even after the federal claims upon which jurisdiction is based have been dismissed or rendered moot. *Baker* v. *Farmers Elec. Co-Op., Inc.*, 34 F.3d 274 (5th Cir. 1994). While pendent jurisdiction is a matter of discretion, *Wright* v. *Associated Ins. Companies, Inc.*, 29 F.3d 1244 (7th Cir. 1994), district courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed. *Noble* v. *White*, 996 F.2d 797 (5th Cir. 1993). It thus cannot be said that appellant could not have proceeded with her claim in federal court.

The federal court's order of dismissal was silent with regard to the state court claim. The dissent seizes upon this fact and maintains that the "could have been litigated" requirement was not met in this case because the federal court failed to take any action on the state tort claim. The dissent reasons that, when the basis of the first court's exercise of jurisdiction is discretionary, then the "could have been litigated" requirement is met only if the first court does take some action on the claim. That, however, is not an argument that was raised below, nor is it one that is advanced in this appeal. As so amply demonstrated by the dissenting opinion's quotation of appellant's argument, it is her sole contention that it was the appellee's failure to answer the claim that precluded litigation of the claim, not the inaction of the federal court. As we have said, and as indicated by the dissenting opinion itself, appellant states her argument for reversal in very narrow terms. Under long-standing procedure, this court is to consider only the arguments raised by the parties, and we are not to consider reversing a trial court for unargued reasons. *Schmidt* v. *McIlroy Bank & Trust*, 306 Ark. 28, 811 S.W.2d 281 (1991). We choose the better practice to confine our review to the issues raised and to not delve into matters which could have been argued, but were not. Contrary then to the dis-

sent's suggestion, our unwillingness to broaden the scope of the argument presented is not a matter of refusing to conduct further, in-depth research, but rather it is a question of reviewing the case in the manner in which it has been argued.

Moreover, the dissent has failed to demonstrate how a court's failure to act on a claim, particularly when it does not appear that the court was ever asked to address it, necessarily leads to a conclusion that the claim could not have been litigated in that forum. The cases cited by the dissent as being supportive of its view are factually distinguishable from the case at bar and, therefore, provide no compelling authority for deciding such an issue, even if the argument were before us. In *Johnson* v. *State*, 631 N.Y.S.2d 795 (Ct. Cl. 1995), the issue before the court was whether the claimant's cause of action in negligence was precluded by a summary judgment obtained by the defendants in federal court, *when the negligence claim was not stated as a basis for relief in the federal case.* In *Andujar* v. *National Property and Casualty Underwriters*, 659 So. 2d 1214 (Fla. App. 1995), the issue to be decided was whether the plaintiff's statutory claim of discrimination under state law was barred by principles of *res judicata* when the defendant had prevailed in federal court in an action brought under Title VII of the Civil Rights Act of 1964. As in *Johnson* v. *State*, *supra*, the state law claim in *Andujar* was never joined in the federal lawsuit. Of course, here, the state tort claim was brought in the federal court suit. Neither *Johnson* nor *Andujar* then stand for the proposition that the "could have been litigated" prong is not satisfied when the first court fails to act. Neither court was presented with that issue, and for that matter neither are we, because it is not an argument that has been raised.

Also, implicit in the dissent's citation to *Seaboard Finance Co.* v. *Wright*, 223 Ark. 351, 266 S.W.2d 70 (1994), is the alternative idea that the federal court dismissed all claims without prejudice. We quickly point out that whether a dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is with or without prejudice is a question governed by federal law, not Arkansas law. And again, the dissent touches upon an argument that is not made by the parties to this appeal. In simple truth, the effect of the federal court's dismissal on the state court claim is not an issue that is before us, and we are unwilling to assume, particularly without benefit of argument from either party, that the federal court, by its silence, dismissed appellant's state court claim without prejudice.

Affirmed.

JENNINGS, C.J., BULLION, Sp. J., PITTMAN, and ROBBINS, JJ., agree.

MAYFIELD, J., dissents.

COOPER, J., not participating.

MELVIN MAYFIELD, Judge, dissenting. This case requires close attention to the factual situation and careful application of the law in order to reach the correct result.

We can start with the fact that prior to the filing of this case in an Arkansas state court, the appellant filed a suit in federal court alleging violations of a federal law — the Equal Credit Opportunity Act (ECOA). However, the complaint also made allegations that were sufficient to state a cause of action for the "tort of outrage" under Arkansas law. *See Deitsch* v. *Tillary*, 309 Ark. 401, 405-06, 833 S.W.2d 760, 761-62 (1992).

Pursuant to the defendant's motion to dismiss filed in federal court, that court dismissed the plaintiff's complaint by an order which characterized the cause of action as follows:

> This is an individual action alleging discrimination and denial of equal credit opportunity, based upon place of employment, in violation of the Equal Credit Opportunity Act.

The federal court order also stated that the court would accept the plaintiff's allegation that the defendant bank denied the plaintiff's credit request because of her place of employment, but the order held that this did not violate the ECOA because a person's employment status is not a protected category. The order then stated that the complaint was dismissed. Also, it is important to note that the order made no mention at all about the plaintiff's tort-of-outrage allegations.

After the dismissal of the complaint in federal court, the plaintiff filed the present suit in an Arkansas circuit court and alleged a cause of action for the tort of outrage based upon substantially the same allegations made as to that cause of action in federal court. Pursuant to the defendant's motion for summary judgment, based upon the doctrine of res judicata, the circuit court dismissed the plaintiff's complaint, and she brings this appeal.

Her argument in this court is based, as the majority opinion states, upon the case of *Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988), and she argues that two prongs of the five-prong test set out in that opinion (and quoted by the majority opinion in this case) have not been satisfied. Those prongs are:

> (3) the first suit was fully contested in good faith;
>
> (4) both suits involve the same claim or cause of action which was litigated or could have been litigated but was not;

To make sure we understand that the appellant has clearly raised these points, I will quote from her brief *portions* of her argument on both points.

> Appellant asserts, however, that the third prong of the test, whether the claim was fully contested in good faith, was not met because appellee's failure to file an answer left the appellant without notice of its position or defenses on the allegations included in the complaint.
>
> Furthermore, it is undisputed that Appellee's Motion to Dismiss, filed in federal court, exclusively addressed the narrow issue of whether the ECOA applied to the facts of appellant's case. Consequently, the court's opinion and grounds for dismissal were exclusively limited to that narrow issue; consistent with appellee's Motion to Dismiss. The court rendered no opinion and indeed, did not mention any other allegations of the complaint.
>
> . . . .
>
> Succinctly, appellant's allegation of appellee's outrageous conduct, was not contested at all, leaving appellant without *any* opportunity to litigate this issue.
>
> . . . .
>
> The fourth prong of the test in *Swofford* states that the doctrine of res judicata applies when:
>
> > "both suits involve the same claim or cause of action which were litigated or could have been litigated but were not."
>
> [295] Ark. at 434, 748 S.W.2d at 661.

> It is appellant's position, that neither was the claim litigated nor could it have been litigated when appellee failed to file the necessary responsive pleading.
>
> Appellant's failure to file an answer to the complaint resulted in none of the issues being joined. Indeed, no response, pleading or notice was given by appellee concerning any of the allegations, ...

The appellant also cites *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 480-81 (1981), and says it held "essentially, that the judicially created doctrine[s] of collateral estoppel and res judicata do not apply when a party against whom an earlier decision is asserted did not have a full and fair opportunity to litigate the claim or issue." And appellant cites *Seaboard Finance Co.* v. *Wright*, 223 Ark. 351, 356, 266 S.W.2d 70, 73 (1994), for its holding that "[a] dismissal of a cause of action *with prejudice* is a final adjudication on the merits within the rule of res judicata," and points out that the federal court order in the present case is "silent regarding whether its dismissal was with or without prejudice." (Emphasis in the opinion quoted.)

The majority opinion responds to the appellant's argument with the assertion that "We cannot agree that appellant was left without the opportunity to litigate the tort claim in federal court" and then, in specious justification of its assertion, says "a federal court has the authority to entertain supplemental jurisdiction over pendent state claims even though it dismisses the claims over which it has original jurisdiction." The majority opinion cites 28 U.S.C.A. § 1367 as authority for this quoted statement, and the opinion also cites two cases to support the rationale upon which the majority opinion is based — which is — that even after a federal claim is dismissed, the federal court has the discretion to retain jurisdiction over a state claim alleged in the case. Therefore, the majority opinion reasons, "It thus cannot be said that appellant could not have proceeded with her claim in federal court."

I respectfully submit, however, that this rationale overlooks two points. One, the federal court *may choose not* to retain jurisdiction over the state claim after the federal claim is dismissed, and two, the fact that the court *could* retain jurisdiction and try the state claim does not mean that the third and fourth prongs set out in the *Swofford* case have been satisfied. In simple fact the state claim was

neither "fully contested" nor "litigated" in federal court and it is neither fair nor just to bar the plaintiff's right to try the merits of her state tort claim by holding that she *could* have tried it in her suit in federal court.

If I were alone in my belief, I would be less sure of my position, but I am not alone in my view. In *Johnson* v. *State*, 631 N.Y.S.2d 795 (Ct. Cl. 1995), the claimant had filed a suit in state court seeking damages for "myriad acts purportedly perpetrated" upon him by state and federal law-enforcement personnel, and the case was removed to federal court. The appellant also filed suit in the state court of claims. Summary judgment was granted by the federal court in favor of the state law-enforcement personnel and this was relied upon in the state court of claims as a basis for dismissal of the suit there under the doctrine of res judicata. The appellant argued that the doctrine did not apply to the negligence cause of action alleged in the state court.

The state court agreed with the claimant, and the opinion explained that the "judicially-created" concept of pendent jurisdiction approved in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), had been codified by 28 U.S.C. § 1367 under the term "supplemental jurisdiction" which allows a federal court in a case before it to assume jurisdiction and dispose of a state claim which could not be before the court if standing alone. But the court said that jurisdiction was discretionary and that:

> It is not feasible for this court to speculate that a federal court would have exercised its discretion to allow the negligence cause of action under its supplemental jurisdiction and then use such speculation as a basis to foreclose a claim under the doctrine of res judicata.

631 N.Y.S.2d at 798.

Also, in *Andujar* v. *National Property and Casualty Underwriters*, 659 So. 2d 1214 (Fla. App. 1995), the court stated the issue involved as follows:

> In the case before us today, a defendant who has previously prevailed in a federal employment discrimination action under Title VII of the Civil Rights Act of 1964 successfully argued to the circuit judge that its victory on the federal claim was res judicata as to the plaintiff's employment

> discrimination claim under the Florida Human Rights Act of 1977 arising from the same facts. We disagree and reverse the judgment dismissing the state law claim.

In discussing the issue, the court said in regard to the "pendent jurisdiction" approved by the United States Supreme Court in the *United Mine Workers of America* v. *Gibbs* case, *supra*, and codified in 28 U.S.C. § 1367, that this jurisdiction "is a doctrine of discretion, not of plaintiff's right" and that the federal court would have been competent to decide the pendent state claims only if the court, "in its discretion, agreed to assume jurisdiction over them." 659 So. 2d at 1217-18.

Thus there is authority for my view that in the present case the fourth prong of the *Swofford* test was not satisfied because that prong provides that if the claim was not actually litigated in the first suit (and it was not in this case) then res judicata applies only if it *could have been litigated* in the first suit. My view and the view of the New York and Florida cases cited above hold that where the first court only exercises jurisdiction in its discretion the *could-have-been-litigated* requirement is satisfied only when the court exercises its jurisdiction by acting upon the claim — not by failing to act (which is what happened here). And the attempt of the majority opinion to obfuscate this fact by distinguishing the facts in the New York and Florida cases does not change the force of those cases on the point under discussion in this case.

I, therefore, dissent from the decision of the majority opinion, and in regard to that opinion's reluctance to discuss the federal court's jurisdiction on the basis that it was not an issue argued by the parties, I would note that the argument made by the appellant, as set out and described by this dissent, very plainly points out that under the Arkansas Supreme Court decision of *Seaboard Finance Co.* v. *Wright*, *supra*, a dismissal of a cause of action *with prejudice* is a final adjudication; that the federal court's dismissal of the case here involved *was not* dismissed with prejudice; therefore, by the *Seaboard* criterion the federal court's dismissal was *without prejudice*; and therefore, that dismissal did not satisfy the third and fourth prongs of the *Swofford* test. I also note that the majority opinion deals with that argument by pointing out that *Seaboard* was an Arkansas case but the state claim here was dismissed by a federal court and stating that "we are unwilling to assume, particularly without benefit of argument from either party, that the federal court, by its silence,

dismissed appellant's state claim without prejudice."

However, I have no problem with looking at the issue presented here in greater depth than that argued by the parties. This is done time after time in both trial and appellate courts. There is a great deal of difference between deciding a case on an issue not presented by the parties and doing additional research on an issue presented. Here, I did read more cases on the issue presented than the parties cited. For that matter all of the judges in this case were furnished a memorandum by one of our staff attorneys that cited many cases, and contained thoughts and perspectives, not disclosed by the briefs filed by the parties.

In his book *One Life in the Law*, at 112, Robert A. Leflar, whose legal career as an attorney, teacher, and appellate judge surely qualifies his opinion as worthy of note, has this to say:

> The adversary system does not perfectly serve the law-making function of the appellate judicial process. Ultimately, it is the judges' diligence and wisdom that must be relied upon to assure that the function is properly performed. They must think not only of the little sets of facts that the immediate cases present but of an undetermined number of sets of facts to which the precedent may in the future be applied. Judges may rely upon the writings of scholars not employed to represent the interests of litigants, but concerned rather with sound correlation of law with the socioeconomic and political needs of the community. These are the ones who today most conscientiously present to the courts the needs and concerns of society. Their work may be cited in briefs of counsel, or it may not, but wise judges avail themselves of it whether it is cited or not. And in their opinions good courts do cite it, or at least make use of it.

I would reverse the trial court's dismissal of this case and remand for further proceedings.

Vaughan Benjamin HOOKS and Sandra Clark Goodier *v.* Ronya Annette PRATTE

CA 95-391 920 S.W.2d 24

Court of Appeals of Arkansas
Division I
Opinion delivered April 24, 1996

Joanna P. Boyles, for appellants.

F. Lewis Steenken, for appellee.

JOHN F. STROUD, JR., Judge. This appeal results from an order of the Madison County Probate Court that terminated the guardianship of Jacob Aaron Hooks, a minor, and returned him to the custody of his mother, appellee, Ronya Annette Pratte. The appellants are Vaughan Benjamin Hooks, who claims that he is the natural father of Jacob, and Hooks's mother, Sandra Clark Goodier, who served as Jacob's guardian prior to the termination.

Appellant Hooks and appellee are Texas residents. They have never been married to each other but have lived together sporadically including the time period that Jacob was eight weeks old until he was ten months of age. In July 1992, appellee left Jacob in the

care of Hooks's mother, appellant Goodier, so that appellee could obtain treatment for her cocaine addiction. The following October, appellant Goodier, with the consent of appellee and Hooks, was appointed guardian of the person and estate of Jacob. Several months thereafter, appellee was seriously injured in a car accident and was hospitalized for two months.

Appellee first sought termination of the guardianship in January 1993 but later amended her petition to request a continuance of the guardianship and visitation in her. In February 1994, appellee filed an amended petition to terminate the guardianship, stating that her consent to the guardianship had been predicated on her need to seek rehabilitation from chemical dependency; that she understood that the guardianship would be voluntarily terminated following her rehabilitation; that she has resolved her substance abuse problem; that she is now married and part of a stable home and family; and that the interests of Jacob would best be served by terminating the guardianship and returning him to her. Appellee also stated in her petition that the paternity of Jacob had never been determined by a court of competent jurisdiction. Appellants Goodier and Hooks filed separate responses that denied the guardianship should be terminated. They both also alleged that Hooks is the natural father of Jacob and that the Texas birth certificate confirms this.

After a hearing on the merits of appellee's petition, the probate court entered an interim order which held that paternity had not been adjudicated in Hooks and therefore he could not be included as a party. The court also held, however, that, if his paternity had been established in Texas, he could provide that information to the court. The court also ordered that a home study and drug-screening test be performed on appellee. The probate court terminated the guardianship of Jacob after the receipt of the home study and drug-screening test, finding that the circumstances that had led to the letters of guardianship being issued had changed to the extent that it would be in Jacob's best interest to terminate the guardianship and to reunite Jacob with his mother, the appellee.

On appeal, appellants make several arguments in support of their contention that the probate court erred in dismissing appellant Hooks as a party to the termination proceeding. They claim that the probate court's holding that an adjudication of paternity was necessary in order for Hooks to participate in the proceeding is clearly erroneous because Ark. Code Ann. § 28-65-207(b) (Supp.

1993) makes no distinction between a parent of a legitimate child and a parent of an illegitimate child. This section provides in part that "notice of the hearing of the application for the appointment of the guardian shall be served upon ... [t]he parents of the alleged ... minor ...." Appellants argue that the court's order that appointed appellant Goodier as guardian recognized Hooks as the natural father of Jacob and, therefore, the doctrine of *res judicata* prevented the probate court from questioning Hooks's status as a parent at the termination proceeding.

The only argument appellants raised at the termination hearing in support of their contention that an adjudication of paternity was unnecessary was their contention that Hooks was listed as the father on Jacob's Texas birth certificate. Because no argument was made concerning the court's earlier order or the doctrine of *res judicata* at the hearing, we find this argument is being raised for the first time on appeal. It has long been held that the appellate court will not consider arguments raised for the first time on appeal. *See Kulbeth* v. *Purdom*, 305 Ark. 19, 21, 805 S.W.2d 622, 623 (1991).

Appellants admitted that there had never been any adjudication of paternity but argued that it was not necessary because, under Texas law, Hooks is considered the father if his name appears on Jacob's Texas birth certificate. The court stated that it would allow Hooks to remain a party to the termination proceeding if he could provide the court with any law to the effect that he would be an appropriate party. The court also stated that, if under Texas law Hooks's name on the birth certificate was sufficient to establish paternity, Hooks needed to file the birth certificate and the statute with the court. Although Hooks later filed a copy of Texas Code Ann. § 12.02(a)(4) (West 1989), with the court, which did indicate a man is presumed to be the biological father of a child if he consents in writing to be named as the child's father on the child's birth certificate, there is no record that he filed a copy of Jacob's birth certificate with the court. We therefore cannot say that the probate court erred in dismissing Hooks as a party.

Appellants also contend that the probate court erred in not making a determination of paternity. We do not address the merits of this contention, however, because appellants' abstract does not show that the probate court was asked to make such a determination. It is fundamental that the record on appeal is confined to that which is abstracted, and the failure to abstract information

pertinent to an issue precludes this court from considering the issue on appeal. *Harvill* v. *Bevans*, 52 Ark. App. 57, 60, 914 S.W.2d 784 (1996).

In connection with their first point, appellants also contend that the probate court violated Hooks's rights to equal protection and due process as established by the United States Constitution when it dismissed him from the termination proceeding. Here again, we find that these arguments were not raised before the probate court. Even constitutional arguments being raised for the first time on appeal will not be considered. *Moore* v. *State*, 323 Ark. 529, 543, 915 S.W.2d 284 (1996).

For their second point, appellants contend that the probate court applied the wrong standard of proof in considering only whether the guardianship was still necessary. They assert that this court's holding in *In re Guardianship of Markham*, 32 Ark. App. 46, 795 S.W.2d 931 (1990), requires that a petitioner must prove that the termination of a guardianship is in the child's best interest before the guardianship of a minor can be terminated.

In *In re Guardianship of Markham, supra*, the appellants had voluntarily consented to an order appointing the appellee as the guardian for their daughter and had asked the appellee to raise the child. The appellants later sought termination; however, the probate court found that it was not in the child's best interest to terminate the guardianship. The appellants argued that it was error not to terminate the guardianship because Ark. Code Ann. § 28-65-204 (1987) established a preference for a natural parent in the appointment of the guardian. On appeal, this court explained that Ark. Code Ann. § 28-65-401(b)(3) (Supp. 1989) governs a proceeding to terminate a guardianship, that it allows the court to consider the best interest of the ward in deciding whether to terminate a guardianship, and that the rights of the natural parents are not proprietary. Our holding, however, should not be interpreted as providing the only guideline a probate court can consider in terminating a guardianship. Arkansas Code Annotated § 28-65-401(b)(3) (Supp. 1993) provides that a guardianship may be terminated if, for any reason, the guardianship is no longer necessary *or* for the best interest of the ward.

In the case at bar, the probate court found that appellee had presented sufficient evidence to show that the guardianship was no

longer necessary and that it would be in Jacob's best interests to terminate the guardianship and to reunite him with his mother. Appellee testified that, when she entered the drug treatment program, she asked appellant Goodier to help take care of her son until she could get on her feet and could provide a stable home for him. Her testimony reflected that she has remained drug-free since she left that program, which had been approximately twenty months at the time of the hearing. She also testified that she has been happily married since October 1993 and helps her husband with work in renovating apartments and cares for his two sons that live with them. She also testified that they have prepared a room for Jacob next to hers, that Jacob has been to their house, and that his guardian, Ms. Goodier, has not indicated that she has any concerns about Jacob's staying with them. She further testified that she and Ms. Goodier have "gotten along" most of the time during the course of the guardianship and that she has no problem with Ms. Goodier visiting Jacob. She further stated that she has been voluntarily paying Ms. Goodier support since September 1993. Although Ms. Goodier disagreed that she should be terminated as Jacob's guardian, she admitted that appellee has been sending her money regularly since last September except for two months and that appellee is not the same person as she was when she left Jacob with her.

The court held that it found appellee to be honest and forthright with the court and that she had convinced the court that she has corrected the problems that she was having at the time the guardianship was established and is ready to assume the motherhood that she should have assumed earlier and to rear Jacob as her own child. Additionally, the drug screening and home study of appellee ordered by the court indicated that there was no evidence that appellee had taken any drugs and that appellee appeared to have a stable marriage, a mutually caring relationship with her stepchildren, and that Jacob appeared happy and quite comfortable in his mother's care. From our review, we cannot say that the decision of the probate court to terminate the guardianship is clearly erroneous. Although probate proceedings are reviewed *de novo* on the record, the decision of the probate judge will not be disturbed unless it is clearly erroneous, and in making that determination, we give due regard to the opportunity and superior position of the trial judge to judge the credibility of the witnesses. *In re Adoption of D.J.M.*, 39 Ark. App. 116, 121, 839 S.W.2d 535, 538 (1992).

Appellants, for their final point, contend that the probate court erred in applying Ark. Code Ann. § 9-10-113(b) (Repl. 1993) to the termination proceeding. This statute provides that a biological father, provided he has established paternity in a court of competent jurisdiction, may petition the chancery court, or other court of competent jurisdiction, wherein the child resides, for custody of the child. Appellants contend that the trial court erroneously relied on this "chancery" statute for requiring an adjudication of paternity in order to allow Hooks to participate in the termination proceeding. We are unable to address this point, however, because appellants' abstract of the proceeding does not indicate that the probate court considered this statute in dismissing Hooks from the proceeding and appellants are raising this issue for the first time on appeal. As we have previously held, the record on appeal is confined to what is abstracted, *see Harvill* v. *Bevans*, 52 Ark. App. at 60, 914 S.W.2d at 787, and we will not consider arguments raised for the first time on appeal. *Kulbeth* v. *Purdom*, 305 Ark. at 21, 805 S.W.2d at 623.

Affirmed.

COOPER and ROBBINS, JJ., agree.

COLUMBIA MUTUAL INSURANCE COMPANY *v.* Danny SANFORD and Gail Sanford

CA 95-244 920 S.W.2d 28

Court of Appeals of Arkansas
Division II
Opinion delivered April 24, 1996

Daggett, Van Dover & Donovan, by: *Robert J. Donovan*, for appellant.

Paul Petty, for appellee.

WENDELL L. GRIFFEN, Judge. Columbia Mutual Insurance Company has appealed the decision by the Jackson County Circuit Court finding in favor of Danny and Gail Sanford on their motion for summary judgment in their breach of contract lawsuit based on an insurance policy. Appellees suffered a fire loss to a poultry house on January 14, 1992. The house was covered by an insurance policy issued by appellant. Appellees filed a claim for total loss. Appellant denied the claim relying upon a "rebuilding clause" in the policy that provided that the amount of insurance applying to a covered structure shall be reduced to sixty percent of the face value if the damaged structure is not repaired or replaced at the same location within twelve months of the loss date. Consequently, appellant confessed judgment and paid appellees $42,000, plus pre-judgment interest. Appellant also confessed judgment for an additional $23,358.36 contingent upon appellees' compliance with the rebuilding clause. After the parties submitted the dispute to the trial court on stipulated facts, the trial court denied appellant's summary judgment motion. Instead, it entered judgment in favor of appellees and against appellant for $23,358.36, plus accrued interest and an attorney's fee of $5,000, based upon its conclusion that the rebuilding clause is contrary to public policy. This appeal followed. We have concluded that the appellees were entitled to judgment as a matter of law, but we reach that result for reasons different from the

trial court. Therefore, we affirm the judgment for appellees.

Appellees purchased farm property near Bradford, Arkansas, in October 1989, and purchased insurance from appellant shortly afterwards to cover two poultry houses on the property. One of the houses was partially destroyed by fire on January 14, 1992, along with all of the chicken house equipment within the part that was damaged. Appellees made demand upon appellant for $70,000, the face value of their coverage under the insurance contract, but their demand was eventually denied by appellant based on the language of the "rebuilding clause" in their policy which reads as follows:

> In consideration of the premium, it is a condition of this insurance that each dwelling or other building structure covered under this policy is subject to the provisions of this Rebuilding Clause. In the event of loss or damage by peril insured against to any such dwelling or other building structure:
>
> (a) if the loss or damage is not repaired or replaced by the insured for the same Occupancy and use within twelve (12) months of the date of loss or damage, at the same location described in the policy, the amount of insurance applying to such dwelling or other building structure shall be reduced to 60% of such amount and the liability of the Company shall not exceed the smaller of (1) the amount for which it would be liable in the absence of the Rebuilding Clause, or (2) the amount of insurance applying to such dwelling or other building structure reduced to 60% of such amount as specified above;
>
> (b) if the loss or damage is repaired or replaced by the insured for the same occupancy and use within twelve (12) months of the date of the loss or damage, at the same location described in the policy, the liability of this Company shall not exceed the smallest of (1) the amount of insurance applying to the damaged or destroyed dwelling or other building structure, or (2) the actual cash value of that part of the dwelling or other building structure damaged or destroyed, or (3) the amount actually or necessarily expended in repairing or replacing the damaged or destroyed dwelling or other building structure.

Appellant contends that appellees did not comply with the

rebuilding clause because they did not rebuild the damaged structure within twelve months of the January 14, 1992, fire loss. Accordingly, appellant tendered payment on December 11, 1992, for $42,000, plus pre-judgment interest, based on its view that the rebuilding clause provided that coverage would be reduced to sixty percent of the policy face value. Appellant also confessed judgment for an additional $23,358.36, the amount it calculated appellees would have been due upon complying with the rebuilding clause.

An insurer may contract with its insured upon whatever terms the parties may agree upon that are not contrary to statute or public policy. *Shelter Gen. Ins. Co.* v. *Williams*, 315 Ark. 409, 867 S.W.2d 457 (1993). The insured, by accepting the policy, is deemed to have approved it with all conditions and limitations expressed therein which are *reasonable* and not contrary to public policy. *AETNA Ins. Co.* v. *Smith*, 263 Ark. 849, 568 S.W.2d 11 (1978) (emphasis added). While we do not find the rebuilding clause itself to be against public policy, we do find the appellant's reliance on the clause to be unreasonable under the facts of this case.

Although appellees submitted a timely estimate for $63,952 in repairs, appellant made no offer to pay that amount until December 11, 1992, almost one month before the end of the period allowed in the rebuilding clause for rebuilding the damaged structure. It is clear that when appellant confessed judgment relying on the rebuilding clause, the prescribed time for rebuilding had not yet elapsed. It is also clear that appellant had received information months beforehand that would have allowed it, under any reasonable analysis, to accept the claim so that appellees could begin to rebuild without risking a reduction in the amount that would be paid on their loss for failure to comply with the rebuilding condition. Using appellant's reasoning, an insurer may withhold payment on an covered claim until the "eleventh hour" — in this case the eleventh month — and thereby force the insured to either comply in merely thirty days with the rebuilding condition or accept a forty percent reduction in coverage. We find appellant's reliance on the rebuilding clause to be unreasonable in this case.

Affirmed.

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

Ennie B. COBB *v.* ESTATE of Bennie C. KEOWN

CA 95-317 920 S.W.2d 501

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 1996
[Petition for rehearing denied May 29, 1996.]

Tona M. DeMers, for appellant.

Henry N. Means, III, for appellee.

JAMES R. COOPER, Judge. The appellant in this probate case was the administratrix of the estate of her brother, Bennie C.

Keown. Wilma Paton filed a motion for an order determining her to be the biological daughter of Bennie C. Keown. After a hearing, the probate judge entered an order on August 15, 1991, finding that Bennie C. Keown executed documents recognizing that Wilma Paton is his natural daughter; that Wilma Paton was in fact the natural daughter of Bennie C. Keown; and that Wilma Paton was therefore entitled to inherit from the estate pursuant to the provisions of Ark. Code Ann. § 28-9-209(d)(2) (1987). The appellant filed a motion to set aside the order, alleging that newly discovered evidence existed which tended to prove Wilma Paton was not the natural daughter of the decedent. The appellant also filed a motion to disqualify Henry N. Means III as attorney for the estate. After a hearing, the probate judge denied both motions. From that decision, comes this appeal.

For reversal, the appellant contends that the probate judge abused his discretion in refusing to set aside the order entered on August 15, 1991, and in denying the motion to disqualify Henry N. Means III as attorney for the estate. We affirm.

Arkansas Code Annotated § 28-1-115(a) (1987) allows a probate court to vacate or modify its orders at any time before the time for appeal has elapsed after the final termination of the estate. *White* v. *Toney*, 37 Ark. App. 36, 823 S.W.2d 921 (1992). By its terms, this statute permits such modification or vacation upon a showing of "good cause." Ark. Code Ann. § 28-1-115(a), *supra*. The initial question in the case at bar is, therefore, whether the probate judge erred in failing to find good cause to vacate the order. We hold that he did not. The appellant's present attorney argues that there is newly discovered evidence consisting of a burial instruction sheet in which the space to list children was left blank, and evidence to show that the decedent had a test revealing a low sperm count several years after Wilma Paton's birth. The appellant's new attorney filed a motion to compel Wilma Paton to submit to a blood test, suggesting to the probate judge that the decedent's body could be exhumed so that tissue samples could be obtained for genetic testing. Although this zeal on behalf of new counsel is perhaps laudable, it nevertheless appears from the record that no satisfactory explanation was offered to show why this evidence could not have been obtained prior to entry of the order that the appellant seeks to have set aside. Accordingly, we hold that the probate judge did not err in failing to find good cause for vacation

of the order determining Wilma Paton to be the daughter of the decedent. *See Brantley* v. *Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991).

Next, the appellant contends that the probate court erred in denying her motion to disqualify Henry N. Means III as attorney for the estate. This motion was based on the fact that Mr. Means had previously represented the appellant in a highway condemnation suit in 1983.

Rule 1.9 of the Model Rules of Professional Conduct precludes a lawyer who has formerly represented a client from representing another person in "the same or a substantially related matter." On this record, we cannot say that the probate judge erred in failing to find that the highway condemnation suit of 1983 was "the same or substantially related" to the determination of heirship at issue in the case at bar and, consequently, we affirm.

Affirmed.

ROBBINS and STROUD, JJ., agree.

Ronald COLDING d/b/a Ronald Colding Motors *v.* Betty WILLIAMS

CA 95-174 920 S.W.2d 507

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 1996
[Petition for rehearing denied June 5, 1996.]

Christopher C. Mercer, Jr., for appellant.

William A. McLean, for appellee.

JAMES R. COOPER, Judge. The appellee in this civil case purchased a 1986 Lincoln Town Car from the appellant's used car lot in April 1991. She subsequently brought an action alleging, *inter alia*, that the appellant intentionally misrepresented the automobile's mileage at the time of the sale. After a bench trial the trial court entered judgment for the appellee in the amount of $5,000.00, plus costs and attorney's fees. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in finding that he violated the mileage disclosure requirement of Ark. Code Ann. § 4-90-206(a) (Repl. 1991), and that the trial court erred in awarding $5,000.00 in damages. We find no error, and we affirm.

In his first point for reversal, the appellant argues that there is no substantial evidence to support the trial judge's finding that the appellant intentionally violated the statute, and that Ark. Code Ann. § 4-90-206 cannot be satisfied by a showing of mere negligence. We address only the first part of this argument because it is dispositive of the entire issue.

Arkansas Code Annotated § 4-90-206(a) (Repl. 1991) provides that:

> No person shall transfer a motor vehicle without disclosing

> in writing to the transferee the true mileage registered on the odometer reading or that the actual mileage is unknown if the odometer reading is known by the transferor to be different from the true mileage.

As used in Ark. Code Ann. § 4-90-206(a), "person" is defined as "an individual, firm, partnership, incorporated or unincorporated association, or any other legal or commercial entity." Ark. Code Ann. § 4-90-201(3) (Repl. 1991).[1]

In the case at bar, the record shows that the appellant was the owner of Ronald Colding Motors and that the appellant's brother was employed as a salesman. Both the appellant and his brother dealt with the appellee at the time the automobile was purchased. The appellee testified that the appellant told her that the automobile was a "good, low-mileage" car, and that she noticed that the odometer reading was approximately 9,800 miles. The record further shows that the car was sold to the appellee after execution of an "Odometer Disclosure Statement" certifying that, to the best of the seller's knowledge, the odometer reading of 9,892 miles reflected the actual mileage of the vehicle.

Although the appellant testified at trial that he knew at the time of the sale that the actual mileage of the vehicle was approximately 109,000 miles, he claims the error was caused by negligence. On these facts, we cannot say that the trial judge clearly erred in finding that the appellant intentionally misrepresented the vehicle's mileage. Ark. R. Civ. P. 52(a).[2]

Next, the appellant contends that the trial court erred in awarding damages in the amount of $5,000.00. We do not agree. Arkansas Code Annotated § 4-90-203 (Repl. 1991) provides that any person injured by violation of the odometer provisions shall recover the actual damages, together with costs and a reasonable attorney's fee. At trial, the appellant himself testified that a 1986 Lincoln Town Car with 9,000 actual miles would be worth

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[1] Although not argued by the parties, we note that this definition of "person" is broad enough to encompass the acts of both the salesman and the appellant.

[2] Given our holding that sufficient evidence exists to support the finding of intentional misrepresentation, discussion of lesser levels of intent is not required to resolve the issues before us. Nevertheless, we refer the reader to *Hinson* v. *Eaton*, 322 Ark. 331, 908 S.W.2d 646 (1995) for a comprehensive discussion of the level of intent necessary to satisfy the statute.

$6,000.00 more than an identical vehicle with 109,000 miles. The difference in value between the vehicle as warranted and its actual value is an appropriate measure of damages, *see Currier* v. *Spencer*, 299 Ark. 182, 772 S.W.2d 309 (1989), and on this record we cannot say that the trial judge clearly erred in setting damages at $5,000.00.

Affirmed.

ROBBINS and STROUD, JJ., agree.

Bobby Joe MULLINAX *v.* STATE of Arkansas

CA CR 95-698 920 S.W.2d 503

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 1996
[Petition for rehearing denied May 29, 1996.]

Doug Norwood, for appellant.

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

JAMES R. COOPER, Judge. The appellant entered a conditional plea of guilty to driving while intoxicated pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. The appellant was fined $250.00, ordered to pay court costs of $403.00, and had his driver's license suspended for ninety days.. He was also ordered to complete an alcohol safety program and sentenced to one day in jail. On appeal, he argues that the trial court erred in denying his motion to suppress because the roadblock at which he was stopped was not implemented in a lawful manner. We disagree and affirm.

In reviewing a trial court's decision to deny an appellant's motion to suppress, this Court makes an independent determination based on the totality of the circumstances and will reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Roark* v. *State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994). We view the evidence in the light most favorable to the appellee. *Beshears* v. *State*, 320 Ark. 573, 898 S.W.2d 49 (1995).

The appellant was stopped at a roadblock on August 11, 1994, conducted by Springdale Police Officers Mike Bell and Mike Peters. Lieutenant John Lewis, supervisor and shift commander in charge at the time, authorized the roadblock, approved the site, and gave Officer Bell instructions on how to proceed. Lieutenant Lewis testified that he had previously participated in numerous roadblocks. He testified that he instructed the officers not to profile certain cars or certain people, and not to stop the cars at random. He testified

that the officers had a set procedure on how they were going to conduct the roadblock and that he confirmed the plan.

The roadblock was set up in a road construction area near a junior high school where traffic was restricted to two lanes and the speed limit was reduced to thirty miles an hour. There had been reports of reckless driving and speeding in that area. Officer Bell testified that there were barrels guiding the traffic through the particular area and that they adjusted the barrels and their vehicles to facilitate the traffic flow. He testified that drivers had to negotiate the barrels before they set up the roadblock and that their presence increased visibility to the area. The officers carried flashlights and wore bright orange reflective safety vests with the word "POLICE" on them in large letters. The blue lights and headlights were activated on the two police vehicles utilized in conducting the roadblock.

Officer Bell testified that the purpose of the roadblock was to check the sobriety of the drivers and to check for valid vehicle registration, driver's licenses, and insurance. He further stated that the purpose of the roadblock was discussed with Lieutenant Lewis. Every vehicle approaching the roadblock was stopped for a period of no more than thirty seconds, and every fifth vehicle was stopped for a more detailed check that lasted less than two minutes. Officer Bell testified that they explained to every vehicle what they were doing and asked every fifth driver for his driver's license, registration, and insurance. The officers called in the driver's license numbers, and the radio operator informed them if the licenses were valid and if there were any outstanding warrants. The radio dispatch logs indicated that the officers called in to check eighteen drivers' licenses during the roadblock, which lasted for approximately one hour.

Officer Bell testified that he noticed the odor of intoxicants coming from the appellant's vehicle and on the appellant's breath when he stopped at the roadblock. He further testified that he saw a plastic cup in the console of the vehicle containing some ice and liquid. He stated that the appellant's vehicle was not one of the fifth vehicles but that the appellant was detained for a further check because it appeared that he had been drinking.

The appellant makes some twenty objections to the conduct of the officers and the manner in which the roadblock was imple-

mented. We first address his arguments that the roadblock was unconstitutional under the Arkansas Constitution. The appellant contends that Article 2, Section 15, of the Arkansas Constitution provides greater protection against unreasonable searches and seizures than the Fourth Amendment to the United States Constitution. We dispose of this argument by noting that our Supreme Court declined to make such a finding in *Stout* v. *State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

A Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444 (1990). The question thus becomes whether such seizures are reasonable under the Fourth Amendment. *Id.*

In *Camp* v. *State*, 26 Ark. App. 299, 764 S.W.2d 463 (1989), we found the roadblock that was established for the purpose of checking driver's licenses and vehicle registration was reasonable under the Fourth Amendment. The permissibility of vehicle stops made on less than reasonable suspicion of criminal activity must be judged in each case by balancing the effect of the intrusion on the individual's Fourth Amendment rights against the promotion of a legitimate government interest. *Camp, supra.* In *Sitz, supra,* the United States Supreme Court held that a state's use of sobriety checkpoints does not violate the Fourth and Fourteenth Amendments to the United States Constitution. The Supreme Court determined that the balancing analysis in *Brown* v. *Texas,* 443 U.S. 47 (1979), and *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), provided the governing framework for ascertaining the reasonableness of a sobriety-checkpoint seizure. In *Brown*, the Supreme Court stated:

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.
>
> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective

> facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

443 U.S. at 50-51 (citations omitted).

Some of the various factors that have been considered in applying the balancing analysis include: the supervision of the individual officers in the field, the limited discretion of the officers in stopping vehicles, the amount of interference with legitimate traffic, the subjective intrusion on the part of the travelers, the supervisory control over the operation, and the availability of a less intrusive means of promoting the legitimate government interest. *See Michigan Dept. of State Police* v. *Sitz, supra*; *Brown* v. *Texas, supra*; *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *United States* v. *Martinez-Fuerte, supra*; and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). *See generally*, Annotation, *Validity of Routine Roadblocks by State or Local Police for Purpose of Discovery of Vehicular or Driving Violations*, 37 A.L.R.4th 10 (1985 & Supp. 1995).

The appellant argues that many of the factors required for a checkpoint to pass constitutional muster were absent or deficient in the roadblock in the case at bar. He relies on cases from other jurisdictions that have found certain factors, such as written guidelines, a local or statewide policy or program, advance publicity, data on site selection, and supervision at the site, to be constitutional prerequisites to a valid checkpoint. However, we find those factors to be merely relevant matters to be considered by a court in the overall balancing process. *See e.g.*, *People* v. *Banks*, 6 Cal. 4th 926, 863 P.2d 769, 25 Cal. Rptr. 524 (1993); *O'Kelley* v. *State*, 210 Ga. App. 686, 436 S.E.2d 760 (1993); *State* v. *Barker*, 252 Kan. 949, 850 P.2d 885 (1993); *People* v. *Cascarano*, 155 Misc. 2d 235, 587 N.Y.S.2d 529 (1992). Thus, we conclude, after the requisite balancing test, that the roadblock in the case at bar did not constitute an unreasonable seizure under the Fourth Amendment.

Here, the roadblock was established for the purpose of determining that licensed and safe drivers were using the public roadway. "No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it." *Sitz*, 496 U.S. at 451. In *Camp*, we noted the importance of qualified drivers and safe vehicles using the highways and that we

were not aware of a less intrusive means of making that determination. There is no evidence that the roadblock in the case at bar was established as a subterfuge for detection of any other criminal activity.

The roadblock was established at a construction area where the speed limit had been reduced and was conducted at a time when the traffic was light. The presence of the officers at the area did not create a traffic hazard or unduly interfere with legitimate traffic. The identity of the officers and the presence of their vehicles were obvious due to the identifying vests worn by the officers and the flashing blue lights. The motorists were only stopped briefly and this was a checkpoint stop rather than a roving patrol. Thus, the level of intrusion was slight. *See Sitz*, 496 at 452-453.

The officers did not make random stops using unbridled discretion but stopped vehicles based on an established procedure that was followed during the roadblock. The roadblock was authorized by the supervisor in charge at the time. Lieutenant Lewis stated that the roadblock was set up as a safety check point and not specifically for the detection of intoxicated drivers. Nevertheless, safety necessarily involves motorists who are not driving while intoxicated. The officers were veterans who were trained as part of the police program in handling driving violations. The data reveals that eighteen drivers' licenses were checked and one arrest was made. This percentage is sufficient to show the checkpoint's effectiveness. *See id.* at 455. Furthermore, after the appellant stopped and Officer Bell detected signs of intoxication, the officers had authority under Arkansas Rule of Criminal Procedure 3.1 to further detain the appellant.

Another of the appellant's arguments is that the officers illegally detained the drivers and their passengers in an effort to run warrant checks on them. However, the officers testified that the radio dispatcher automatically checked for outstanding warrants when they called in the driver's license numbers so it was not in fact a further detention in order to run warrant checks. Moreover, the rights secured by the Fourth Amendment are personal in nature, and the appellant does not have standing to challenge the seizure on the behalf of any passengers that may have been involved. *See Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994).

Thus, under these circumstances, we conclude that the roadblock was not conducted in a manner inconsistent with the appellant's Fourth Amendment rights or that the limited intrusion on those rights, to the extent that the intrusion advanced the public interest, outweighed the promotion of society's legitimate interest. Therefore, we find that the trial court did not err in denying the appellant's motion to suppress.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

Johnnie MORRIS *v.* STATE of Arkansas

CA CR 95-556 920 S.W.2d 508

Court of Appeals of Arkansas
Division II
Opinion delivered May 1, 1996

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

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

WENDELL L. GRIFFEN, Judge. This appeal arises from separate rape convictions of the same defendant, Johnnie Morris. On November 28, 1994, appellant Morris was convicted of the June

18, 1994, rape, battery, and kidnapping of Jane Doe[1]. One week later, Morris was convicted of the February 17, 1994, rape of Mary Roe. The Roe rape, although it occurred first, was tried second.

Morris raises three points on appeal. First, he argues that the trial court abused its discretion when it allowed into evidence Jane Doe's testimony about an alleged threat that Morris communicated to her the day after she was raped. Appellant also asks us to reverse the court's denial of his motion in limine which sought to limit the scope of testimony from Jane Doe, his second victim, in the rape trial involving the attack on Mary Roe. Third, appellant asks us to correct an error in the judgment and commitment order that mistakenly listed the kidnapping charge as a Class Y, instead of a Class B, felony. We affirm the first two points and modify the judgment to reflect the appropriate felony class on the third point.

Jane Doe was raped at appellant's residence on June 18, 1994. She reported the attack to the police, and an article concerning a reported rape appeared in a local newspaper the next day. At the rape trial, appellant's counsel sought to exclude Doe's testimony concerning a telephone conversation that appellant had with her after the newspaper article appeared. Appellant allegedly mentioned to her during the conversation that if she had reported a rape, and accused him, then he would be tried for murder rather than rape. Appellant objected to her testimony regarding his post-crime statements on relevancy grounds.

Evidence of post-crime conduct has been held relevant and admissible in a variety of contexts under Arkansas law. A defendant's hostility and anger after the killing of his victim was held relevant to show intent. *Segerstrom* v. *State*, 301 Ark. 314, 783 S.W.2d 847 (1990). In a sexual-abuse case, evidence of the victim's fear and repulsion after the attack was deemed relevant to the issue of consent. *Skiver* v. *State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992). Even conduct of a defendant on the day of trial was relevant to show guilt. *Morris* v. *State*, 21 Ark. App. 228, 731 S.W.2d (1987). Objections to circumstantial evidence on grounds of irrelevancy are not favored because the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. *Grigsby* v. *State*, 260 Ark. 499, 542 S.W.2d 275 (1976).

[1] The victims' real names have been changed.

The trial court did not abuse its discretion by admitting the testimony of appellant's threat. Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401. The fact that the threat occurred the day after the crime made it no less relevant to the issues of consent, intent, or guilt.

Because it was not an abuse of discretion to admit the evidence, we also hold that it was not an abuse of discretion to deny appellant's motion for a mistrial. A mistrial is a drastic remedy to which resort should be had only when there has been an error so prejudicial that justice cannot be served by continuing the trial. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994). The denial of appellant's motion for a mistrial is affirmed.

Appellant's second point on appeal involves his motion in limine in the second (Mary Roe) rape case. He sought to present testimony from Jane Doe, the victim in the first rape case, that she was knocking on appellant's bedroom window about the time of the Mary Roe rape, and that she heard nothing unusual. Appellant sought to present this testimony to show consent in the Mary Roe case, but wanted also to limit the testimony to avoid any reference Jane Doe might make to her own rape that occurred in the same bedroom five months later.[2]

The trial court denied appellant's motion in limine. Appellant then elected not to present testimony from Jane Doe. On appeal, appellant assigns error to the trial court's denial of the motion, and he contends that he should not have been forced to make the Hobson's choice between presenting testimony from a witness with both exculpatory and inculpatory information and presenting no testimony from that witness at all. However, the denial of a motion in limine, by its very nature, often leaves the proponent of the evidence with several choices, any of them potentially unfavorable. The proponent may decide to forego presenting any proof from the witness. He may decide to present the proof through another source deemed less damaging. Or, the proponent

[2] The trial court was obviously struck by the irony of the prospect of a rape victim testifying in defense of her attacker in a subsequent proceeding. The court characterized this turn of events as "unfair," "misleading to the jury," and "heinous."

may decide to run the risk of the damaging testimony in the hope that the trier of fact will give it less weight than the testimony that is not damaging. This dilemma is not improper, however uncomfortable it may be for the party affected by it. Here, the court's ruling did not deny a right or compel appellant's decision one way or the other. Whether to put Jane Doe on the stand or not was a matter of trial strategy — a process that trial lawyers and their clients must undertake in every trial. It was not an abuse of discretion for the court to decline to immunize appellant from making that choice and facing its consequences.

For his final point, appellant urges us to correct the judgment and commitment order that listed appellant's kidnapping charge as a Class Y felony. Appellant points us to Ark. Code Ann. § 5-11-102(b) (Repl. 1993) which classifies kidnapping as a Class Y felony "except that if the defendant shows by a preponderance of the evidence that he or an accomplice voluntarily released the person restrained alive and in a safe place prior to trial, it is a Class B felony." The jury specifically found that appellant voluntarily released Jane Doe "alive and in a safe place." Appellant asserts, and appellee agrees, that the correct classification of kidnapping on these facts should have been Class B.

An error which relates only to punishment may be corrected by reducing the sentence in lieu of reversing and remanding for a new trial. *Richards* v. *State*, 309 Ark. 133, 827 S.W.2d 155 (1992). By statute, this court may also reverse, affirm, or modify the judgment or order appealed from, in whole or in part and as to any or all parties. Ark. Code Ann. § 16-67-325(a) (1987). Accordingly, we modify the judgment and commitment order to reflect kidnapping as a Class B felony in this matter. Otherwise, the judgment is affirmed.

Affirmed as modified.

MAYFIELD, J., agrees.

PITTMAN, J., concurs in the result.

Arthur B. JESSIE *v.* Betty J. JESSIE

CA 95-259 920 S.W.2d 874

Court of Appeals of Arkansas
Division III
Opinion delivered May 8, 1996

[redacted]

Burbank, Dodson & McDonald, by: *Gary D. McDonald*, for appellant.

Vickery, Landers & Lightfoot, P.L.L.C., by: *Ian W. Vickery*, for appellee.

JOHN E. JENNINGS, Chief Judge. Arthur B. Jessie appeals from a divorce decree of the Union County Chancery Court. He argues that the trial court erred in failing to dismiss the complaint for lack of personal jurisdiction over him. He also argues that the trial court lacked subject-matter jurisdiction because his marriage to appellee,

Betty Jessie, was void and invalid. We disagree and affirm.

The parties were married in El Dorado, Arkansas, in July 1960. They then moved to Texas. A son, Jeff, was born there in 1961. The family, including her son from a previous marriage, moved frequently in the ensuing years, with her and the boys living at various times in Texas, Kansas, Oklahoma, and Arkansas while appellant worked in those states and in Louisiana, sometimes living with the family and sometimes living at the job site. After a serious illness, Jeff required special care. In 1969 they decided it would be best for Jeff to attend a special school in El Dorado, and the family set up its household there. After a year and a half, the family moved to another house in El Dorado which they rented for two years and then bought. Appellant testified that after the family relocated to El Dorado in 1969, he continued to live and work in Texas and never lived in Arkansas. He testified that he "maintained two households for thirty years" and provided support for his wife and son, visiting them regularly once a month or every six weeks. Appellee testified that appellant would "come in once a week or every two weeks" and she would do his laundry and prepare meals for him to freeze and take back with him.

Jeff died in 1993. In 1994 appellee filed for divorce in Union County, Arkansas. Appellant entered a special appearance and filed a motion to dismiss on the ground that the court lacked personal jurisdiction. He also argued that appellee had failed to obtain a divorce from her prior husband, William Kelly, before marrying appellant and that therefore the parties' marriage was void. Appellant participated with counsel at a hearing on the motion to dismiss, but did not participate in the hearing regarding the divorce and division of marital property.

The chancellor found that appellant was personally subject to the court's jurisdiction "as a result of his activities in Arkansas, including ownership of real and personal property in the State of Arkansas, his support of members of his family in the State of Arkansas for an extended period of time and the physical presence of [appellant] within the State on a regular and frequent basis since 1969 until the death of his son in 1993."

Appellant argues that he is a nonresident of Arkansas and has been for many years, and that when appellee established her present domicile in Union County in 1969, he maintained and continued

his established domicile in Texas, where he has continued to reside. He argues that the parties' last marital domicile was outside of Arkansas, and that he has committed no "acts" in the state sufficient to confer jurisdiction under the long-arm statute.

The question of whether the trial court's determination of personal jurisdiction over appellant was clearly erroneous must be answered in two parts. First is whether the long-arm statute providing for service of process on nonresidents was complied with. Appellant acknowledges that he was served pursuant to the statute. Our statute, codified at Ark. Code Ann. § 16-58-120 (1987), has been read by the supreme court to provide that any cause of action arising out of acts done by an individual in Arkansas, including matters concerning domestic relations, may be brought here although the defendant has left the state. *Bunker* v. *Bunker*, 261 Ark. 851, 552 S.W.2d 641 (1977). Whether the exercise of jurisdiction on the basis of acts done in this state is reasonable depends upon the facts of each individual case, with the principal factors to be considered being the nature and quality of the acts, the extent of the relationship of the defendant to this state, and the degree of inconvenience which would result to the defendant by being forced to stand suit in this state in that particular cause of action. *Cotton* v. *Cotton*, 3 Ark. App. 158, 623 S.W.2d 540 (1981).

If state law provides for personal jurisdiction, the next question to be answered is whether the exercise of that jurisdiction comports with federal constitutional requirements of the Due Process Clause of the Fourteenth Amendment. *See Kulko* v. *California Superior Court*, 436 U.S. 84 (1978). The constitutional standard for determining whether a state may enter a binding judgment against a non-resident defendant, set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), requires that a defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. An essential criterion in all cases is whether the quality and nature of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in that state. This "minimum contacts" test is not susceptible of mechanical application; a determination of "reasonableness" requires that the facts of each case be weighed to determine whether the requisite "affiliating circumstances" are present. *See generally, Kulko, supra.*

There can be no question that appellant in this case had

substantial and regular contacts with the State of Arkansas. He owned real property here. He maintained a car registered in his own name here. He had a checking account here, supported his family here, and maintained his family's home here. He made regular frequent visits to the family home where he would sometimes stay for several days and nights while his wife did his laundry and prepared two weeks' worth of meals for him to take back to his trailer and job in Texas. Unlike the "appellant's glancing presence" in the forum state in *Kulko*, appellant here "purposefully derive[d] benefits" from his activities in Arkansas, and we cannot conclude that the chancery court's exercise of jurisdiction over him offends "traditional notions of fair play and substantial justice."

Appellant also argues that the chancellor should have granted his motion to dismiss on the ground that there was no showing that a divorce decree was ever entered terminating appellee's prior marriage to William Kelly, thus rendering the parties' marriage void. The chancellor, in a temporary order, noted that at the hearing on the appellant's motion, "no proof was submitted by [appellant] as to the invalidity of the marriage." In the divorce decree, the chancellor found that appellee was married to William Kelly on November 26, 1958, filed an action for divorce on March 7, 1960, and that "no divorce therein was granted." The decree further stated:

> With regard to the challenge of subject matter jurisdiction of this Court, the Court finds that notwithstanding that the marriage of the parties was technically invalid as a result of the failure of the [appellee] to receive a final divorce from her previous husband, that if the invalidity of the marriage was to be asserted as a defense, such a defense would work an inequitable result and constitute a miscarriage of justice. Accordingly, by the conduct and actions of the [appellant], [appellant] is estopped from asserting such a defense, and the Court finds that it does have subject matter jurisdiction over the marriage and the dissolution of the marriage between the parties hereto. Such finding is based upon the extended duration of the marital relationship between the parties hereto for thirty-four (34) years, during which each party believed themselves to be legally and morally bound by matrimony one to the other, including the raising of a child together, the establishment of a home for [appellee] and Jeff Jessie, and the discharge of obligations and duties of a spouse

as each party respectively understood those obligations.

Appellant argues that while the principle of estoppel would apply to prevent appellee from challenging the validity of the parties' marriage, it should not apply to him.

Appellant testified that he first learned that there might have been a question regarding appellee's prior marriage after she filed for divorce in 1994, when a search of the court records failed to produce a decree of divorce. Introduced into evidence were a verified complaint for divorce filed by appellee against William Kelly, along with a warning order, proof of publication and affidavit, and a copy of the chancery court docket. Appellee testified that she had engaged an attorney to help her obtain a divorce from Mr. Kelly, and the lawyer had indicated to her that he would take care of it and that she would not have to come to court. She testified that it was her understanding that "it had gone through" and that she had custody of her son born of that marriage. She testified that the first indication she had that perhaps the divorce hadn't been made final was in 1994. She testified that Mr. Kelly deserted her when their son was three weeks old, that she never saw or heard from him again, had no idea as to his whereabouts, and filed for divorce some eighteen months later.

It has been held that, while a legal marriage cannot be created by estoppel, equity can require that parties be estopped from denying the validity of a marriage. *Brown* v. *Imboden*, 28 Ark. App. 127, 771 S.W.2d 312 (1989). While it is true that a bigamous marriage is void from its inception,

> [I]t is a longstanding presumption of law that a marriage entered in due form is valid, and the burden of proving a marriage is invalid is upon the party attacking its validity. It is presumed that, when a man and woman are married, and one had a living spouse, the former spouse has been divorced at the time of the marriage.
>
> Further, there is the additional presumption that the former spouse was dead at the time of the second marriage. The presumptions of divorce from or death of a previous spouse are so strong that they exist despite the fact that overcoming them involves proof of a negative, i.e., proof of no divorce and/or proof that the previous spouse is still living.

Clark v. *Clark*, 19 Ark. App. 280, 719 S.W.2d 712 (1986) (citations omitted). It has been held that even if the existence of the former spouse at the time of the second marriage was established by proof, and the clerk of the divorce court in the county of the purported divorce testified that careful examination of the records failed to produce any record of a divorce obtained in the prior marriage, such proof is not sufficient to overturn the second marriage, which is presumed to be legal. *Estes* v. *Merrill*, 121 Ark. 361, 181 S.W. 136 (1915). Applying these longstanding principles to the facts before us, we cannot say that the chancellor's ruling was clearly erroneous.

Affirmed.

ROGERS and NEAL, JJ., agree.

Doyle PARHAM, Christopher Simmons, and Richard Carr, as Trustees on Behalf of Bethel Missionary Baptist Church *v.* CHURCH MUTUAL INSURANCE COMPANY

CA 95-197 922 S.W.2d 724

Court of Appeals of Arkansas
En Banc
Opinion on Rehearing Setting Aside Original Opinion
delivered May 8, 1996

Tony Price, for appellants.

Richard Watts, for appellee.

JOHN E. JENNINGS, Chief Judge. On March 27, 1996, we handed down an opinion in this case which reversed the decision of the circuit court. It was a panel decision with Judge Neal writing the opinion. Judges Mayfield and Jennings were also on the panel.

On April 10, 1996, Church Mutual filed a petition for rehearing en banc. Under Ark. Code Ann. § 16-12-113 (Repl. 1994) and the corresponding internal rules of this court, an additional three-judge panel (division) was assigned to participate in the rehearing. The additional panel was composed of Judges Cooper, Stroud, and Griffen.

Judge Griffen promptly recused and at this point Judge Neal realized he was disqualified and recused.

On April 22, Church Mutual filed a "Motion to Supplement Petition for Rehearing En Banc" asking that Judge Neal recuse on the basis that his wife is presently being represented in civil litigation by the firm of Wright, Lindsay and Jennings, which also represented the appellants in the case at bar. By the time of the filing of the "Motion to Supplement," Judge Neal had already recused.

Under rules of this court Judges Pittman and Rogers were designated to take the places of Judges Neal and Griffen in considering the petition for rehearing. Both Judges Pittman and Rogers have recused for unrelated reasons.

We have given considerable thought to what our proper course of action should be in light of the decision of the supreme court in *Johnson Timber Corp.* v. *Sturdivant*, 295 Ark. 663-B, 758 S.W.2d 415 (1988), which involved a somewhat similar situation. In *Sturdivant*, the justice who authored the original opinion later determined that he should have disqualified, even though his failure to do so was inadvertent. Although there are differences between *Sturdivant* and the case at bar, including the fact that the supreme

court sits en banc in every case while we function primarily in three-judge divisions, we have concluded that the remaining judges on the court should also disqualify, that the opinion previously delivered in this case should be vacated, and that we should ask the chief justice of the supreme court to assign three special judges to hear the case anew. As the supreme court noted in *Sturdivant* this course of action is not absolutely required by United States Supreme Court decisions and furthermore is a decision that rests with each individual judge. Judges Mayfield and Jennings were in the original panel that decided the case. While the remaining three judges available to consider the petition for rehearing, Judges Cooper, Stroud, and Robbins, did not participate in the original decision, they did participate in the approval of the opinion and the vote on publication.

We sincerely regret the delay that this course of action will entail but believe that this is our best choice under the circumstances.

Our previous decision is set aside.

MAYFIELD, COOPER, STROUD, and ROBBINS, JJ., agree.

NEAL, GRIFFEN, PITTMAN, and ROGERS, JJ., not participating.

Terrence McCLUNG *v.* STATE of Arkansas

CA CR 95-444 920 S.W.2d 867

Court of Appeals of Arkansas
Division II
Opinion delivered May 8, 1996

Vowell & Atchley, P.A., by: *Stevan E. Vowell*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Terrence McClung appeals from his conviction of driving while intoxicated, for which he was sentenced to one day in jail, was fined $400.00, and had his driver's license suspended for ninety days. He contends that the trial court erred in denying his motion to dismiss for violation of the speedy trial rules. We agree and reverse and dismiss.

On May 31, 1991, a judgment was filed in the Eureka Springs Municipal Court sentencing appellant for his convictions of driving while intoxicated and driving left of center. On May 31, 1991, appellant timely appealed those convictions by filing the municipal court record in the Carroll County Circuit Court. On June 30, 1992, appellant and his attorney appeared in circuit court and moved to dismiss the charges on grounds that he had not been provided with a speedy trial *de novo*. The court denied appellant's motion because none of the documents perfecting appellant's appeal reflected that they had been served on the prosecutor, who in this

case was the Eureka Springs City Attorney. On April 22, 1993, the court entered a written order denying appellant's motion and tolling the speedy-trial period until appellant properly notified the prosecutor. The order reflects that the city attorney had been present in court on June 30, 1992, when appellant's motion was presented and denied.

Appellant's trial in circuit court was finally held on December 30, 1994. Before trial, appellant again moved to dismiss the charges on speedy-trial grounds. Again, the motion was denied. After the trial, appellant was convicted of driving while intoxicated.

On appeal, appellant contends that the trial court erred in denying his motion to dismiss the charges. The State concedes error on this point. We agree and reverse and dismiss.

Rule 28.1(c) of the Arkansas Rules of Criminal Procedure provides that, subject to any excludable periods under Rule 28.3, a criminal defendant charged in circuit court and held to bail, or otherwise lawfully set at liberty, shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months from the time provided in Rule 28.2. Our courts have held that the time period within which a defendant must be brought to trial upon appeal of a misdemeanor conviction to circuit court begins to run under Rule 28.2 on the day that the appeal is perfected. *McBride* v. *State*, 297 Ark. 410, 762 S.W.2d 785 (1989); *Shaw* v. *State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986). The primary burden is on the court and prosecutor to assure that a case is brought to trial in a timely fashion. *Glover* v. *State*, 307 Ark. 1, 817 S.W.2d 409 (1991); *see Reed* v. *State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991). A defendant has no duty to bring himself to trial, *Glover* v. *State*, *supra*, and the time for trial commences running without demand by the defendant, Ark. R. Crim. P. 28.2; *Raglin* v. *State*, 35 Ark. App. 181, 816 S.W.2d 618 (1991). Once it has been shown that a trial is to be held after the speedy-trial period has expired, the State has the burden of showing that any delay was the result of the defendant's conduct or that it was otherwise legally justified. *Raglin* v. *State*, *supra*; *Reed* v. *State*, *supra*.

Here, appellant perfected his appeal to circuit court on May 31, 1991, but his trial was not held until some three years and seven months later, on December 30, 1994. Therefore, the burden was on the State to show that at least two years and seven months of

the delay was excludable. The State failed to meet that burden. We need not decide in this case whether appellant was required to notify the city attorney of his appeal in order to start the running of the speedy-trial period. This is true because, even if we were to assume that appellant did have some such burden, the city attorney was clearly aware of the appeal no later than June 30, 1992, yet appellant's trial still was not held until two years and six months later. Of that thirty-month period, the record indicates only that the period from June 30 to August 7, 1992, was excludable and attributable to appellant. There appears in the record no reason why appellant's trial could not have been held within twelve months of August 7, 1992. Therefore, we hold that the trial court erred in denying appellant's December 1994 motion to dismiss.

Reversed and dismissed.

GRIFFEN and MAYFIELD, JJ., agree.

Allen William WALLACE *v.* STATE of Arkansas

CA CR 94-266 920 S.W.2d 864

Court of Appeals of Arkansas
Division III
Opinion delivered May 8, 1996

David C. Schoen, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of three counts of delivery of a controlled substance, marijuana. He was sentenced to serve consecutive sentences of ten years on each count for a total of thirty years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion for a mistrial; that the evidence is insufficient to support his conviction; and that the trial court erred in ordering his sentences to run consecutively. We affirm.

For his second argument, the appellant challenges the sufficiency of the evidence. He asserts that the State failed to prove that the green vegetable matter introduced into evidence as State's Exhibit 3 was actually marijuana because Roy J. Adams, Jr., a forensic drug chemist from the Arkansas State Crime Laboratory, failed to identify the exhibit as marijuana. We consider a challenge to the sufficiency of the evidence prior to a review of any alleged trial errors. *Kennedy* v. *State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995). However, the appellant's argument is not preserved for appellate review.

At the close of the State's case, the appellant made the following motion for a directed verdict:

> Thank you, your Honor. We would also move for a directed verdict on the three counts of delivery, feeling that the State has failed to meet the burden of proof and produce sufficient evidence that this Defendant delivered the substances, and that they were delivered for money or other consideration. All of the proof was that they never found any money. So that's our motion.

A motion for a directed verdict must be specific enough to apprise the trial court of the particular basis on which the motion is made. *Stewart* v. *State*, 320 Ark. 75, 894 S.W.2d 930 (1995). The reasoning underlying this rule is that when specific grounds are stated and the proof is pinpointed, the trial court can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof. *Brown* v. *State*, 316 Ark. 724, 875 S.W.2d 828 (1994). Our law is well established that arguments not raised at trial will not be addressed for the first time on appeal, and that parties cannot change the grounds for an objection on appeal,

but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Stewart, supra.*

■ In the case at bar, the appellant did not make the specific argument to the trial court that he now makes on appeal. Therefore, his motion for a directed verdict was inadequate to preserve for review the specific argument he now raises.

■ Moreover, we find the evidence to be sufficient on this point. Amy Hodges was the undercover officer who purchased the marijuana from the appellant on March 29, April 2, and April 12, 1993. Officer Hodges testified, without objection, that she went to the appellant's residence to purchase a quarter pound of marijuana on three separate occasions. She testified that each time the appellant retrieved a large plastic ziplock bag full of marijuana from a duffel bag, he took some marijuana from the ziplock bag and placed it into another bag for her. Officer Hodges testified that she paid the appellant $350.00 for each quarter pound of marijuana.

Officer Hodges was working with and turned over the evidence to Roger Ahlf, an investigator with the State Police. Officer Hodges and Investigator Ahlf both identified, again without objection, State's Exhibit #3 as the marijuana purchased from the appellant.

The appellant also argues that the trial court should have granted his motion for a mistrial because the prosecuting attorney improperly commented on his failure to testify when she stated during closing arguments, "You know, a typical defense ploy is to throw stones at the way the police handle a case when they don't have a defense." However, this argument is also not preserved for review because the appellant failed to make a timely objection and motion for a mistrial.

■■ The appellant did not object to the prosecutor's statements until after the jury had retired to deliberate. It is settled law that for the trial court to have committed reversible error, timely and accurate objections must have been made, so that the trial court was given the opportunity to correct such error. *Butler Mfg. Co.* v. *Hughes*, 292 Ark. 198, 729 S.W.2d 142 (1987). In order to preserve for appellate review an allegation that the prosecuting attorney made an improper argument during his or her closing address to the jury, the defendant must make immediate objections to the statement at issue. *Id.*; *Jones* v. *State*, 248 Ark. 694, 453 S.W.2d 403

(1970). Further, we do not think the prosecutor's statement was an improper comment on the appellant's failure to testify.

For his third argument, the appellant asserts that the trial court erred in failing to exercise its discretion when it ordered his sentences to run consecutively. It is within the province of the trial court to determine whether sentences should proceed consecutively or concurrently, and the decision is left to the sound discretion of the trial court. *Brown* v. *State*, *supra*. The Court has remanded for resentencing when it was apparent that the trial court did not exercise its discretion. *Wing* v. *State*, 286 Ark. 494, 696 S.W.2d 311 (1985).

Here, the trial court explained that it was taking several factors into consideration in denying the appellant's request that his sentences be run concurrently. The trial court stated:

> This Court feels that [the appellant] has been convicted by a jury of three counts of delivery of marijuana, involving three separate, distinct sales occurring on March 29th, April 2nd, and April 12th. The sales involved were of no small quantity. Each of the sales involved approximately one-quarter pound of marijuana, which this Court considers to be a rather large amount of marijuana to take place in a single transactional sale. We're not talking about a small baggie that is typically delivered by individuals in this county to persons who intend to smoke or consume marijuana for their own use. We're talking about three sales in large quantities in large bags that amount to over, or approximately three-quarters of a pound of marijuana in fifteen days to the same person. This Court feels that that is an aggravating circumstance that it must consider, the large quantity of marijuana that is — that was sold, the fact that it was a repeated sale to the same person of almost three-quarters of a pound of marijuana, which would certainly cause one to wonder what [the appellant] thought his purchaser was doing with three-quarters of a pound of marijuana in fifteen days. . . . With those circumstances and with that evidence, this Court feels that the proper and the prudent sentence to impose would be to impose the sentences as a consecutive sentence to reflect the total finding of the jury and that is what I intend to do.

We think that these statements clearly show that the trial court carefully and thoughtfully analyzed the facts and exercised its discretion appropriately.

Affirmed.

ROBBINS and MAYFIELD, JJ., agree.

SECOND INJURY FUND *v.* JAMES RIVER CORPORATION, Employer, Aetna Insurance Company, Carrier and Floyd G. Darter

CA 95-278 920 S.W.2d 869

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 1996

Mark E. Lang, for appellant.

Bethell, Callaway, Robertson, Beasley, & Cowan, by: *John R. Beasley*, for appellees James River Corp. and Aetna Ins. Co.

Walker Law Firm, by: *Eddie H. Walker, Jr.*, *William J. Kropp, III*, and *R. Scott Zuerker*, for appellee Floyd G. Darter.

MELVIN MAYFIELD, Judge. The Second Injury Fund has appealed a decision of the Worker's Compensation Commission which held it liable for all of appellee-claimant's benefits above a nine percent impairment rating to the body as a whole. Appellant argues that the Commission's finding that the second and third requirements which trigger Second Injury Fund liability were met is not supported by substantial evidence.

The claimant Floyd Darter contended he was permanently and totally disabled. At the time of the hearing he was fifty-six years old, had a fifth-grade education, and had been given training in the military equivalent to an eighth-grade education but said he couldn't spell very well, although he could read "some." Mr. Darter had worked for James River Corporation for almost seventeen years, when, on July 27, 1991, an eighty-pound hoist fell several feet and hit him on the head, left shoulder, and arm. He was off work for four days, treated conservatively, and went back to work. However, because of recurring pain, on July 29, 1992, surgery was performed on his shoulder by Dr. Steven Heim. Mr. Darter was off work for eight or nine weeks, then released to return to work with a permanent physical impairment rating of nine percent to the body as a whole, and a twenty-five pound weight restriction. Darter continued to work until June 10, 1993, when he quit and has not worked since.

While working for appellee James River, Darter had also sustained work-related injuries to his shoulder and neck in 1989 and had surgery for bilateral carpal tunnel syndrome. In addition, he had numerous non-work-related physical problems. While in the Army in 1959 Darter injured his lower back lifting a pot of potatoes, and he has had back problems which have continued to worsen ever since. He has been diagnosed with chronic obstructive pulmonary disease and degenerative disc disease in the cervical and lumbar spine. He also has severe hypertension that is difficult to control, tendinitis of the left shoulder, peripheral vascular disease with vascular insufficiency to the right leg which causes numbness and makes it difficult for him to stand or walk, and shortness of breath as a result of over forty years of smoking two packs of cigarettes a day.

Dr. L.R. Darden stated that Darter was totally disabled, and

the administrative law judge agreed. The law judge also held that the appellee employer was only responsible for Darter's nine percent physical impairment and that the Second Injury Fund was liable for the remainder of his disability. The Commission affirmed and adopted the opinion of the administrative law judge, and it is this decision that has been appealed.

In *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), the Arkansas Supreme Court set out the requirements for Second Injury Fund liability:

> 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 540. It is clear that the first hurdle was satisfied by the July 1991 injury. But the appellant Second Injury Fund argues that there is not sufficient evidence to support the Commission's finding that hurdles two and three have been met.

We have consistently said that the findings of the Commission must be upheld unless there is no substantial evidence to support them and that we will reverse only if we are convinced that fair-minded persons with the same facts before them could not have reached the same conclusion arrived at by the Commission. *Price* v. *Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993). And in the very recent case of *Kuhn* v. *Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996), the Arkansas Supreme Court, citing a previous case of that court, said that "substantial evidence exists if reasonable minds could have reached the same conclusion" as that reached by the Commission and that reversal is proper only if "fair-minded persons considering the same facts could not have reached the same conclusion." Therefore, we examine the Commission's findings in the instant case in keeping with the standards set out in the above cases.

As to the second hurdle set out in the *Mid-State Construction* case, the Commission found that Darter had high blood pressure, back problems, chronic obstructive pulmonary disease, shoul-

der problems, bilateral carpal tunnel syndrome, and vascular problems. Appellant contends, however, that these conditions do not meet the requirements of the second hurdle under *Mid-State* because they were either latent, arose after the date of injury, were injuries sustained while in the employment of James River, or were not substantial enough to constitute a disability or impairment. We agree.

Arkansas Code Annotated § 11-9-525(a)(3) (1987) provides:

> It is intended that latent conditions which are not known to the employee or employer not be considered previous disabilities or impairments which would give rise to a claim against the Second Injury Fund.

In the case of *Purolator Courier* v. *Chancey*, 40 Ark. App. 1, 841 S.W.2d 159 (1992), we reviewed cases by both this court and our supreme court which had held that "latent" means that which is present without showing itself; hidden, concealed, or dormant. And we said that under the above statute: "An injury is latent until its substantial character becomes known or until the employee knows or should be reasonably expected to be aware of the full extent and nature of his injury." 40 Ark. App. 6-7, 841 S.W.2d at 162.

The evidence in this case clearly shows that Darter's chronic obstructive pulmonary disease (COPD) was not discovered until December 18, 1992, when a chest x-ray was made. This was more than a year after his July 1991 injury. The x-ray report states that no old films are available, but there is "apparent hyperinflation of the lungs suggesting COPD." However, a lung biopsy was done on August 4, 1989, which revealed only a benign mass, and Darter was returned to work with no restrictions. Dr. Darden's progress notes made in 1990 state that Darter is "a little short of breath and he coughs and his throat is irritated and his head feels stopped up." However, the report also states that "his lungs don't sound stopped up." Although the doctor advised Darter to stop smoking, Dr. Larry Travis noted on June 24, 1991, that Darter was still smoking. Dr. Travis also found that Darter had gastritis and duodenitis but that there was "no evidence of ulceration" and that "the esophagus is normal." The doctor also wrote on his progress record "no significant abnormalities noted other than he is very agitated and nervous." And he gave Darter a prescription for Tagamet with one refill.

We do not believe there is substantial evidence to support a finding that the "substantial character" or the "full extent and nature" of Darter's pulmonary disease was known when he was injured in July of 1991. Therefore, under the law his condition was latent at that time and it cannot qualify as a prior disability or impairment which would trigger Second Injury Fund liability in this case.

Also, Darter's vascular problems were not diagnosed or treated until after his injury in July of 1991. It was not until July 19, 1993, that Dr. Rowland P. Vernon of the Holt Krock Clinic reported:

> [Darter] had a peripheral vascular lab exam which suggests that he has bilateral femoral popliteal segment disease, worse on the right than the left by pulse wave form studies. And he has as well abnormal femoral pulse wave forms.
>
> On exam, the patient has no femoral pulses to speak of. He has no pedal pulses. He has bruits all over his abdomen. He has been recently unable to work for some time.
>
> It would be my impression that he needs to stop smoking and that he might reasonably be offered arteriography and possible aortoiliac bypass. He is indeed functionally impotent at this point and has been for some time. . . .

There is no evidence that Darter or his employer knew of this condition until after the 1991 injury. Darter stopped working on June 10, 1993. He was referred to Dr. Michael Standefer who examined him on June 29, 1993. Dr. Standefer's record of that examination made no mention of a vascular problem or complaint. However, Dr. Standefer referred Darter to Dr. James S. Deneke and his report of September 28, 1993, states that Darter said his hips hurt "with walking even a block." Dr. Deneke also reported that Darter had a history of "vascular insufficiency to the right leg." This evidence falls short of showing that Darter was aware — or should have been — of the substantial character or the full extent and nature of his vascular problem until it was diagnosed by Dr. Vernon in July of 1993.

The employer, James River Corporation, argues that Dr. Larry Travis noted in his record of June 24, 1991, that Darter had peripheral neuropathy in his feet. But, as we have pointed out, that record also stated that Darter had "no significant abnormalities"

other than he was "agitated and nervous." The notation on the record made by Dr. Travis indicates that his finding as to Darter's feet was based on "swelling." Obviously this could result from working all day while standing on his feet, or from some other cause, and does not show that Darter knew or should reasonably be expected to aware of the substantial character or full extent and nature of the vascular problem that was found in 1993. Thus, we think that the substantial evidence shows this was a latent condition.

Also, the Second Injury Fund is not liable for injuries sustained during the employment by one employer. *Riceland Foods, Inc.* v. *Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986); *McCarver* v. *Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 429 (1986); Ark. Code Ann. § 11-9-525(a)(1) (1987). Darter's 1987 shoulder injury, which was surgically repaired in 1992; his bilateral carpal tunnel syndrome, which was surgically corrected in 1991; and his right shoulder and arm tendinitis were all sustained while Darter was working for James River Corporation, and even though Darter said these conditions became worse after the hoist fell on him in July of 1991 they cannot support Second Injury Fund liability. *See Chamberlain Group* v. *Rios*, 45 Ark. App. 145, 871 S.W.2d 595 (1994).

Darter's back condition and his high blood pressure were not sustained during Darter's employment with James River or discovered after the 1991 injury; however, in *Mid-State Construction, supra*, the court said:

> It is the *substantial nature* of the impairment which is emphasized, and the elements of compensability, none of which may have existed as to the particular claimant, merely assist the fact finder in his *determination as to whether the former condition was sufficient in degree to constitute an impairment qualifying the claimant as one of the "handicapped" for whose benefits the statute was enacted.*

295 Ark. at 6, 746 S.W.2d at 540 (emphasis added).

Although we view the evidence in the light most favorable to the decision of the Commission, that standard neither insulates the Commission from judicial review nor renders our function in these cases meaningless, and we will reverse the Commission when we are convinced that fair-minded persons with the same facts before them could not have reached the same conclusion

arrived at by the Commission. *Morgan* v. *Desha County Tax Assessor's Office*, 45 Ark. 95, 871 S.W.2d 429 (1994). When the "substantial nature" of Darter's overall physical condition is considered, we do not think there is substantial evidence to support a finding that he was "handicapped" prior to his 1991 injury. There is evidence that at the time of his 1991 injury Darter was accustomed to working up to twelve hours per day and usually more than forty hours per week; he had no medical restrictions; and he consistently took physically strenuous jobs.

The appellant also contends that the third hurdle of *Mid-State Construction* has not been met in this case, i.e., that there is no substantial evidence to support the Commission's finding that Darter's pre-existing conditions and his 1991 injury *combined* to cause his current disability status. Again we agree. We note that Darter testified that he purposely took more physically demanding jobs because they paid more and did not normally include any paper work. Darter also testified that before his 1991 injury he worked long hours, sometimes as long as twelve to sixteen hours per day, and sometimes seven days per week. The safety coordinator for James River confirmed that Darter always did his job prior to his 1991 injury. Moreover, the coordinator testified that he had observed Darter working on the job for a number of years, and he never had to modify a job so that Darter could do it. We said in *Arkansas Highway and Transportation Department* v. *McWilliams*, 41 Ark. App. 1, 6, 846 S.W.2d 670, 673-74 (1993), that in considering whether an employee's prior impairment combined with his last work-related injury to produce his current disability status, it was proper to consider his physical ability to work before his work-related injury. We think it also important that even after his 1991 injury, Darter continued to work for almost two years, before he quit. And it is not disputed that he was totally and permanently disabled after he quit.

Under the evidence in this case, we think fair-minded persons would find that Darter's current disability arises from a combination of his latent conditions, his prior injuries sustained while working for James River, and his 1991 injury. In this connection we quote the following from the reply brief of the Second Injury Fund:

> The Appellee/Claimant in its brief makes a puzzling argument. Claimant's argument concerns the statement in

> the Fund's brief that he worked 12–16 hour days prior to his injury. Claimant states that this is not a meritorious argument by the Fund, as he is not required to show that any prior conditions caused any loss of earning capacity. The puzzling part of this is that the Fund has never argued that Claimant needed to show a loss of earning capacity, nor does its brief even contain the words "earning capacity."
>
> The Fund's argument is that the Appellee/Claimant, at the time of his injury, was capable of working long hours at heavy labor. As such, he was not one of the "handicapped" for whose benefit the statute was enacted. . . . Neither of the Appellees directly address this position.

We find that the Commission's decision is not supported by substantial evidence; therefore, the Second Injury Fund is not liable for any compensation to which the employee Darter is entitled.

Reversed and remanded.

JENNINGS, C.J., and NEAL, J., agree.

WAL-MART STORES, INC. *v.* Lee DOUGLASS, Insurance Commissioner of Arkansas

CA 95-34 920 S.W.2d 857

Court of Appeals of Arkansas
En Banc
Opinion delivered May 8, 1996
[Petition for rehearing denied June 5, 1996.]

Ronald A. Williams, Wal-Mart Corporate Counsel and *Robinson, Staley & Marshall*, by: *Robert L. Robinson, Jr.* and *Patricia Stanley Luppen*, for appellant.

Jack East, III, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from an order of the Pulaski County Circuit Court which held that the appellant, Wal-Mart Stores, Inc., is "collaterally estopped from recovering any sums under the 'tail coverage' from the Arkansas Property and Casualty Insurance Guaranty Fund (Fund) and is bound by the Eighth Circuit's opinion." The appellee is the Administrator of the Fund and is also Ancillary Receiver of Transit Casualty Company.

In 1982, Wal-Mart, a self-insured employer, sought proposals for its workers' compensation insurance. Carlos Miro, who was authorized to issue and place insurance on behalf of Transit Casualty Company (which is now insolvent), offered to provide workers' compensation insurance coverage for all Wal-Mart employees for a flat and guaranteed premium of $3,500,000, which would not be increased regardless of losses. In addition to the workers' compensation insurance coverage, "tail coverage" (retroactive coverage for Wal-Mart's liability with respect to the period of time during which Wal-Mart was self-insured and which time period had already passed when coverage was purchased) would be provided for a guaranteed premium of $2,852,000. Wal-Mart accepted Miro's offer. When Transit issued the policy, it contained a provision for computation of premium in accordance with the standard manual rates which are on file with the appropriate state regulatory agencies and which are multiplied by the estimated payroll to reach the premium. The policy premium was $3,500,000 as agreed, but to reach the premium guarantee, Wal-Mart's payroll, reported to Transit as $547,000,000, was reduced on the face of the policy to $250,000,000.

Policy claims were far beyond expectations, and in January

1985, Transit requested an additional premium of $13,000,000. Wal-Mart filed a declaratory judgment action in an Arkansas federal district court seeking to enforce the policy as written. Transit answered and filed a counterclaim seeking to recover additional premiums in the amount of approximately $20,000,000. During the pendency of the action, a Missouri court entered an order of insolvency against Transit and appointed a receiver.

In an opinion dated July 6, 1987, the federal district court held, among other things, that the agreement under which Wal-Mart would pay a flat rate for workers' compensation insurance was void and unenforceable. The district court refused to apply the doctrine of *in pari delicto* and "leave the parties where it found them" and held that Wal-Mart was liable for the sum of $16,772,144 in additional premiums for the coverage. The district court could find no basis, however, to hold that the "tail coverage" was not in compliance with the law and held that the "tail coverage" was fully enforceable according to its terms. *Wal-Mart Stores, Inc.* v. *Crist*, 664 F. Supp. 1242 (W.D. Ark. 1987).

Wal-Mart appealed to the Eighth Circuit Court of Appeals, and in an opinion dated December 26, 1988, the court of appeals agreed that the agreement was illegal and violated state law. The Eighth Circuit, however, applied the doctrine of *in pari delicto* and held that the district court should have denied relief on both Wal-Mart's action for declaratory judgment and Transit's counterclaim for payment of premiums. The Eighth Circuit reversed the decision of the district court with respect to Transit's counterclaim and remanded to the district court with directions to dismiss the case without relief to either party. The opinion was silent as to the "tail coverage" except for a footnote in which the court stated that the portion of the district court's decision holding that the "tail coverage" was a fully enforceable agreement binding on both parties was not challenged on appeal, and "we shall not discuss it further." *Wal-Mart Stores, Inc.* v. *Crist*, 855 F.2d 1326 (8th Cir. 1988).

On August 19, 1991, the appellee filed a "Motion for Order Denying Claim of Wal-Mart Stores, Inc." (No. 85-011593) in Pulaski County Circuit Court. The appellee stated that in January and February 1986 Wal-Mart made a demand for indemnification and loss adjustment expenses from the Arkansas Property and Casualty Insurance Guaranty Fund for claims arising under the Transit policies; that the appellee refused to honor the demands because the

validity of the "tail coverage" was the subject of litigation in federal district court; that the "tail coverage" was ultimately declared to be part of an illegal agreement by the Eighth Circuit; that Wal-Mart failed to seek review of the Eighth Circuit decision; and that Wal-Mart is barred by res judicata and collateral estoppel from relitigating the legality of the insurance contracts between it and Transit. The appellee stated that Wal-Mart had made a claim against the Fund for the "tail coverage" in the amount of $445,516.40. The appellee asserted that the Fund is responsible only for the payment of "covered claims" as defined by Ark. Code Ann. § 23-90-103(2); and that because, under the Eighth Circuit opinion, there is no valid policy of insurance, there are no "covered claims." The appellee asked for an order denying Wal-Mart's claim.

On August 21, 1991, the appellee filed a "Complaint and Motion to Transfer and Consolidate Actions" in Pulaski County Circuit Court (No. 91-4836). In the complaint, the appellee stated that, under the mistaken belief that Transit had insured Wal-Mart with valid and legally enforceable policies of insurance, the Commissioner had paid $221,702.02 to claimants and as claims adjusting expense until August 25, 1988, and an additional $31,031.03 since that date. The appellee stated that the Eighth Circuit had found the agreement illegal and asked for a monetary judgment in the amount of $252,733.05 together with prejudgment interest as allowed by law and attorney fees. The appellee also asked that case No. 91-4836 be transferred to Pulaski County Circuit Court, 7th Division, and that an order be entered consolidating case No. 91-4836 with case No. 85-011593.

On October 21, 1991, Wal-Mart filed a "Motion for Partial Summary Judgment" in both cases. Wal-Mart alleged it was entitled to partial summary judgment in No. 85-011593 because the federal district court held the "tail coverage" was properly issued and that policy enforceable according to its terms; that decision was not appealed to the Eighth Circuit; and the Eighth Circuit did not decide that issue.

On October 28, 1991, cases No. 91-4836 and 85-011593 were transferred to Pulaski County Circuit Court, 2nd Division, and the cases were consolidated.

On June 9, 1993, the appellee filed a motion for summary judgment in connection with the workers' compensation insurance

claims in case No. 91-4836, and on November 8, 1993, the circuit judge entered an order granting appellee's motion for summary judgment in No. 91-4836. No appeal was taken from that order and we shall not consider it further.

On June 19, 1994, the circuit judge entered an order in No. 85-011593 granting the appellee's "Motion for Order Denying Claim of Wal-Mart Stores, Inc." in regard to the "tail coverage". The circuit judge held that the Eighth Circuit found that Transit and the appellant were parties to an illegal agreement; that the "tail coverage" was part of that agreement; and that the Eighth Circuit dismissed the case, including the "tail coverage", without relief to any party. The circuit judge held, therefore, that Wal-Mart is collaterally estopped from recovering any sums under the "tail coverage" and is bound by the Eighth Circuit's opinion.

Appellant argues on appeal that the trial court erred in holding that, because of the Eighth Circuit's opinion, it was collaterally estopped from recovering any sums from the Fund. Appellant contends that the Eighth Circuit opinion dealt solely with Transit's counterclaim for additional workers' compensation insurance premiums and had nothing to do with the "tail coverage."

The doctrine of collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by the parties in the first suit. *Scallion* v. *Whiteaker*, 44 Ark. App. 124, 868 S.W.2d 89 (1993). In the instant case, the issue of "tail coverage" was decided by the federal district court which held that the "tail coverage" was fully enforceable according to its terms. *Wal-Mart Stores, Inc.* v. *Crist*, 664 F. Supp. 1242 (W.D.Ark. 1987). Although an appeal was taken in that case, the finding with regard to "tail coverage" was not appealed from. Indeed, in *Wal-Mart Stores, Inc.* v. *Crist*, 855 F.2d 1326 (8th Cir. 1988), the Eighth Circuit stated that the district court's decision regarding "tail coverage" was not challenged on appeal and "we shall not discuss it further." Therefore, the decision of the federal district court was final on this issue and the trial court erred in holding that appellant was collaterally estopped by the Eighth Circuit's opinion.

Reversed and remanded for further proceedings not inconsistent with this opinion.

COOPER, STROUD, NEAL, and GRIFFEN, JJ., agree.

JENNINGS, C.J., dissents.

JOHN E. JENNINGS, Chief Judge, dissenting. The majority opinion accurately sets forth the procedural history in this case. It must also be conceded that the footnote contained in the opinion of the Eighth Circuit Court of Appeals lends support to the view that the majority takes. I cannot agree, however, that the decision of the trial court should be reversed.

First, the so called "tail-coverage" was made a part of the insurance policy by way of endorsement and the insurance policy was held to be an illegal bargain by the Eighth Circuit. The court specifically held that the district court should have found the parties in pari delicto and refused to grant relief of any sort. It specifically held that the district court should have denied relief on Wal-Mart's action for a declaratory judgment. The last sentence of the opinion of the Eighth Circuit states, "We reverse the decision of the district court with respect to *Transit's* counterclaim, and remand with directions to dismiss the case without relief to any party." On remand, the district court ordered "that the parties take nothing and that this action be dismissed on the merits without relief to any party." No appeal was taken from this order.

Clearly the Eighth Circuit's holding that the parties to the insurance contract were in pari delicto is binding on the Pulaski County Circuit Court. So is the district court's dismissal on remand. Under these circumstances I cannot agree that the Pulaski County Circuit Court erred in denying Wal-Mart the relief that it now seeks against the state insurance commissioner. Therefore, I respectfully dissent.

Montrevel BILLINGS *v.* STATE of Arkansas

CA CR 95-651 921 S.W.2d 607

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 1996

Sam Sexton, III, for appellant.

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

JOHN F. STROUD, JR., Judge. On November 8, 1993, Montrevel Billings pleaded guilty to conspiracy to deliver cocaine, a Class A felony, and possession of drug paraphernalia, a Class C felony. The court sentenced him to twenty years in the Arkansas Department of Correction with fifteen years suspended on the first felony and ten years with five years suspended on the second. The conditions of the suspension ordered that he not possess or use any

controlled substance, and that he not violate any federal, state, or municipal law. Appellant was incarcerated, released on parole, and subsequently arrested for possession of cocaine with intent to deliver. The State filed a petition to revoke the suspended sentences, and the parole board revoked his parole. At the revocation hearing, the suspended sentences were revoked by the circuit judge. Appellant was later tried and acquitted of the charge of possession of cocaine with intent to deliver. Appellant raises four points on appeal. We find no error and affirm.

Appellant filed two motions with the court before the revocation hearing. First, he asked that the petition to revoke be dismissed as a double jeopardy violation because he already had been reincarcerated for his parole violation. He also asked the court to require the State to disclose the name of the confidential informant, stating that the Confrontation Clause of the United States Constitution and its counterpart in the Arkansas constitution entitled him to subpoena the person for the hearing. Both motions were denied.

Detective Dennis Alexander of the narcotics unit of the Fort Smith Police Department gave the only testimony at the hearing. He testified that he had assisted in the preparation of an affidavit for a warrant to search room 11 at the Holiday Motel and a 1981 maroon Oldsmobile Cutlass bearing Oklahoma plates. A copy of the affidavit was introduced into evidence.

The affidavit referred to information from a confidential informant who had previously provided information about illicit drug traffic in Fort Smith and whose information had led to six arrests for possession or sale of crack cocaine. The confidential informant told police that appellant was dealing in crack cocaine and that the informant was in the motel room with appellant during the late night hours of July 25, 1994. He observed several sales of crack cocaine, observed appellant take some of the money and place it under the seat of a 1981 maroon Oldsmobile Cutlass parked in front of room 8, and observed a further quantity of crack cocaine being offered for sale by appellant. Police investigation and surveillance of the motel revealed that room 11 was registered to Tom Benton of 505 North 19th Street, Fort Smith, and that appellant, on his last arrest report, had listed his address as 505 North 19th and his mother's name as Maggie Benton.

Detective Alexander testified that he had participated in the

execution of the search warrant at 6:00 a.m. on July 26, 1994. Appellant, who had been sleeping and was the only person in the room, opened the door for the police when they could not force it. Neither the police nor their drug-sniffing dog found any drugs in the room. The police opened the car door with a key found in the room in a pair of pants. The detective testified that the appellant said the pants belonged to him. Initially the police did not find drugs in the automobile; the dog, however, alerted to the dash around the stereo system. Officers partially dismantled the dash and disassembled a fuse or junction box beneath and to the left of the brake pedal. There they found a paper towel which held three rocks of cocaine.

Under cross-examination, Detective Alexander said that no officers were outside the room when the confidential informant was there but that officers constantly drove by to keep surveillance from the time the informant left the room until the warrant was served. Appellant was not observed leaving the room during the surveillance. Detective Alexander also testified that the affidavit or reports referred to a second person in the room with Billings who had participated in the sales. Appellant's counsel asked the name of the second person, but the court sustained the State's objection on the grounds of relevancy. Appellant's counsel said he was attempting to show that the person in possession of the drugs was the other person in the room. The court appropriately noted that no drugs were found in the room.

Appellant moved to dismiss after the State rested, stating that nothing showed that the vehicle belonged to him, no evidence connected him with the vehicle, and the car keys could have belonged to the other man in the room the previous night. He stated that he would like to have the other man present to testify about ownership of the car. The trial judge denied the motion and found that the State had proven its case by a preponderance of the evidence, noting that the keys were found in the pants and that the cocaine was found in a vehicle over which appellant obviously had control.

Appellant's first point on appeal is that the evidence was insufficient to support the finding that he violated the terms of his suspended sentence. On appeal of a revocation, the evidence must be viewed in the light most favorable to the State. *Reese* v. *State*, 26 Ark. App. 42, 44, 759 S.W.2d 576 (1988). Evidence that is insuffi-

cient to support a criminal conviction may be sufficient to support a probation revocation. *Lemons* v. *State*, 310 Ark. 381, 836 S.W.2d 861 (1992). On appeal, we will not reverse unless the trial court's findings are clearly against the preponderance of the evidence, giving due regard to the trial court's superior position to determine credibility of the witnesses and the weight to be given their testimony. *Cavin* v. *State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984).

The issue here is similar to that in *Harris* v. *State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980), a revocation case where police executing a warrant to search found marijuana on top of the refrigerator and under the couch in Mr. Harris's apartment. Mr. Harris argued on appeal that the trial court's finding that he had violated his probation was against the preponderance of the evidence because there was no evidence linking him to the contraband. This court rejected his argument, stating that "[t]he evidence adduced at trial may not have been sufficient to convict one charged with possession of a controlled substance, but it was sufficient for the trial judge to determine that appellant had violated the terms of his probation." *Harris* v. *State*, 270 Ark. at 636. In the case now before us, the evidence viewed in the light most favorable to the State showed that appellant possessed a key to an automobile in which police found cocaine upon executing a warrant to search. We hold that the trial court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence.

As his second and third points, appellant asserts that the trial court erred in refusing to require disclosure of the confidential informant and of the other person who was present when the drug sale occurred. Appellant contends that he was denied the right to confront the confidential informant, whose information in the affidavit might have been considered by the court as evidence that appellant possessed cocaine. The abstract of the court's findings and ruling, however, clearly shows that appellant's suspended sentence was revoked because he had the keys to a vehicle in which cocaine was found. Our supreme court has stated that disclosure of an informant's identity is not required where the defendant was charged only with possession and the informant merely supplied information leading to the issuance of the search warrant. *Heard* v. *State*, 316 Ark. 731, 876 S.W.2d 231 (1994). In the case now before us, where appellant's suspended sentences were revoked and the

informant merely supplied information used in the affidavit supporting the warrant to search, there was no requirement to disclose the identity of the informant.

Similarly, appellant's request for the identity of another person allegedly present in the room was not relevant to appellant's violation of conditions of his suspended sentences. He argues that testimony by this other person could have shown that it was not appellant, but this person, who had access to the keys and ownership of the drugs. His bare assertions, however, are insufficient to preserve a challenge on appeal to the trial court's discretionary power to exclude evidence. *Cf. Zinger* v. *State*, 313 Ark. 70, 852 S.W.2d 320 (1993) (where defendant wanted to convince the jury that another person might have committed the crime for which he was being tried, evidence of commission of a similar crime in another state was insufficient without more to warrant admission).

As his final point, appellant states that the revocations of both his parole and his suspended sentence for the same conduct constituted a violation of the doctrines of double jeopardy and due process. Because he presents no argument or authority as to the due process claim, we address only the double jeopardy argument, dismissing the due process claim as speculative and not supported by any reasonable argument or authority. *See Milholland* v. *State*, 319 Ark. 604, 893 S.W.2d 327 (1995).

Appellant's argument that the revocation of his parole and suspended sentence for the same behavior violates double jeopardy is without merit. The revocation of appellant's parole and the revocation of his suspended sentence resulted in appellant's being punished for his original offenses; neither proceeding imposed a separate punishment for the behavior that was the catalyst for the revocation proceedings. Neither parole revocation nor suspended sentence revocation is a stage of a criminal prosecution, *see Lawrence* v. *State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992)(citing *Gagnon* v. *Scarpelli*, 411 U.S. 788 (1973); and *Pyland* v. *State*, 302 Ark. 444, 790 S.W.2d 178 (1990)). The Double Jeopardy Clause protects defendants in criminal proceedings only against multiple punishments or repeated prosecutions for the same offense. *Lawrence, supra,*

(citing *United States* v. *Dinitz*, 424 U.S. 600 (1976)). Thus, appellant has no valid double jeopardy claim.

Affirmed.

COOPER and ROBBINS, JJ., agree.

Shannon ALLEN *v.* STATE of Arkansas

CA CR 95-440 920 S.W.2d 860

Court of Appeals of Arkansas
En Banc
Opinion delivered May 8, 1996

Daniel D. Becker and *Michael E. Harmon*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Shannon Allen appeals his conviction in the Garland County Circuit Court following a jury verdict of guilty on the charge of burglary, and contends that the trial court erred by refusing his requested and proffered jury instruction for the lesser-included offense of criminal trespass. We reverse and remand this case for a new trial, because we agree with appellant that a rational basis was established for charging the jury regarding the lesser-included offense.

Appellant was charged with burglary in connection with his entry into a residence in Hot Springs, and his eventual departure (accompanied by his ex-wife) with a Super Nintendo game that belonged to the resident of the house. The prosecution presented its proof during the morning session of the one-day trial. At the noon recess, the trial judge and counsel for the parties considered the jury instructions to be given, and appellant's counsel requested that the jury be instructed regarding the lesser included offense of criminal trespass. Counsel informed the trial judge that he expected the appellant to testify that appellant accompanied his ex-wife into the residence with the permission of the inhabitant, and that appellant

did not know that she had the article that was allegedly stolen. However, the trial court denied appellant's requested instruction. During the afternoon session, appellant testified as his counsel had predicted. Appellant contends that his proffered testimony warranted the requested instruction. The State argues that appellant should have renewed his objection to the jury instruction after his case-in-chief ended, and that the trial court's denial of the instruction was not improper because the ruling was made based on the testimony heard to that point (when the jury instructions were discussed at the end of the prosecution's case-in-chief during the noon recess). The State also urges that we affirm based upon its objection to appellant's supplemental abstract.

Arkansas Code Annotated § 5-1-110(c) (Repl. 1993) provides that the court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. It is well settled that criminal trespass is a lesser-included offense in the crime of burglary. *Graves* v. *State*, 264 Ark. 564, 572 S.W.2d 847 (1978). It is not error for a court to refuse or fail to instruct on a lesser-included offense where the evidence clearly shows only one of two possible results—the defendant is either guilty of the greater offense or is innocent. *Brown* v. *State*, 321 Ark. 413, 903 S.W.2d 160 (1995). But error occurs when the trial court refuses to give a lesser-included-offense instruction where there is even the slightest evidence to warrant it. *State* v. *Jones*, 321 Ark. 451, 903 S.W.2d 160 (1995). A defendant is entitled to a particular jury instruction if a timely request is made, the evidence supports the proffered instruction, and the instruction correctly states the law. *U.S.* v. *Hood*, 748 F.2d 439 (8th Cir. 1984).

Based upon these principles, we hold that it was error to refuse the lesser-included-offense instruction. Although there was no evidence to support the lesser-included-offense instruction at the time of the noon recess when the instructions were discussed, the trial court had been alerted by appellant's counsel that such evidence was forthcoming. That prediction, standing alone, would not have warranted the instruction because it was not evidence. However, the trial judge would have been prudent to withhold a ruling on the lesser-included-offense instruction pending presentation of the defense case. Because the subsequent testimony by appellant supported the proffered instruction and correctly stated

the law, the trial court should have reversed its earlier ruling denying the lesser-included-offense instruction and included it in the charge to the jury.

The State's contention that appellant should have renewed his objection to the jury instructions after he presented his case appears to be based upon the view that an objection to jury instruction is in the same procedural realm as a motion for directed verdict. There is a clear line of precedent holding that the motion for directed verdict must be renewed at the close of all the evidence in order for a party to preserve its challenge to the sufficiency of the evidence for appellate review. *See, e.g., Clay* v. *State*, 318 Ark. 550, 886 S.W.2d 608 (1994); *Henry* v. *State*, 309 Ark. 1, 928 S.W.2d 346 (1992). It is equally clear that objections to jury instructions must be made either before or at the time that instructions are given. *Zinger* v. *State*, 313 Ark. 70, 852 S.W.2d 320 (1993). Appellant made a timely objection to the trial court's refusal to include an instruction on the lesser-included offense during the noon recess when the instructions were discussed. His counsel proffered an instruction on that offense when the instructions were discussed, and before they were given to the jury. Those actions were sufficient to inform the trial court regarding the appellant's objection to the instructions that were to be given.

Although appellant's supplemental abstract is objectionable to the State, it does contain those material parts of the record necessary to understand the issue presented for our review. *Newton* v. *Chambliss*, 316 Ark. 334, 871 S.W.2d 587 (1994). The sole point on appeal is whether there was a rational basis for a conviction of criminal trespass. Appellant's abstracted testimony clearly demonstrates that he claimed to have no intent to borrow or steal the Super Nintendo game. That testimony was enough to permit the issue presented for our review to be understood.

Reversed and remanded.

JENNINGS, C.J., MAYFIELD, and NEAL, JJ., agree.

PITTMAN and ROGERS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. The appellant in this case was found guilty by a jury of residential burglary. In reversing that conviction, the majority holds that appellant was entitled to an instruction on the lesser included offense of criminal trespass. I

dissent primarily because there was no rational basis for the giving of such an instruction, but also because the issue was not properly preserved for appellate review.

To place the issue in perspective, I feel that it is necessary to briefly set out the evidence presented by the State, even though appellant failed to include such testimony in his abstract. The record reflects that Darrell Heller, age twenty-seven, who is mentally disabled, lived at home with his mother and father. According to Heller, on the evening of July 3, 1994, he took a bath while his parents were out of the house. He said that he had locked the front door before bathing. After finishing his bath, he discovered appellant looking through a dresser in his parents' bedroom. He also saw appellant's wife standing in the kitchen. Darrell testified that he had not previously known either appellant or his wife and that he asked them why they were in the house. He also asked them to leave and, when they paid no attention to him, he asked them to leave again. Heller said that he "escorted" them out and that he later discovered that his Super Nintendo and five games were missing, along with his radio. His father, Vernon Heller, testified that the storm door had been yanked open and that the metal frame had been bent.

A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a) (Repl. 1993). A person commits criminal trespass if he purposely enters or remains unlawfully in or upon a vehicle or the premises of another person. Ark. Code Ann. § 5-39-203(a) (Repl. 1993). Criminal trespass is complete upon the making of an unlawful entry. No intent to engage in further unlawful conduct is necessary. *Brown* v. *State*, 12 Ark. App. 132, 671 S.W.2d 228 (1984).

The majority is correct in its assertion that criminal trespass is a lesser included offense of burglary. *Grays* v. *State*, 264 Ark. 564, 572 S.W.2d 847 (1978). The majority is also on firm ground in stating that it is error to refuse a lesser included offense instruction where there is even the slightest evidence to warrant it. If there is any rational basis upon which the jury could have found the accused guilty of a lesser crime, it is reversible error to refuse to give a correct instruction on that lesser crime. *Martin* v. *State*, 46 Ark. App. 276, 879 S.W.2d 470 (1994). The majority's ruling in this case is based on the testimony of the appellant. However, the appellant's

testimony provides no rational basis for the giving of an instruction on criminal trespass.

Appellant testified that he and his wife were invited inside the home by Darrell and that Darrell offered them both a coke and gave his wife a piece of cake to eat. Appellant said that he went onto the porch to wait while Darrell fixed his wife's hair. He testified that about ten minutes later Darrell and his wife came to the door and that Darrell handed her a sack before showing her out. Appellant said that he did not know what was in the sack until his wife told him while they were walking down the street that she was borrowing Darrell's Super Nintendo.

As indicated above, the crime of criminal trespass is founded upon an unlawful entry. However, appellant denied that his entry to the home was unlawful. It was his testimony that he entered the home with the permission of the occupant. It was also his testimony that he entered the home without the intent to commit any crime, and in fact he denied any involvement in the theft of the Super Nintendo. Consequently, if appellant's testimony were to be believed, it would completely exonerate him of committing not only the offense of burglary, but also that of criminal trespass. In a long line of cases, it has been held that it is not error for the trial court to refuse or fail to instruct on the lower offense where the evidence clearly shows that defendant is either guilty of the greater offense charged, or innocent. *Brown* v. *State*, 321 Ark. 413, 903 S.W.2d 160 (1995). It has also been uniformly held that there is no rational basis for the giving of a lesser included offense instruction where the theory of defense is premised upon a complete denial of the defendant's participation in the act charged. *State* v. *Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995). In sum, appellant's testimony was inconsistent with a charge of criminal trespass. And, since his defense was that of a complete denial of any criminal conduct, I cannot say that the trial court erred in refusing the lesser included offense instruction. There simply was no rational basis to instruct the jury on criminal trespass.

With regard to the procedural aspect of this case, the majority misunderstands the State's argument. Contrary to the majority's conclusion, the State does not liken the situation to the requirement for renewing a motion for a directed verdict.

The record reflects that the question of jury instructions was

discussed at a noon recess just after the State had rested its case. The only "proffer" of testimony offered by appellant at that time in support of his request for an instruction on criminal trespass was the statement,[1] "I anticipate the testimony of my client to be that he did not have any intent of going to that house with the purpose of committing a theft or any crime punishable by law." The trial judge stated that there was no evidence in the record to support that instruction and ruled that "I'm just going to instruct *at this time* on residential burglary."

It is the State's position that this issue was not properly preserved for appeal since appellant did not renew his request for the instruction. The State points out that appellant's argument rests entirely on his own testimony and reasons that a trial court cannot be held in error based on evidence adduced after its ruling is made. The majority holds, however, that it was incumbent on the trial court to reverse its ruling in light of appellant's testimony. I cannot agree. First, as discussed above, appellant's testimony did not provide a rational basis for the giving of the instruction. Secondly, it is clear from the record that the trial judge's ruling was conditional and based on the record made thus far in the trial. If appellant felt that his testimony added something to the earlier proffer, or provided further justification for his request for the instruction, it was for appellant to urge the court to reconsider its ruling. I know of no authority, and the majority cites none, placing the onus on the trial court. *See Thomas* v. *Allstate Ins. Co.*, 27 Ark. App. 27, 766 S.W.2d 31 (1989).

Moreover, appellant failed to abstract any of the State's evidence that had been presented prior to the court's ruling. Without a review of the evidence before the court when it ruled, we cannot discern any error. Therefore, the appellant has failed to produce a record that demonstrates error. *Young* v. *Young*, 316 Ark. 456, 872 S.W.2d 856 (1994).

I would affirm.

ROGERS, J., joins in this dissent.

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[1] Actually, the proffer was directed toward appellant's request for an instruction on the offense of breaking or entering, which the trial court denied. Appellant makes no argument in this appeal concerning the trial court's refusal of that instruction.

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

CA 94-504 920 S.W.2d 856

Court of Appeals of Arkansas
En Banc
Opinion Upon Denial of Rehearing delivered May 8, 1996
Dissenting Opinion delivered May 8, 1996

MELVIN MAYFIELD, Judge. By opinion dated December 20, 1995, this court dismissed the appellants' appeal in this case. *See* 51 Ark. App. 188, 912 S.W.2d 938 (1995). The appellants have filed a petition for rehearing, and the court has denied the petition. I dissent.

I also dissented from the opinion that dismissed the appeal in the first instance; however, I want to more fully explain my position by this present dissent.

I start by pointing out that the majority opinion which dismissed the appeal did so on the basis that the appellants filed their appeal from "the final order entered in this case on January 26, 1994," and the majority opinion held that this order was "simply the chancellor's confirmation and approval of a commissioner's report of the sale of real and personal property in foreclosure."

The majority opinion then stated that the foreclosure sale followed the entry of a *consent* decree entered on November 16, 1993, in a suit which had been consolidated with this suit.

The majority opinion then stated that the November 16, 1993, *consent* decree gave judgment in rem against certain real and personal property but that ownership of a few of the items of personal property had also been determined in a previous order in that case entered on April 30, 1993.

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

The majority opinion then discussed the elements necessary to constitute a final judgment or decision and concluded that "the April 30, 1993, decision was not a final order for purposes of appeal" because all the claims in the consolidated case remained for trial.

Then the majority opinion stated: "Next, it is necessary to determine whether the November 16, 1993, consent decree was final for purposes of appeal." The opinion said that a decree granting foreclosure and placing the court's directive into execution is final and appealable and it would be necessary to file a notice of appeal within thirty days from the entry of such an order but that a decree confirming a foreclosure sale is also a "separate, final, and appealable order, and a notice of appeal must also be given within thirty days of that decree."

The majority opinion then administered the *coup de grace* with the following conclusion:

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

The point in the appellants' petition that I want to discuss first is that the November 16, 1993, decree, which the majority opinion says is the final and appealable order from which the appellants should have appealed, was a *consent* decree. The appellants' petition for rehearing states that "Arkansas has never allowed an appeal from a consent decree before this case." They cite *Saleski* v. *Boyd*, 32 Ark. 74 (1877), and *Martin* v. *Houck*, 79 Ark. 95, 94 S.W. 932 (1906), for this proposition. *See also The McCall Company* v. *Smith*, 117 Ark. 118, 173 S.W. 845 (1915), and *Cave* v. *Smith*, 101 Ark. 348, 142 S.W. 508 (1912). They also point out that Rule 2 of the Arkansas Rules of Appellate Procedure does not specifically mention consent decrees but that Rule 54(a) of the Arkansas Rules of Civil Proce-

dure provides that judgment "as used in these rules includes a decree and any order from which an appeal lies." Because it does not appear that an appeal may be taken from a consent decree, I would hold that the appeal from the January 26, 1994, decree was a viable appeal in this case.

In the second place, I agree with the appellants' argument that they are not attempting to appeal from the November 16, 1993, decree granting foreclosure, but their appeal from the January 26, 1994, decree brings up for review any intermediate order (which would include the April 30, 1993, order) involving the merits and necessarily affecting the orders and rulings in that separate but consolidated case. *See* Arkansas Rules of Appellate Procedure 2(b).

I would grant rehearing and address the merits of the points raised on appeal.

Robert KIMBLE *v.* PULASKI COUNTY SPECIAL SCHOOL DISTRICT

CA 95-702 921 S.W.2d 611

Court of Appeals of Arkansas
Division I
Opinion delivered May 15, 1996

Roachell Law Firm, by: *Travis N. Creed*, for appellant.

Skokos, Bequette & Smith, P.A., by: *Jay Bequette*, for appellee.

JOHN MAUZY PITTMAN, Judge. Robert Kimble has appealed from a summary judgment entered for appellee, Pulaski County Special School District, in his wrongful discharge action. On appeal, appellant argues that his employment was not terminable at will. We disagree and affirm the circuit court's decision.

Appellant was employed by appellee as a custodian at Mills High School in the 1991-92 school year. His written contract of employment provided: "The employment shall commence on the first day of August, 1991. Subject to the other terms of this agreement, the employment will be for a maximum of 233 days...." Under the "special conditions" listed in the contract, it was provided: "Both parties agree that this contract may be terminated at any time by either party by giving oral or written notice to the other party."

In February 1992, the high school was damaged by fire. After the principal investigated the fire's origin, he informed appellee that appellant had been negligent in his duties. Appellant was then notified by appellee's superintendent that he was being recommended for immediate termination because he had ignored a fire alarm. Appellant was given a termination hearing on March 11, 1992, and was then discharged.

In February 1994, appellant filed this wrongful discharge action against appellee, alleging that he had been terminated in violation of his contract. He also sought recovery for certain tort claims.

Appellee moved for summary judgment, relying on *Griffin* v. *Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982), wherein the Arkansas Supreme Court recognized that, generally, when the term of employment is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship *at will* and *without cause*. In response, appellant stated: "Ark. Code Ann. § 6-17-1701, et seq., known as the Public School Employee Fair Hearing Act, is applicable to this case and has bearing on the question of 'at will' employment." Although appellant abandoned his tort claims, he argued that questions of fact remained as to his breach of contract claim. In its reply, appellee argued that, although the Public School Employee Fair Hearing Act provides that school districts must offer minimum due process to employees recommended for termination, it has not modified the employment-at-will doctrine.

The circuit judge agreed with appellee, stating:

> Plaintiff was employed by the Pulaski County Special District under a written employment contract, which provided for employment up to a maximum of 233 days, but also provided that both Plaintiff and the District reserve the right to terminate the contract at any time upon notice to the other party. Accordingly, Plaintiff's employment with the District was "at will" and either party, Plaintiff or the District, was entitled to terminate the Plaintiff's contract at any time and for any reason or no reason.

■ 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. *Johnson* v. *Harrywell, Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994). In considering a motion for summary judgment, the court may also consider answers to interrogatories, admissions, and affidavits. *Muddiman* v. *Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991). When the movant makes a *prima facie* showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Johnson* v. *Harrywell, Inc.*, 47 Ark. App. at 63. In appeals from the granting of summary judgment, this court reviews facts in the light most favorable to the appellant and resolves any doubt against the moving party. *Id.* Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Id.* On appellate review, this court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of a motion left a material question of fact unanswered. *Id.*

Appellant focuses his appeal on two arguments: (1) that his employment was not terminable at will because it was for a definite period of time; and (2) that the Public School Employee Fair Hearing Act has altered the employment-at-will doctrine.

Appellee concedes that the employment contract was for a definite term, even though it provided that appellant would be employed for a "maximum of 233 days." We therefore need not determine the effect of the words "maximum of" in establishing whether the contract was for a definite term.

Arkansas Code Annotated § 6-17-1703 (Repl. 1993) provides:

> (a) The superintendent of a school district may recommend termination of an employee during the term of any contract, or the nonrenewal of a full-time nonprobationary employee's contract, provided that he gives notice in writing, personally delivered, or by letter posted by registered or certified mail to the employee's residence address as reflected in the employee's personnel file.
>
> (b) The recommendation of nonrenewal of a full-time nonprobationary employee's contract shall be made no later than thirty (30) calendar days prior to the beginning of the employee's next contract period.

(c) Such written notice shall include a statement of the reasons for the proposed termination or nonrenewal.

(d) The notice shall further state that an employee being recommended for termination, or a full-time nonprobationary employee being recommended for nonrenewal, is entitled to a hearing before the school board upon request, provided such request is made in writing to the superintendent within thirty (30) calendar days from receipt of said notice.

Where statutory language is clear and unambiguous, the task of the appellate court is to follow the statute, not interpret it. *Public Employee Claims Div.* v. *Chitwood*, 324 Ark. 30, 918 S.W.2d 163 (1996). Generally, the law of this state is that an employer or an employee may terminate an employment relationship at will. *Crain Indus., Inc.* v. *Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991). Under the employment-at-will doctrine, an at-will employee may be discharged for good cause, no cause, or even a morally wrong cause. *Smith* v. *American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991). Although the employment-at-will doctrine has been modified in some respects, as discussed below, *Griffin* v. *Erickson*, as it applies to this case, continues to represent the law of this state. There, the supreme court discussed the history of the employment-at-will doctrine in this state and stated:

> It is generally, perhaps uniformly, held that when the term of employment is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship *at will* and *without cause*. See cases cited in 56 *Corpus Juris Secundum*, Master-Servant, § 31, p. 412 and 53 *American Jurisprudence* 2nd, Master-Servant, § 17, p. 94. It has been stated generally that employment is held only by mutual consent, and that at common law the right of the employer to terminate the employment is *unconditional* and *absolute*. *Jefferson Electric Company* v. *N.L.R.B.*, 102 F.2d 949 (1939).
>
> Generally, a contract of employment for an indefinite term is a "contract at will" and may be terminated by either party, whereas a contract for a definite term may not be terminated before the end of the term, except for cause or by mutual agreement, unless the right to do so is reserved in

> the contract. *Little* v. *Federal Container Corporation*, 452 S.W.2d 875 (Ct. of App. Tennessee, 1969).
>
> Our own cases have adhered to this principle, that either party has an absolute right to terminate the relationship. *Miller* v. *Missouri Pacific Transportation Company*, 225 Ark. 475, 283 S.W.2d 158 (1955), *Moline Lumber Company* v. *Harrison*, 128 Ark. 260, 194 S.W. 25 (1917), *St. Louis, I.M. and S.R. Company* v. *Matthews*, 64 Ark. 398, 42 S.W. 902 (1897). Federal decisions applying Arkansas substantive law in this field are: *Tinnon* v. *Missouri Pacific Railroad Company*, 282 F.2d 773 (8th Cir. 1960); *Cato* v. *Collins*, 539 F.2d 656 (8th Cir. 1976), and *Clark* v. *Mann*, 562 F.2d 1104 (8th Cir. 1977). Nor does the fact that the employment is public rather than private alter the rule. *Ruggieri* v. *City of Somerville*, 405 N.E.2d 982 (Mass. 1980). *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Mittlestaedt* v. *Board of Trustees of the University of Arkansas*, 487 F.Supp. 960 (1980).
>
> It is quite clear, therefore, that in the absence of some alteration of the basic employment relationship, an employee for an indefinite term is subject to dismissal at any time without cause.

277 Ark. at 436-37, 642 S.W.2d at 310.

In *Newton* v. *Brown & Root*, 280 Ark. 337, 658 S.W.2d 370 (1983), the court stated: "It is generally held that, when the term of employment is indefinite, or at will (terminable by either party), either the employer or the employee may put an end to the relationship at will and without cause."

■ In *Gladden* v. *Arkansas Children's Hospital*, 292 Ark. 130, 728 S.W.2d 501 (1987), the supreme court modified the employment-at-will doctrine to provide that, where an employee hired for an indefinite term relies on a personnel manual or employment agreement that expressly states that he or she cannot be discharged except for cause, the employee may not be arbitrarily discharged in violation of such a provision. The court stated:

> We do, however, believe that a modification of the at will rule is appropriate in two respects: where an employee relies upon a personnel manual that contains *an express provision* against termination except for cause he may not be

> arbitrarily discharged in violation of such a provision. Moreover, we reject as outmoded and untenable the premise announced in *St. Louis Iron Mt. Ry. Co.* v. *Matthews*, 64 Ark. 398, 42 S.W. 902 (1897), that the at will rule applies even where the employment agreement contains a provision that the employee will not be discharged except for cause, unless it is for a definite term. With those two modifications we reaffirm the at will doctrine.
>
> ... We have come to the conclusion that an implied provision against the right to discharge is not enough. The firm rule at common law is that either party can terminate at will and while the rule has been criticized, 24 *Arkansas Law Review* 729, 93 *Harvard Law Review* 1816, we are unwilling to replace it with a rule that subjects the employer to suit for wrongful discharge whenever an employee is terminated.

292 Ark. at 136, 728 S.W.2d at 505. *See also Mertyris* v. *P.A.M. Transport, Inc.*, 310 Ark. 132, 832 S.W.2d 823 (1992); *Crain Indus., Inc.* v. *Cass, supra.*

■ In *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), the supreme court held that, if an employee is discharged for exercising a statutory right, or for performing a duty required by law, or the reason for the discharge was in violation of some other well-established public policy, it would recognize the employee's wrongful discharge claim as an exception to the employment-at-will doctrine. *Accord Webb* v. *HCA Health Servs. of Midwest, Inc.*, 300 Ark. 613, 780 S.W.2d 571 (1989); *Koenighain* v. *Schilling Motors, Inc.*, 35 Ark. App. 94, 811 S.W.2d 342 (1991).

■ In *Wal-Mart Stores, Inc.* v. *Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991), the court held that an employer violates the public policy of this state in discharging an employee for making a claim for workers' compensation benefits. In that case and in *Leggett* v. *Centro, Inc.*, 318 Ark. 732, 887 S.W.2d 523 (1994), which followed it, the supreme court again stated that, when the term of employment in a contract is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship at will and without cause. In *Tackett* v. *Crain Automotive*, 321 Ark. 36, 899 S.W.2d 839 (1995), the supreme court recognized that, by Act 796 of 1993, the General Assembly had eliminated the cause of action for retaliatory discharge

described in *Wal-Mart Stores, Inc.* v. *Baysinger, supra.*

Griffin v. *Erickson* was also cited in *City of Green Forest* v. *Morse,* 316 Ark. 540, 873 S.W.2d 154 (1994); *Smith* v. *American Greetings Corp., supra*; *Proctor* v. *East Central Arkansas EOC,* 291 Ark. 265, 724 S.W.2d 163 (1987); *Bryant* v. *Southern Screw Machine Products Co.,* 288 Ark. 602, 707 S.W.2d 321 (1986); and *Riceland Foods, Inc.* v. *Director of Labor,* 38 Ark. App. 269, 832 S.W.2d 295 (1992).

We do not believe that the Public School Employee Fair Hearing Act has modified the employment-at-will doctrine. Both *City of Green Forest* v. *Morse, supra,* and *Leggett* v. *Centro, Inc., supra,* were decided after the statute was enacted; both of these cases indicated that a contract is terminable at will when the term of employment is left to the discretion of either party, *or* left indefinite, *or* terminable by either party.

Accordingly, we hold that, even though appellee admits that appellant's contract was for a definite term, it was terminable at will by either party for any reason, provided notice and a hearing were given. In his complaint, appellant admitted that he was given notice of the reason for his termination and was provided with a hearing.

We find no error in the entry of summary judgment for appellee.

Affirmed.

STROUD and NEAL, JJ., agree.

Dayton MOSES, et ux. *v.* Ella DAUTARTAS

CA 95-366 922 S.W.2d 345

Court of Appeals of Arkansas
En Banc
Opinion delivered May 15, 1996

Dan McCraw, for appellants.

D. Scott Hickam, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellants, Dayton and Betty Moses, appeal from a chancery court order holding that the appellee, Ella Dautartas, proved adverse possession of land to which

appellants hold legal title. We affirm.

The parties to this appeal own adjoining property in the Quinn's Lake Park Subdivision in Garland County. Appellee filed a complaint in May 1993, claiming ownership by adverse possession to a narrow strip of land on the western edge of appellants' property. Appellee asserted that she had utilized and maintained the area for over seven years and that a portion of a concrete drainage system she had constructed had been located in the area since 1985. No one resided on appellants' property until appellants bought it in June 1992 and built a house. This action was filed after appellants built a fence in the disputed area.

It is well settled that, in order to establish title by adverse possession, appellee had the burden of proving that she had been in possession of the property continuously for more than seven years and that her possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. The proof required as to the extent of possession and dominion may vary according to the location and character of the land. It is ordinarily sufficient that the acts of ownership are of such a nature as one would exercise over her own property and would not exercise over that of another, and that the acts amount to such dominion over the land as to which it is reasonably adapted. Whether possession is adverse to the true owner is a question of fact. *See Walker* v. *Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990); *Hicks* v. *Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990). Although this court reviews chancery cases *de novo* on the record, it does not reverse the decision of a chancellor unless the chancellor's findings are clearly against the preponderance of the evidence, giving due deference to the chancellor's superior position to judge the credibility of the witnesses and the weight to be given their testimony. *Lee* v. *Lee*, 35 Ark. App. 192, 816 S.W.2d 625 (1991); *Appollos* v. *Int'l Paper Co.*, 34 Ark. App. 205, 808 S.W.2d 786 (1991).

Appellee, who purchased her property in 1972, testified that she and her son, Ray Dautartas, began living on the property in 1976. She stated that during the following years, she and her son utilized and maintained the disputed area by stacking lumber and roof shingles there, by mowing and raking the area, by burning leaves there, and by uprooting a tree in the area in 1982. Appellee also stated that her use of the area could be seen from the road and that there were no objections to the use. In addition, appellee

presented bills dated in 1985 for the construction of the concrete drainage system, which curves around her garage and is partly in the disputed area. She testified that an underground pipe was later installed in the area to improve the drainage system. Ray Dautartas testified that he cut grass and raked leaves in the area and also used it as a storage area for firewood and shingles. He stated that the woodpile was approximately four feet high and sixteen feet long. Wade Spainhour, who surveyed the property for appellee, testified that he saw landscape timber and part of the drainage system in the area. He stated that appellee's property to the east of the area was wooded with normal ground cover but that there was ground ivy in the disputed area, resulting in that area looking "different."

Appellant Dayton Moses testified that he and his wife bought their property in May 1992 and built a house there. He stated that during the construction of the house, appellee complained that a construction worker had intruded on her property. He also stated that he did not see any maintenance or use of the disputed area by appellee. Mr. Moses testified that aside from trash such as cans, broken glass, dumped concrete, and a half-buried tire, the only thing he saw in the area was a tree that had been uprooted and a pile of dirt. He stated that when appellee offered to buy a portion of the disputed area, he refused to sell it. Appellant Betty Moses testified that she saw no sign of maintenance in the area.

James Stevens, whose grandmother owned the Moses' property for many years prior to her death in 1990, testified that he gave the property a "cursory overview" every four months. He stated that he did not see stacks of wood and shingles or anything else unusual in the disputed area.

The chancellor, who viewed the property, stated in a letter opinion that pursuant to the survey presented by Mr. Spainhour and her inspection of the property, the concrete drainage structure clearly encroached on appellants' property and had done so in excess of seven years. The chancellor stated that appellee and her son "presumed their encumbrances were proper and immediately took action when those encroachments were challenged by [appellants]." After discussing in detail the testimony presented at trial, the chancellor concluded that the evidence showed "that for over seven years the area in dispute was utilized by [appellee] with a clear, distinct and unequivocal intention that the disputed area belonged to her. Moreover, no one challenged the use of this land and,

further, the existence of the underground pipe and concrete structure is not disputed."

On appeal, appellants concede that appellee met her burden in showing adverse possession of "the two or three square feet of concrete in her garage drainage system that are obviously over the line." Appellants argue, however, that appellee failed to show possession to the full extent of the land she claimed. The appellee, who makes her claim without color of title, responds that she presented sufficient evidence of her possession of the property and of her intent to hold adversely against the true owner.

The quantum of proof necessary for a trespasser to establish title to land by adverse possession is greater where the trespasser has no color of title. *DeClerk* v. *Johnson*, 268 Ark. 868, 596 S.W.2d 359 (Ark. App. 1980). When one is claiming without color of title, as appellee does here, she must show pedal or actual possession to the extent of the claimed boundaries for the required seven years. *Id.* Appellants appear to be arguing that appellee was required to place a structure or improvement on the disputed area. We do not agree. The difference between claiming adversely with and without color of title was discussed in *Clark* v. *Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982), as follows:

> One who enters adversely under color of title and actually possesses any part of the tract is deemed to have constructive possession of the entire area described in the document constituting color of title. *St. Louis Union Trust Co.* v. *Hillis*, 207 Ark. 811, 182 S.W.2d 882 (1944). Where one enters adversely upon an enclosed tract his possession of any part thereof is constructive possession of the entire enclosure. *Kieffer* v. *Williams*, 240 Ark. 514, 400 S.W.2d 485 (1966). Where, as here, one enters with neither color of title nor enclosure he is unaided by constructive possession and his claim is limited to that area over which he maintains actual pedal possession. *DeClerk* v. *Johnson*, 268 Ark. 868, 596 S.W.2d 359 (1980).

4 Ark. App. at 159-60, 632 S.W.2d at 436-37. Here, appellee claimed actual possession of the disputed area, not constructive possession.

In light of the total circumstances of this case, we find that the chancellor's findings are not clearly against a preponderance of the

evidence. The chancellor noted in the letter opinion that appellee's son corroborated appellee's testimony and stated:

> Specifically, he testified that he worked on the property, cutting grass, raking leaves, cutting and hauling wood and also storing shingles for roofing on the disputed land. He testified that the pile of lumber and wood as well as the shingles were placed in broad daylight behind the garage on the now disputed property, and no one ever challenged his or his mother's use of the land for those purposes. The woodpile was highly visible, he stated, for it was at least sixteen feet long and four feet high.

The chancellor also discussed Mr. Stevens' testimony that there was no visible sign of encroachment on his grandmother's property. Although the chancellor described the testimony as credible, she stated: "[H]owever, he was unable to deny the existence of the concrete drainage structure as well as the drainage pipe. These actual encroachments were over seven years old and were readily visible upon the Court's inspection of the property."

In the dissent's view, this case must be reversed and remanded to cure a perceived inconsistency between the chancellor's letter opinion and the final judgment. We find this view to be flawed in several respects. First, the chancellor's findings in the letter opinion clearly did not constitute a judgment.

> The decisions, opinions, and findings of a court do not constitute a judgment or decree. They merely form the bases upon which the judgment or decree is subsequently to be rendered and are not conclusive unless incorporated in a judgment or a judgment be entered thereon. They are more in the nature of the verdict of a jury and no more a judgment than such a verdict.

Thomas v. *McElroy*, 243 Ark. 465, 469-70, 420 S.W.2d 530, 533 (1967) (citations omitted). *See also Mason* v. *Mason*, 319 Ark. 722, 895 S.W.2d 513 (1995). A final determination of the parties' rights was not made until the entry of the judgment. Second, the issue of any inconsistency between the chancellor's letter and the final judgment was neither raised by objection or motion below nor raised by the parties on appeal. Even if the trial court were in error, it cannot be seriously argued that the case should be reversed because to do so would require the application of the "plain error" doctrine,

which we do not have in Arkansas. *Security Pac. Housing Servs., Inc.* v. *Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993); *Lynch* v. *Blagg*, 312 Ark. 80, 847 S.W.2d 32 (1993); *Pharo* v. *State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990).

The exact boundaries and description of the claimed area are presented in Mr. Spainhour's survey, and this description was incorporated into the final judgment. Appellee and her son testified that their activities covered this area. The chancellor viewed the area and assessed the credibility of the witnesses, and the court's finding that appellee proved actual possession to the extent of the claimed boundaries is not clearly against a preponderance of the evidence.

Affirmed.

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

GRIFFEN and NEAL, JJ., concur in part, dissent in part.

WENDELL L. GRIFFEN, Judge, concurring in part, dissenting in part. I agree with the decision to affirm the chancellor in this adverse possession case to the extent that actual and continuous possession is proved for the disputed area north of the concrete drainage structure. However, I write to explain my view that the decree must be reversed in part and remanded to the chancellor so that it can be reformed to reflect the true extent of the appellee's actual ("pedal") possession.

The decree was drafted by counsel for appellee at the direction of the chancellor in an opinion letter dated August 24, 1994. That letter stated, in pertinent part:

> The primary issue in this case, after one has examined the property, is whether or not there was sufficient adverse possession or maintenance on the property to meet the requirements of adverse possession concerning that property NORTH OF THE VISIBLE CONCRETE DRAINAGE STRUCTURE. The testimony of the Plaintiff [appellee] and her son indicates that they presumed their encumbrances are proper and immediately took action when these encroachments were challenged by defendants [appellants]. Plaintiff and Plaintiff's son testified that the concrete drain had existed for over seven years and that the other encroachments leading to the road had existed well over seven years. Mrs. Dautartas and

> her son testified to the following facts: she purchased the property in 1976; she mowed and raked and built the garage with her son's help which encroached on the disputed property; she utilized the disputed area to stack wood or to store construction materials.
>
> . . . .
>
> Plaintiff is only claiming the disputed area of which she has maintained ACTUAL POSSESSION. THIS AREA IS THE AREA FROM THE CONSTRUCTED DRAINAGE STRUCTURE NORTH TO ATKINSON'S ROAD.
>
> Mr. Hickam [counsel for appellee/plaintiff] is requested to prepare a precedent for entry by the court, complete with the PROPER LEGAL DESCRIPTION OF PLAINTIFF'S ACQUIRED PROPERTY AND INCLUDING THE FINDINGS CONSISTENT WITH THIS LETTER DECISION. (Emphasis added.)

It is beyond question in actions for adverse possession that where one enters with neither color of title nor enclosure she is unaided by constructive possession, and her claim is limited to that area over which she maintains actual pedal possession. *Clark* v. *Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982). Appellee claimed no title by color of title, and conceded the appellant's legal title. Thus, she was a trespasser who claimed title by adverse possession. Both the evidence at trial and the chancellor's letter opinion limited the area of appellee's pedal possession to land north of the concrete drainage structure. There was no evidence of pedal possession south of that point. The chancellor did not find that there was evidence of pedal possession south of that improvement. Therefore, the decree is clearly erroneous because the legal description of the property that appellant acquired by adverse possession includes land south of the concrete drainage structure. Reversal and remand is necessary if the decree is to be consistent with the trial proof, and if the result is to be consistent with established notions of justice regarding the extent that a trespasser can acquire title by adverse possession.

I am authorized to state that Judge Neal joins in this opinion.

Jean MADDEN, d/b/a Madden Law Firm and Gordon Humphrey *v.* CONTINENTAL CASUALTY COMPANY

CA 95-297 922 S.W.2d 731

Court of Appeals of Arkansas
Division III
Opinion delivered May 15, 1996

The Perroni Law Firm, P.A., by: *Samuel A. Perroni* and *J. Nichole Graham*, for appellants.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *John S. Cherry, Jr.* and *Christopher Gomlicker*, for appellee.

MELVIN MAYFIELD, Judge. Appellants, Jean Madden, d/b/a Madden Law Firm, and Gordon Humphrey, appeal from an order granting summary judgment in favor of appellee, Continental Casualty Company.

The appellee issued a Lawyers Professional Liability Insurance Policy to the Madden Law Firm for the period September 19, 1993, to September 19, 1994, covering claims made against the insured during the term of the policy. The policy provided that:

> I. COVERAGE AGREEMENTS
>
> A. We will pay all amounts, to our limit of liability, which you become legally obligated to pay as a result of a wrongful act by you or by any entity for whom you are legally liable.
>
> . . . .
>
> IV. DEFINITIONS
>
> "Claim" means the receipt of a demand for money or services, naming you and alleging a wrongful act.
>
> "Professional services" means services rendered in your capacity as a lawyer, real estate title insurance agent, or

> notary public. This also includes your acts as an administrator, conservator, executor, guardian, trustee, receiver, or in any other similar fiduciary activity.
>
> "Wrongful act" means any negligent act, error or omission in:
>
> A. the rendering of or failure to render, professional services; or . . . .

The policy also contained exclusions for other business enterprises and for fraud.

On April 22, 1994, Pete and Sherry Frandsen filed a complaint against appellants alleging that Pete Frandsen applied for a loan to develop certain real estate with Hillcrest Mortgage Company, Inc., which is owned by Jean Madden. Instead of making the loan, Madden entered into a business venture with the Frandsens and instructed Gordon Humphrey, her employee, to prepare the necessary paperwork. According to the complaint, Madden and Humphrey agreed to perform all legal work necessary to carry on the real estate development as Huckleberry Woods, Inc.

The complaint alleged that Madden and Humphrey undertook legal representation of the Frandsens, and it listed fifteen separate acts alleged to constitute either legal malpractice or fraud. In regard to malpractice, the complaint alleged that appellants undertook legal representation of the Frandsens, and, at the same time, undertook to represent them in a joint business venture; that appellants failed to advise the Frandsens of their rights as corporate stockholders; that appellants breached their fiduciary duty to the Frandsens; and that appellants breached their duties as attorneys by failing to perform work promised. In regard to fraud, the complaint alleged that Madden set about a course of action to force them into bankruptcy and take their real property; that Madden made false representations to induce the Frandsens to enter into a business agreement in order to steal their property; and that Madden failed to change an incorrect property description in a deed.

The appellee declined to defend the lawsuit, and on June 14, 1994, the appellants filed a complaint for declaratory judgment seeking a determination that the appellee was liable on its policy; that appellee pay damages that might be awarded to the appellants; that the appellee owed a duty to defend in the lawsuit; and that

appellants recover costs and attorney's fees.

Both parties moved for summary judgment. In its motion for summary judgment, the appellee asserted that there is no coverage under the policy because the activities in question were not services rendered by Madden in her capacity as a lawyer and, alternatively, that her actions fell within policy exclusions for fraud and for actions taken in connection with another business enterprise. The appellee asserted that it had no duty to defend or indemnify appellants under the policy. The appellants' motion for summary judgment asserted there were no genuine issues of material fact and that summary judgment should be entered in their favor as a matter of law.

On November 30, 1994, the trial court granted appellee's motion for summary judgment on the basis that the actions alleged in the complaint did not constitute the performance of professional services of an attorney, and no attorney/client relationship was formed between either of the appellants and the Frandsens. The court stated that the fact that the complaint used the words "legal malpractice" is not determinative, and that neither coverage nor a duty to defend was triggered under the policy.

The court also found that, even if an attorney/client relationship existed, the allegations of fraud could not trigger coverage because of a policy exclusion. The court made no finding on the applicability of the "business enterprise" exclusions.

The appellants argue that the trial court erred in granting summary judgment to the appellee because the complaint alleges sufficient acts of a legal nature to constitute coverage under the policy.

We first note that the declaratory judgment in this case was entered as a result of the court's granting appellee's motion for summary judgment. Summary judgment is authorized by Ark. R. Civ. P. 56(c) when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." Summary judgment is an extreme remedy and should be granted only when a review of the pleadings, depositions, and other filings reveal there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Baxley* v. *Colonial Insurance Co.*, 31 Ark. App. 235, 792 S.W.2d 355 (1990). In considering a

motion for summary judgment the court views the facts in the light most favorable to the party against whom the judgment is sought; all inferences are drawn against the moving party; and when reasonable minds might differ as to conclusions to be drawn from the facts disclosed, a summary judgment is not proper. *Culpepper* v. *Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990).

The general rule is that the pleadings against the insured determine the insured's duty to defend. *Baxley* v. *Colonial Insurance Co.*, *supra*. The duty to defend is broader than the duty to pay damages and the duty to defend arises where there is a possibility that the injury or damage may fall within the policy coverage. *Commercial Union Insurance Co. of America* v. *Henshall*, 262 Ark. 117, 553 S.W.2d 274 (1977). The insurer must defend the case if there is any possibility that the injury or damage may fall within the policy coverage. *Home Indemnity Co.* v. *City of Marianna*, 291 Ark. 610, 727 S.W.2d 375 (1987). It is the allegations made against the insured, however groundless, false, or fraudulent such allegations may be, that determine the duty of the insurer to defend the litigation against its insured. *Equity Mutual Insurance Co.* v. *Southern Ice Co.*, 232 Ark. 41, 334 S.W.2d 688 (1960).

Here, the appellee issued a Lawyers Professional Liability Insurance Policy to the Madden Law Firm for the period September 19, 1993, to September 19, 1994, covering claims made against the insured during the term of the policy. On April 22, 1994, a complaint was filed against the Madden Law Firm. The complaint alleged that the appellants undertook legal representation of the Frandsens and committed malpractice; that they had a fiduciary duty to the Frandsens due to the attorney/client relationship; that they breached their duties as attorneys by failing to perform work that they had promised to do; that they failed to properly describe real estate; and that they failed to advise the Frandsens of their rights as stockholders.

Therefore, based upon the filing of a complaint against the appellants during the policy term and upon the allegations of the complaint, we think the trial court erred in holding the appellee had no duty to defend appellants and in granting summary judgment for the appellee.

However, we cannot grant appellants' request that we remand for entry of a summary judgment in their favor.

While the insured is entitled to a defense if there is any *possibility* that the injury may fall within the policy limits based upon the allegations of the complaint however groundless or false those allegations may be, *Home Indemnity Co.*, and *Equity Mutual Insurance Co.*, *supra*, whether the insurer has a duty to pay depends upon whether coverage actually extends to the facts established at trial. *See Commercial Union Insurance Co.*, *supra*; *American Home Assurance Co.* v. *Ingeneri*, 479 A.2d 897 (Me. 1984). *See also* 7C John A. Appleman, *Insurance Law and Practice*, § 4684 at 83-84 (Berdal ed. 1979).

At this point in this case, we cannot determine whether appellee has a duty to pay. There are questions of fact as to whether the appellants' actions are actions relating to the practice of law; whether an attorney/client relationship was established; and whether appellants' actions fell within the policy exclusions.

There are situations in which declaratory judgment may be granted as to the duty to defend. *See Travelers Indemnity Company* v. *Olive's Sporting Goods, Inc.*, 297 Ark. 516, 764 S.W.2d 596 (1989), (declaratory judgment proceeding to determine the amount of coverage under the terms of a policy of insurance); *American Policyholders' Insurance Co.* v. *Cumberland Cold Storage Co.*, 373 A.2d 247 (Me. 1977) (declaratory judgment may be entered simultaneously as to both the duty to defend and the duty to pay when the case is based on such issues as nonpayment of a premium, cancellation of a policy, failure to cooperate, or lack of timely notice).

Here, however, because there are genuine issues of fact to be determined, a declaratory judgment based upon a motion for summary judgment was not proper.

Reversed and remanded for further proceedings consistent with this opinion.

PITTMAN and GRIFFEN, JJ., agree.

William HINZMAN *v.* STATE of Arkansas

CA CR 95-128 922 S.W.2d 725

Court of Appeals of Arkansas
Division I
Opinion delivered May 15, 1996

Meredith Wineland, for appellant.

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

JUDITH ROGERS, Judge. The appellant, William Hinzman, was found guilty of raping his eleven-year-old stepdaughter, M.P., in violation of Ark. Code Ann. § 5-14-103(3) (Repl. 1993). As a result of the jury's verdict, he was sentenced to twenty years in the Arkansas Department of Correction. Appellant raises three issues in this appeal. He contends that: (1) the trial court erred by permitting improper impeachment of M.P. with a prior inconsistent statement; (2) the trial court erred in allowing the testimony of two persons who were not previously identified as witnesses; and (3) the trial

court erred in denying his motion for a directed verdict because the State failed to offer adequate proof to corroborate his confessions. Because we find merit in the first issue raised, we reverse and remand for a new trial.

As his third point, appellant contends that the trial court erred in denying his motion for a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Young* v. *State*, 321 Ark. 541, 906 S.W.2d 280 (1995). Preservation of an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of other trial errors. *Passley* v. *State*, 323 Ark. 301, 915 S.W.2d 248 (1996); *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the jury's verdict. *Misskelley* v. *State*, 323 Ark. 449, 915 S.W.2d 702 (1996). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Mosley* v. *State*, 323 Ark. 244, 914 S.W.2d 731 (1996).

In August of 1993, M.P. reported to her mother, appellant's wife, that she was being molested by appellant. M.P. moved with her mother out of the home they shared with appellant, and the local authorities were notified of M.P.'s accusations. On September 15, 1993, appellant was interviewed by Lieutenant David Smith of the Saline County Sheriff's Department. Appellant gave a recorded statement in which he confessed to committing acts of deviate sexual activity with the child. In summary, he described incidents of touching, fondling and the mutual performance of oral sex. Appellant also admitted that he had shown the child a sexually explicit video as a demonstration of "what I wanted her to do." A transcript of the statement was introduced into evidence by the State at appellant's trial.

Appellant attended two counselling sessions with Dr. William G. Grambling, the first in the company of his wife, and the second in the presence of both his wife and M.P.'s natural father, Jim Price. At trial, Dr. Grambling testified that at the first session he explained to appellant and his wife that, although his primary responsibility was toward the child, he would also work with them, but that he expected the truth to be told. He said that he sent appellant's wife out of the room and that appellant looked at him and said, "I did it." He said that appellant's confession was discussed with his wife

when she returned to the room. Dr. Grambling also testified that appellant admitted what he had done in the session attended by Jim Price. Mr. Price confirmed this in his testimony. He said that appellant admitted that he had engaged in oral intercourse with M.P. on four occasions and that appellant related that he had educated the child by showing her an "X-rated" video program.

Appellant contends that there was no evidence introduced by the State to corroborate the various confessions made by him. We cannot agree.

Unless made in open court, a defendant's confession standing alone will not support a conviction except where "accompanied by other proof that the offense was committed." Ark. Code Ann. § 16-89-111(d) (1987). This requirement for other proof, called the corpus delicti, mandates only that a showing be made that the offense occurred, and nothing more. *Mills* v. *State*, 322 Ark. 647, 910 S.W.2d 682 (1995). Hearsay statements, when admitted, are sufficient to corroborate a confession. *See Johnson* v. *State*, 298 Ark. 617, 770 s.w.2d 128 (1989). Here, appellant's wife testified, without objection, that M.P. told her that appellant had "chewed her out," meaning that appellant had oral intercourse with her. Mrs. Hinzman further testified that M.P. reported that appellant had touched her chest and had placed his hands inside her pants. On the basis of this testimony, we cannot conclude that corroboration was lacking and hold that there was substantial evidence to support the conviction.

Prior to trial, M.P. recanted her allegations of abuse. The primary thrust of this appeal concerns the dual contentions that the trial court erred by permitting the State to call M.P. solely for the purpose of impeaching her testimony and by allowing the State to outline the substance of those statements during the impeachment process. Appellant contends that the probative value of the State's use of the statements was far outweighed by the danger of unfair prejudice.

The issue arose in this manner. Appellant filed a motion *in limine* informing the court that M.P. had disavowed her accusations of sexual misconduct perpetrated by appellant. For this reason, he asked the court to prohibit the State from calling her as a witness for the purpose of impeaching her testimony with the prior statements. The court addressed the motion in chambers before the beginning

of trial. After M.P. was provided the opportunity to consult with an attorney, she told the court that she would testify that the statements she had made in the past were false. The trial court ruled that it would permit the State to call her as a witness for the purposes of establishing opportunity, timing and identity. The court further ruled that, if M.P. denied making the earlier statements, then it would allow the State to impeach her with her inconsistent statements. The court also offered to instruct the jury that it was to consider the statements only for the purpose of judging the child's credibility, but not as substantive evidence.

When M.P. testified before the jury, she said that appellant had never touched her in an inappropriate manner, and she denied that he had ever engaged in oral sex with her. M.P. admitted that she had previously reported that appellant had done those things, but she said that her statements were not true. She explained that she had falsely accused the appellant in anger over being punished for having told a lie. The trial court refused the State's request to introduce into evidence the separate statements M.P. had made to Officer Smith and a caseworker from the Saline County Department of Human Services. Over appellant's multiple objections, the court permitted the State to question M.P. in detail and with specificity regarding the statements she had made.

■ In deciding this issue, we observe a few general principles. Rule 613 of the Arkansas Rules of Evidence permits extrinsic evidence of prior inconsistent statements of a witness for the purpose of impeachment if the witness is afforded the opportunity to explain or deny the statement, and does not admit having made it, and the other party is afforded the opportunity to interrogate the witness on that statement. *Harris* v. *State*, 36 Ark. App. 120, 819 S.W.2d 30 (1991); *see also Chisum* v. *State*, 273 Ark. 1, 616 S.W.2d 728 (1981). If the witness, however, admits making the prior inconsistent statement, then extrinsic evidence of that statement is not admissible. It has been said that an admitted liar need not be proved one. *Gross* v. *State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983). *See also Ford* v. *State*, 296 Ark. 8, 753 S.W.2d 258 (1988). Also, unsworn prior statements made by a witness cannot be introduced as substantive evidence in a criminal case to prove the truth of the matter asserted therein. Ark. R. Evid. 801(d)(1)(i); *Lewis* v. *State*, 41 Ark. App. 89, 848 S.W.2d 955 (1993). *See also Smith* v. *State*, 279 Ark. 68, 648 S.W.2d 490 (1983). Therefore, the trial court was correct in

its ruling that the statements previously made by M.P. could not be introduced into evidence for impeachment purposes since she admitted making them. The trial court was also correct in recognizing that the statements could not be introduced as substantive evidence since neither of them were made under oath, and were thus hearsay.

As authority for his argument, appellant places much emphasis on our decision in *Gross* v. *State*, *supra*. In that case, the prosecution knew, as it did here, that its witness, who had once implicated both himself and the appellant in the commission of a crime, would not testify in accordance with his earlier statement. The statement itself was not admitted into evidence, nor did the police officers who recorded the statement testify regarding it. However, the prosecution had been allowed to question the witness about the particulars of his prior inconsistent statement. In reversing, we held that the resolution of the issue was controlled by Rule 403 of the Arkansas Rules of Evidence, and we were persuaded that any advantage the prosecution may have gained by discrediting the witness was exceeded by the risk of prejudice resulting from disclosing to the jury the content of the statement.

In *Gross* v. *State*, we relied heavily on the decision in *Roberts* v. *State*, 278 Ark. 550, 648 S.W.2d 44 (1983). There, the witness first professed to have witnessed the murder of his mother by his father. In two subsequent accounts, the witness retracted that statement and gave a differing version of the events he had observed, which were less incriminating of his father. Although the witness fully admitted making the prior inconsistent statement, the trial court allowed the prosecution to introduce the complete text of the statement through another witness. On appeal, the court found error in that ruling. The court also addressed the question of whether the State could impeach its own witness by use of the prior inconsistent statement. The court held that such impeachment was permitted if the probative value on the issue of impeachment outweighs the prejudicial effect arising from the danger that the jury will give substantive effect to the prior inconsistent statement. The court concluded that, under the circumstances of that case, it was error to have allowed the State to ask the witness about the prior inconsistent statement. The court further observed:

> The State argues that asking Richard about his prior inconsistent statements was for impeachment purposes, but it

> was really a mere subterfuge. The only conceivable reason that the State could have for impeaching its own witness was to bring before the jury hearsay information not admissible as substantive evidence, hoping that the jury would accord it substantive value although it was clearly inadmissible as such under Rule 801(d)(1)(i). In this instance the danger of convicting the defendant on unsworn testimony is too great; the limiting instruction to the jury directing them to consider the prior inconsistent statement for impeachment only was not a sufficient safeguard.

Id. at 552, 648 S.W.2d at 46.

In a subsequent decision, *Pemberton* v. *State*, 292 Ark. 405, 730 S.W.2d 889 (1987), a witness for the State gave testimony which was contrary to an earlier statement she had made. The trial court initially ruled that the State could not ask her about the prior statement, but later allowed such questioning in light of questions asked by the defense on cross-examination. On appeal, the appellant argued that the decision in *Roberts* v. *State*, *supra*, disallowed any reference whatsoever to the prior inconsistent statement. The supreme court disagreed, holding that under the attendant circumstances, the questioning of the witness was not unduly prejudicial. In discussing *Roberts*, the court said:

> Whatever the unfair prejudice may have been in that case, we do not find it here. The ruling in the *Roberts* case that the prior statement itself could not be *quoted* into evidence as part of the impeachment process was consistent with prior Arkansas cases, and indicated that the adoption of A.R.E. 613 had not presaged any change in that respect. However, if we meant to say there that the fact that a *reference to, rather than a quotation of*, a prior inconsistent statement was unfairly prejudicial because it came in the form of the state's impeachment of its own witness, we failed to take account of A.R.E. 607. That rule makes it clear that there no longer is a general prohibition against such impeachment.

Pemberton v. *State*, at 408-409, 730 S.W.2d at 891. (emphasis supplied) (citations omitted).

■ With these decisions in mind, we conclude that the State's use of the statements exceeded the parameters of proper impeachment. In questioning M.P., the prosecutor quoted from the

statements, line by line, in effect reciting the statements into the record. We must agree with appellant that this tactic allowed the State to accomplish through the back door that which it could not have achieved directly. As stated above, the statements were not admissible for purposes of impeachment since M.P. had admitted making them, and the statements were not admissible as substantive evidence because they were not made under oath. By proceeding in this manner, the danger was too great that the jury would accord the statements substantive value.

Whether or not the State should have been allowed to impeach M.P. by reference to the previous statement is another issue. As pointed out by the supreme court in *Pemberton* v. *State*, *supra*, the impeachment of a party's own witness is generally permitted under Rule 607 of the Arkansas Rules of Evidence. *See also Chisum* v. *State*, 273 Ark. 1, 616 S.W.2d 728 (1981). In accordance with that decision, and the opinions in *Roberts* v. *State*, *supra*, and *Gross* v. *State*, *supra*, the answer to this question is governed by Rule 403 of the Rules of Evidence. Since we are reversing this case because the State exceeded the bounds of permissible impeachment, we address this question only to the extent that it may arise on retrial. Since the complexion of the case will likely be different on remand, we are not willing to decide at this time whether impeachment of the witness will be permitted, and instead we leave it for the trial court to determine, in its discretion, whether the risk of unfair prejudice will outweigh the probative value of impeachment.

As his last issue, appellant argues that the trial court erred by not excluding the testimony of Dr. Grambling and Jim Price, who were called by the State in light of M.P.'s disaffirmance of her previous statements. Appellant objected and requested a continuance, alleging a discovery violation because neither of them had been listed by the State as potential witnesses. The court allowed the State to present their testimony and initially denied appellant's request for a continuance, but the court later altered its ruling by granting a three-week continuance after the witnesses had been examined. In granting the continuance, the trial court stated that it was doing so "out of an abundance of caution," but that it did not feel that appellant had been surprised or prejudiced by the witnesses's testimony. The court also stated that he would permit appellant further cross-examination of the witnesses and later, when

trial resumed, the court stated that it would strike any part of the witnesses's testimony which appellant showed to be objectionable.

Rule 17.1 of the Rules of Criminal Procedure requires the prosecution to give the names and addresses of witnesses it intends to call at trial, and Rule 19.2 imposes a continuing duty to disclose this information. The required notification must be accomplished in sufficient time to permit beneficial use by the defense. *Robinson* v. *State*, 317 Ark. 407, 878 S.W.2d 405 (1994). The trial court has four options under Rule 19.7 to remedy a violation of the rules: permit discovery, exclude the undisclosed evidence, grant a continuance, or enter an order as the court deems appropriate under the circumstances. *Nooner* v. *State*, 322 Ark. 87, 907 S.W.2d 677 (1995). The key in determining if a reversible discovery violation exists is whether the appellant was prejudiced by the prosecutor's failure to disclose; absent a showing of prejudice, we will not reverse. *Burton* v. *State*, 314 Ark. 317, 862 S.W.2d 252 (1993).

Appellant's claim of prejudice is based on the argument that the witnesses' testimony was privileged under Rule 503 of the Rules of Civil Procedure, which sets out the psychotherapist-patient privilege. Appellant's claim of prejudice is misplaced in that the record reflects that the communications made by appellant in the counselling sessions were not "confidential."

Rule 503(b) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his ... confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

A communication is "confidential" if it is not intended to be disclosed to third persons, except persons present to further the interest of the patient, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family. Ark. R. Evid. 503(a)(4).

Dr. Grambling testified that he explained to appellant that he would report his findings to the prosecuting attorney's office and the Department of Human Services, and said that he did indeed make reports to both of those entities. Thus, it cannot be said that appellant can successfully claim that his communications during those sessions were privileged. In addition, the court allowed a lengthy continuance, permitted the opportunity for further cross-examination and stated its willingness to strike any part of the witnesses's testimony that proved inadmissible. Although we agree with appellant that the better course would have been for the court to have allowed a continuance before the witnesses testified, we cannot say that the court's action amounted to an abuse of discretion under these circumstances. *See Caldwell* v. *State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

Reversed and remanded.

PITTMAN and COOPER, JJ., agree.

Rodney LANES *v.* STATE of Arkansas

CA CR 94-1267 922 S.W.2d 349

Court of Appeals of Arkansas
Division I
Opinion delivered May 22, 1996

Etoch Law Firm, by: *Louis A. Etoch*, for appellant.

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

JOHN E. JENNINGS, Chief Judge. On November 25, 1992, Michael Perry was found shot to death in a park near his home in Marianna. Appellant, Rodney Lanes, was subsequently charged with capital murder in connection with Perry's death. Lanes was found guilty by a Lee County jury of the lesser-included offense of second-degree murder and was sentenced to a term of twenty years imprisonment.

On appeal Lanes contends that the judgment of the trial court should be reversed because (1) the evidence is insufficient to support the conviction, (2) the court erred in refusing to suppress his

statement given to police officers, (3) the court erred in admitting hearsay evidence, and (4) the attorney fee awarded by the trial court was so inadequate as to constitute an abuse of discretion. We find sufficient merit in appellant's third and fourth points to require reversal.

When reversal is sought both on the grounds of the insufficiency of the evidence and for other errors that may have occurred at trial, we may not reverse and remand for "trial error" without first having considered the sufficiency of the evidence. *Burks* v. *United States*, 437 U.S. 1 (1978); *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). This rule is based upon the Double Jeopardy Clause. *Harris* v. *State*, *supra*.

Evidence to support a conviction, whether direct or circumstantial, must be of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or another. *Kirkpatrick* v. *State*, 322 Ark. 728, 912 S.W.2d 917 (1995). On appeal we view the evidence in a light most favorable to the State and look only to that evidence which supports the verdict. *Smith* v. *State*, 308 Ark. 390, 824 S.W.2d 838 (1992). In determining the sufficiency of the evidence we consider all of the evidence, including that which was erroneously admitted. *Burkett* v. *State*, 40 Ark. App. 150, 842 S.W.2d 857 (1992).

At trial, James Sexton, an officer with the Marianna Police Department, testified that he investigated the Michael Perry murder scene on November 25, 1992. No one at the scene had seen anything. When the EMTs rolled the body over they found what appeared to be "crack." Officer Sexton testified that Mr. Perry's billfold was not found.

A statement given by appellant to police officers in April 1993 was admitted into evidence:

> Fred and I went to Michael Perry's shop and Fred talked to Michael. They went into Michael's office and talked there. Fred came out and we left. It was after 10 p.m. when we left. We went up to the liquor store (Spirit of 75). On the way to the liquor store Fred said if GunTee don't want to get it, do you want to get Mike. That's Michael Perry. I told him nope because Michael and I grew up together. I told him if I wanted some dope, all I had to do was ask Michael and then not pay him because Michael would not do anything. We

> went to my sister's house (Sharon Lanes) and I used the telephone. We left there and went by GunTee's house. He wasn't there so we went to the park and Fred parked the car next to the fence. We were facing Michael Perry's mother's house (Marine's Street). Fred, got out of the car and met Michael halfway, then when they walked up to the car where I was sitting in the passenger seat. Michael handed me a one-half ounce rock. I looked at the rock and gave it back to Michael. Then he asked me was it straight, and I said yeah, and then he gave it back to me. He and Fred was talking and Michael told Fred how much he wanted for it. Fred said pay him Rodney and I patted my pockets and said with what and Fred said you ain't got no money on you and then pulled a black pistol from his coat pocket and shot Michael. Michael put both hands up to his face and said please man don't shoot me and was backing up toward the fence and Fred shot about three more times. Then Fred ran and got in the car and drove away towards Claybrook Court. I said you should not have did that. He just said fuck it. Fred turned around in the street and went back to see if Michael was dead and we couldn't find him. We went to Walnut Grove Church and picked up Jerome and Chris and went to Forrest City. On the way to Forrest City just before you get to Haynes, Fred threw that pistol out the window. He threw it over the car into the field on my side of the car. We went to Jevena's house at Forrest City and Fred and Chris dropped Jerome and me off and they [went] back to Marianna.

J.C. Aikens Jr. testified that on the night Michael Perry was killed he saw appellant and Fred Westbrook. They each had pistols, Westbrook a .38 and appellant a .22. Aikens testified, "I heard them say they were going to rob somebody, you know, take their money or something like. They mentioned Gun-T and Elias Hill and Michael Perry."

Jerry Vest, an employee of the Arkansas Highway Department, testified that in January 1993, he found a .38 revolver in a ditch near Haynes and Forrest City. Ronald Andrejack, a firearms examiner for the Arkansas Crime Laboratory, testified that the bullet he received from the Marianna Police Department was fired from this same .38 revolver. Edna Malone, Michael Perry's mother, testified that between 10:00 and 10:30 on the night in question Perry was

counting out a "ball of money." Soon after he went outside she heard three gunshots. At the hospital, she was given Michael Perry's billfold and there was no money in it.

Kevin Caffey testified that on November 25, 1992, he saw Fred Westbrook and the appellant drive up together to Michael Perry's pool hall. He testified that Westbrook went over and talked to Perry. Johnny Woodson, also known as "Gun-T," testified that on November 25 Westbrook and appellant came to his house and Westbrook tried to sell him some drugs. He testified that he heard Westbrook ask appellant if he wanted a gun.

Dr. William Sturner, the state medical examiner, testified that he performed an autopsy on Michael Perry and that Perry died as a result of a single gunshot wound, which passed through his face, neck, and chest.

James Robinson, Michael Perry's cousin, testified that he saw Westbrook and appellant in Little Rock the day after Perry was killed. He talked with appellant, who told him that Westbrook had shot Michael Perry. Over appellant's objection, Robinson was also permitted to testify that Westbrook told him that appellant shot Perry. This evidence was admitted to show that Westbrook and appellant were each "pointing the finger at each other." The court instructed the jury not to consider the statement for the truth of the matter asserted but did not further explain its relevance.

■■ We hold that the evidence was legally sufficient to support appellant's conviction of second-degree murder. On this lesser-included offense, the trial court correctly instructed the jury that the State had the burden of proving that appellant knowingly caused the death of Michael Perry under circumstances manifesting extreme indifference to the value of human life. *See* Ark. Code Ann. § 5-10-103 (Repl. 1993). The jury was also instructed on accomplice liability. As the State points out, factors relevant to determining whether a person is an accomplice include the presence of the accused near the crime, the accused's opportunity to commit the crime, and association with a person involved in the crime in a manner suggestive of joint participation. *See Banks* v. *State*, 315 Ark. 666, 869 S.W.2d 700 (1994).

Appellant next argues that the trial court erred in declining to suppress the statement he made while in custody. Appellant states that the original information was filed on March 9, 1993, charging

him with the murder of Michael Perry. The State notes that although the original information is not contained in the record on appeal, appellant was charged sometime before April 2, 1993, because on that date, even though he had not yet been arrested, an attorney was appointed to represent him.

Appellant was arrested on April 28, 1993, and his first appearance was set for April 30. On April 29 he was interviewed in the Phillips County jail by Sergeant James Sexton of the Marianna Police Department and Investigator Barry Roy of the Arkansas State Police.

At the pretrial Denno hearing both officers testified that appellant's statement was voluntarily given. Appellant signed a waiver of rights, acknowledging that he had the right to counsel and that he expressly waived that right. Indeed, no contention is made that the rights waiver was inadequate in form or content.

Investigator Roy conducted the interview, which lasted between one and two hours. After appellant first made a statement denying any involvement, Roy told appellant that it would be in his best interest to tell the truth. At this point appellant gave the statement that was subsequently admitted at trial.

Both officers testified that they were unaware that counsel had previously been appointed for appellant. Joe Perry, the private attorney appointed pursuant to the April 2 docket entry, testified that he had not talked to appellant before the April 29 interview. It is evident that appellant himself was unaware that an attorney had been appointed to represent him.

Custodial statements are presumed involuntary, and the State had the burden of proving otherwise. *Shaw* v. *State*, 299 Ark. 474, 773 S.W.2d 827 (1989). The State must therefore make a prima facie showing that the accused knowingly, voluntarily, and intelligently waived his right to remain silent. *Morris* v. *State*, 302 Ark. 532, 792 S.W.2d 288 (1990). In reviewing the trial court's denial of the motion to suppress, we make an independent determination based on the totality of the circumstances and reverse the trial court only if the decision was clearly against a preponderance of the evidence. *Dickerson* v. *State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995). The credibility of the witnesses who testified to the circumstances surrounding appellant's custodial statement is for the trial court to determine. *See Smith* v. *State*, 286 Ark. 247, 691 S.W.2d

154 (1985). Within the context of an independent review, our search focuses on whether the accused wished to remain silent, and gave such expression to that desire that any statements made thereafter in response to interrogation are in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See Johnson* v. *State*, 307 Ark. 525, 823 S.W.2d 440 (1992).

Appellant first argues that the statement was "the result of lengthy interrogation, threats of the death penalty, and only after Investigator Roy explained to Lanes it was in his best interests to give it." We do not regard the interrogation as unduly lengthy, nor do we think the officers' statement of the possible penalties for the crime with which appellant was charged constitutes a threat. Similarly, the officers' statement that it would be in appellant's best interest to tell the truth is not, in itself, objectionable. *See Noble* v. *State*, 319 Ark. 407, 892 S.W.2d 477 (1995).

Appellant's more serious argument is that principles announced in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), require suppression of the statement. *Michigan* v. *Jackson* involved two consolidated cases. One defendant, Bladel, was arraigned on a murder charge and asked at his arraignment that an attorney be appointed. The Court appointed counsel and mailed a notice of the appointment to a law firm. Before the notice was received, police officers interviewed Bladel and, after advising him of his *Miranda* rights, obtained a confession.

Jackson, the other defendant, also asked that counsel be appointed for him during his arraignment on murder charges. The next day, before he had an opportunity to consult with counsel, police officers interviewed him and, again after advising him of his rights under *Miranda*, obtained a confession. In both cases the investigating officers were present at the arraignment.

In both instances the *Michigan* trial courts denied the defendants' motion to suppress. The Michigan Supreme Court reversed, holding that the rule in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), "applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police.... The police cannot simply ignore a defendant's unequivo-

cal request for counsel." 421 Mich. 39, 365 N.W.2d 56 (1984).

The United States Supreme Court affirmed and in the course of its opinion said:

> Indeed, after a formal accusation has been made — and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment — the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.
>
> . . . .
>
> The State points to another factual difference: the police may not know of the defendant's request for attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

Thus, appellant argues that an attorney had been appointed for him and the officers' lack of knowledge of this is irrelevant. The critical difference, however, between *Michigan* v. *Jackson* and the case at bar is that in *Jackson* both Jackson and Bladel *asked* that counsel be appointed to represent them. Here, appellant made no request for counsel and was unaware that counsel had been appointed. In *Moran* v. *Burbine*, 475 U.S. 412, 422 (1986), the Court said, "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *See also*, *Bussard* v. *State*, 296 Ark. 556, 562, 759 S.W.2d 24, 27 (1988) (Newbern, J., dissenting). We conclude that the trial court's determination that both the waiver and the statement were knowingly and voluntarily given should be affirmed.

Appellant next argues that the trial court erred in admitting the testimony of James Robinson to the effect that Fred Westbrook told him that appellant shot Michael Perry. We agree. Arkansas Rule of Evidence 802 provides that hearsay is generally inadmissible. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. Rule 801(c). The State's theory at trial was that this evidence was admissible to prove that both Westbrook and Lanes were "pointing the finger at each other." This theory does not fit within any recognizable hearsay exception. And while it is true that the trial court instructed the jury not to consider the evidence for "the truth of the matter asserted," the court did not explain to the jury why the evidence was otherwise relevant. Here the fact that the statement was made has no apparent relevance, apart from its content. Despite the court's admonition to the jury, the statement was clearly inadmissible hearsay. *See Davis* v. *State*, 38 Ark. App. 115, 828 S.W.2d 863 (1992). Finally, given the nature of the other evidence in the case, we cannot say with any confidence that the error was harmless. The case must therefore be reversed and remanded on this point.

At the conclusion of the trial, the circuit court awarded appellant's counsel, Mr. Lewis Etoch, an attorney's fee of $3,500.00. In the past few years the applicable principles of law have become fairly clear. The trial court should determine fees that are just, taking into consideration the experience and ability of the attorney, the time and labor required to perform the legal service properly, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, the time limitations imposed upon the client's defense or by the circumstances, and the likelihood, if apparent to the court, that the acceptance of the particular employment will preclude other employment by the lawyer. *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *see also State* v. *Crittenden County*, 320 Ark. 356, 896 S.W.2d 881 (1995). There is no fixed formula for computing attorney's fees, and the appellate court will defer to the superior perspective of the trial judge to weigh and apply the factors set forth in *Arnold* v. *Kemp*, because of the trial court's intimate familiarity with the proceedings and with the quality of services rendered. *Price* v. *State*, 313 Ark. 96, 98-A, 856 S.W.2d 10 (1993), (supplemental opinion denying rehearing); *State* v. *Crittenden County*, *supra*. The

discretion of the trial court will not be disturbed on appeal in the absence of an abuse of that discretion. *Price, supra*; *State* v. *Campbell*, 312 Ark. 593, 851 S.W.2d 434 (1993). "Just compensation" does not mean full compensation in the sense that the trial court need not simply award fees based on the attorney's customary hourly charges. *See State* v. *Campbell, supra*; *Arnold* v. *Kemp, supra*.

After trial Mr. Etoch presented a petition seeking attorney's fees in the amount of $19,500.00. The petition recited that Mr. Etoch practiced law for more than five years in Helena; that he would customarily charge $110.00 per hour in a capital murder case; that he had tried more than fifteen felony criminal jury cases; and that he devotes a substantial amount of his practice to criminal law. Mr. Etoch submitted an itemized statement that shows a total of 138.75 hours expended in the case together with another itemized statement from his father, Mike Etoch, showing an additional 29 hours expended in assisting. He appended an affidavit from Jimmy L. Wilson, a Phillips County attorney, which stated, among other things, that the fee Etoch sought was fair and reasonable.

After the court awarded the fee, Mr. Etoch petitioned for reconsideration and the court entered an order:

Findings of Fact

> Mr. Louis Etoch, appointed attorney for Rodney Lanes, has filed a "Petition for Reconsideration of Attorney's Fees, Specific Findings of Facts and Conclusions of Law, A Request for A Hearing" and the Court finds:
>
> Mr. Louis Etoch was appointed to represent Rodney Lanes.
>
> Mr. Etoch represented Rodney Lanes at trial in Lee County.
>
> Mr. Etoch's request for fee is shockingly exorbitant, outrageous, totally unwarranted, and an example of gross unprofessionalism.
>
> The trial transcript is replete with examples of the uncivil, irreverent and disrespectful conduct of Mr. Etoch. This uncharacteristic misconduct and patent disrespect for the court was considered when the attorney's fee was set. The court did not intend to punish Mr. Etoch, but rather to

try to teach him that disrespect for the authority of the court and unprofessionalism do not pay.

A good example was when the Court ruled on what would be permissible under Rules of Evidence No. 609 in Mr. Etoch's cross-examination of a state's witness. Mr. Etoch contemptuously ignored the rulings of the Court in direct violation of same.

An example of the misuse of the Court's time was when Mr. Etoch caused the Court to hold a special hearing on the manner in which the venire was notified. This occurred after the trial. During voir dire, Mr. Etoch did not exercise all of the available peremptory challenges.

A few minutes of simple, preparatory research would have quickly revealed that a criminal defendant cannot complain of the jury composition if he does not exhaust his peremptory challenges; *Brown* v. *State*, 395 S.W.2d 344, 239 Ark. 909, *cert. denied* 86 S. Ct. 1985.

Arnold v. *Kemp*, 813 S.W.2d 770, 306 Ark. 294 (1991), holds that the trial court should consider the following to determine compensation for attorneys representing indigent criminal defendants:

a.) experience and ability
b.) time and labor
c.) novelty and difficulty of issues involved

State v. *Independence County*, 850 S.W.2d 842, 312 Ark. 472 (1993), stated:

> "In awarding fees to Messrs. Arnold and Allen for reasonably expended services, we do not mean that the trial court must simply award fees based on their customary hourly charges or fixed fees" and
>
> "time spent on theories which are unfounded in fact or law, or those which have been repeatedly rejected by appellate courts, are presumptively noncompensable absent special circumstances."

Conclusions

The trial court has both the right and duty not to allow an attorney to misuse valuable trial time.

The trial court has a duty not to allow an attorney to succeed in a course of action resulting in an unwarranted attorney's fee.

The trial court has the right and duty to use the criteria set forth in *Arnold* v. *Kemp*, *supra*, in setting attorneys' fees, and to also consider, when appropriate, the following additional criteria:

a.) professionalism
b.) respect for the Court
c.) proper use of trial court time
d.) courteousness
e.) contemptuous behavior

The previously set attorney fee of $3,500.00 is appropriate in this case.

To accede to Mr. Etoch's request for a higher fee would be a serious mistake and encourage greed, avarice, and unprofessional conduct.

IT IS THEREFORE BY THIS COURT ORDERED THAT Mr. Etoch's Petition for Reconsideration and other relief, be and the same is hereby denied.

We cannot say that the "additional criteria" considered by the trial judge in setting the attorney's fee are not factors that the court may consider, although they were not among those mentioned by the supreme court in *Arnold* v. *Kemp* and subsequent cases. We do note that there is considerable overlapping among the additional factors considered by the judge.

We cannot say that the judge was wrong to factor in the apparently unnecessary hearing related to the jury panel. The trial court's assertion that Mr. Etoch "contemptuously ignored" the trial judge's ruling on the State's motion in limine as to the scope of cross-examination of J.C. Aikens Jr. is somewhat less clear. But in any event the trial court's finding of fact that Mr. Etoch's fee request was "shockingly exorbitant" and an example of "gross

unprofessionalism" is not supported by this record. Nor is the trial court's finding that the record is "replete with examples of the uncivil, irreverent, and disrespectful conduct of Mr. Etoch." To the contrary, the record as a whole demonstrates that Mr. Etoch generally conducted himself in a civil and professional manner throughout the trial.

We have come to the conclusion that the circuit court, in setting the attorney's fee, focused too much on an isolated incident and not enough on those factors set forth by the supreme court in *Arnold* v. *Kemp*, *supra*.

We take judicial notice that Judge Wilkinson, after many years of honorable service, has now retired. Because the case must be reversed and remanded for a new trial, we likewise remand the question of an appropriate attorney's fee and direct that the circuit court set the fee after conducting whatever hearing, if any, the court may deem necessary.

Reversed and remanded.

MAYFIELD and NEAL, JJ., agree.

Charles LUNINGHAM *v.* ARKANSAS POULTRY FEDERATION INSURANCE TRUST

CA 95-750 922 S.W.2d 1

Court of Appeals of Arkansas
Division I
Opinion delivered May 22, 1996

John Harris, for appellant.

John T. Hardin, for appellee.

JOHN MAUZY PITTMAN, Judge. Charles Luningham has appealed from the entry of summary judgment for appellee, Arkansas Poultry Federation Insurance Trust, in this action to recover medical benefits. We affirm in part and reverse and remand in part.

Appellant is a poultry grower and has been a member of the Arkansas Poultry Federation for many years; as a member, he has been able to participate in a group health benefit plan that the federation obtained from appellee. In 1994, appellant incurred medical bills totalling more than $50,000.00. Appellee paid more than $24,000.00 and denied the balance of appellant's claim. Appellant then sued appellee. He stated in his complaint that, although he did not have a copy of his benefit plan, he believed that his coverage was the same as that shown on a brochure labelled Exhibit "A" to appellant's complaint, which set forth the terms of appellee's Producer Option Health Plan. Appellant alleged in his complaint that, under the terms of that plan, appellee owed him $24,573.17.

In its answer, appellee denied that it owed appellant any money or that appellant had coverage under the Producer Option Health Plan. It admitted, however, that, "at various times, the [appellant] has been a member of the [appellee's] group plan." In appellee's answers to interrogatories, it stated that appellant had had various policies with appellee over the years and that the plan became self-funded in 1981. Appellee stated that, as shown in Exhibit "A" to the answers to interrogatories, Don Weeks, senior vice president of the plan's administrator, Fewell & Associates, Inc., sent a letter on July 26, 1991, to the insured poultry producers, including appellant, announcing changes in the plan's benefits. Appellant also attached as Exhibit "B" to the answers to the interrogatories the plan booklet reflecting the benefits as announced in the July 26, 1991, letter. Appellee stated that these items were furnished to appellant.

In Interrogatory No. 2, appellant asked the following: "What material changes, either in benefits or premiums, have been made to [appellant's] original policy with said [appellee]? Please attach

copies of each and every said material change made to [appellant's] policy or plan aforementioned." Appellee objected to this interrogatory and referred appellant to Exhibits "A" and "B." Appellee asserted that the changes noted in Exhibits "A" and "B" were in effect at the time of appellant's loss in 1994. Appellee also objected to appellant's request for copies of every notice sent to him about material changes in the plan. In its answers to interrogatories, appellee stressed that appellant was not covered by the Producer Option Health Plan and had never applied for coverage thereunder. In its answers to Interrogatories Nos. 12 and 13, appellee discussed why it had determined certain expenses to be ineligible for coverage.

On December 1, 1994, appellant moved for an order compelling appellee to answer Interrogatories Nos. 1, 2, 3, 4, 5, and 13. On December 13, 1994, Randy Coleman was relieved as counsel for appellee, and John Hardin was substituted as its counsel.

On April 4, 1995, appellee moved for summary judgment. Appellee argued that appellant was a participant in the 1981 Growers Health Benefit Plan and that, although he was notified that he could apply for coverage under the Producer Option Health Plan, he had never applied for benefits thereunder. Appellee further argued that appellant's claims in the complaint were not covered by the 1981 plan. In support, appellee attached the affidavit of Randy Coleman, who stated that, since January 1, 1981, appellant has been a participant under the 1981 Growers Health Benefit Plan, which has been modified from time to time. He also stated that this plan is between the Arkansas Poultry Federation as sponsor and appellee as provider and that appellee and the federation have agreed to changes in the terms of the plan; as a participant, appellant was subject to these modifications. He stated that appellant never applied for health benefits under the Producer Option Health Plan and that the claims for which this suit was brought were not covered by the 1981 plan. Attached to this motion were copies of the apparently unmodified 1981 plan and a letter from Fewell & Associates to the self-employed poultry producers in 1990 offering the Producer Option Health Plan.

In response, appellant argued that he had never received notice of the Producer Option Health Plan and that, if he had, he would have applied for that coverage. Additionally, appellant argued that he had never agreed to and had never been notified of any major benefit modifications of the 1981 plan. In his affidavit attached to

his response, appellant stated:

> 4. There is not much difference in the premiums for the two plans; I understand it's only about $35.00 a month, and if I had known I could have the 1991 plan, I would have applied for it if it is a better plan, but I didn't even know it existed until after I had my heart attack when the defendant wouldn't pay some of my claims. I should have the coverage they sold to me and the coverage I've paid for all these many years, and they should have given me the opportunity to apply for the 1991 plan if it is better than the 1981 plan that the defendant says I still have, but *either* policy should pay more than what's been paid.
>
> 5. Mr. Coleman also says they have made changes in my benefits, but they didn't tell me about any changes and I never got any letters or anything letting me know about any changes; I wouldn't have agreed to them changing my coverage to something less than what I have had in the past and what I have been paying good money for ever since the 'sixties. I never agreed to less benefits, and I would have gotten other insurance somewhere else if they had told me they were going to give less benefits, but they never told me. They used to have just one policy and it had good benefits, but they say they now have *two* policies, so the new one must have better benefits since the premium is higher than the other one which they say I still have; but they never let me apply for the new one, and this is not right for them to tell me I can't have the new one since I didn't apply for it. I didn't apply for it because I *couldn't* apply for it since I didn't know they had it.
>
> 6. The plan that I bargained for and paid insurance premiums for all these many years should cover all of the items I am now claiming in my complaint, whether it is the 1981 plan or the 1991 plan. Under the 1981 plan, which the insurance company says I now have, I would have to pay $2100.00 of my medical expenses due to my heart attack and the defendant should pay the balance. My total expenses were $50,995.84, my part would be $2100.00 and the defendant's part would be $48,895.84. They have only paid $24,152.67, so they owe me $24,743.17 even under the 1981 plan which they insist I still have.

At the hearing on the motion for summary judgment, appellant argued that, under basic principles of contract law, appellee could not modify the insurance contract without notifying appellant and without obtaining appellant's agreement. He also argued that whether and how the parties had actually modified the policy and whether his claims were covered under it were questions of fact.

Appellant further argued that, because Mr. Coleman had served as counsel for appellee, the court should not consider his affidavit in support of the motion for summary judgment. The trial judge noted that Mr. Coleman wrote the affidavit a few months after being removed as counsel and held that his affidavit could properly be considered. On April 20, 1995, the circuit judge entered summary judgment for appellee.

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. *Johnson* v. *Harrywell, Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994). In considering a motion for summary judgment, the court may also consider answers to interrogatories, admissions, and affidavits. *Muddiman* v. *Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991). When the movant makes a *prima facie* showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Johnson* v. *Harrywell, Inc.*, 47 Ark. App. at 63. In an appeal from the granting of summary judgment, we review facts in the light most favorable to the appellant and resolve any doubt against the moving party. *Id.* Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Id.* On appellate review, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of a motion left a material question of fact unanswered. *Id.*

Appellant argues that the circuit judge erred in holding that appellee could unilaterally, without consent from or notice to appellant, modify the terms of the 1981 plan. Appellant argues that, since appellee is exempt under Ark. Code Ann. § 23-61-502 (Repl. 1994) from the requirements of the Arkansas Insurance Code, the basic rules of contract law, which require both parties to agree to a

modification of a contract, apply. It is true that both parties must agree to the modification of a contract and to the terms of modification. *Moss* v. *Allstate Ins. Co.*, 29 Ark. App. 33, 776 S.W.2d 831 (1989). *Accord Leonard* v. *Downing*, 246 Ark. 397, 438 S.W.2d 327 (1969). In *Afflick* v. *Lambert*, 187 Ark. 416, 418-19, 60 S.W.2d 176, 177 (1933), the court stated:

> It is ... a well-settled rule of this court that any parties who can make a contract can rescind or modify it by mutual consent. If they are capable of making the contract in the first instance, they may by mutual consent modify it in any manner.
>
> ....
>
> Whether there was a modification ... was a question of fact for the chancellor.

See also Askew Trust v. *Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985).

Here, there is no case directly on point. However, as appellee points out, the group health agreement is between the Arkansas Poultry Federation and appellee; appellant is simply a plan participant. Appellee argues, therefore, that appellant's reliance on general principles of contract law is misplaced and points out that a similar issue arose in *Neely* v. *Sun Life Assurance Co. of Canada*, 203 Ark. 902, 159 S.W.2d 722 (1942). There, the supreme court held that a group policy can be canceled by mutual agreement of the insurer and the employer because it is a third-party beneficiary contract; the employee, who pays a part of the premium, will be bound by their action. *Accord Clapp* v. *Sun Life Assurance Co. of Canada*, 204 Ark. 672, 163 S.W.2d 537 (1942). In *Hendrix* v. *Republic National Life Insurance Co.*, 270 Ark. 955, 959, 606 S.W.2d 601, 603 (Ark. App. 1980), we stated: "Arkansas law contemplates that a group insurance policy is a contract between the employer and the insurer and not a contract between the employee and the insurer...."

Here, there is no dispute that the parties to the 1981 plan, appellee and the federation, agreed to modify the plan. Therefore, we do not believe that appellee was required to obtain appellant's agreement before putting such modifications into effect.

Appellant further argues that whether the purported

modifications to the 1981 plan exclude all of his claimed expenses is a question of fact. Appellant points out that, in its answer to Interrogatory No. 13, appellee only stated that an amount of $11,381.30 was ineligible. Appellant argues that his claim for an additional $13,157.87 has not even been addressed by appellee. Appellant also argues that, on its face, the 1981 plan provides such coverage. (Appellee apparently attached a copy of the original 1981 plan to its motion for summary judgment. However, it attached a copy of the *modified* 1981 plan to its answers to interrogatories.) Appellant contends that whether these modifications exclude all of his claims are questions of fact that should have been tried. Appellee responds that appellant failed to raise the issue of how the benefits were actually calculated to the trial court. Although the 1991 letter from Mr. Weeks explains the modifications to the 1981 plan, we do not believe that appellee proved that, as a matter of law, all of appellant's claims are excluded from coverage. In fact, from our review of the record, it is not possible to determine precisely how appellee applied the terms of the modified plan to deny each expense claimed by appellant. We therefore hold that appellee failed in its initial burden of making a *prima facie* showing of entitlement to judgment as a matter of law and that the summary judgment must be reversed and remanded in part for trial on this issue.

Additionally, appellant has raised the issue of whether it was proper for Mr. Coleman to sign an affidavit in support of the motion for summary judgment because he had acted as counsel for appellee. In *Bishop* v. *Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983), the supreme court stated that an attorney for a party cannot testify in person or give such testimony by affidavit. *Accord McIntosh* v. *Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990). However, at the time he signed the affidavit, Mr. Coleman no longer represented appellee in this proceeding. We agree with the circuit judge that his affidavit could be properly considered by the court.

Affirmed in part; reversed and remanded in part.

STROUD and NEAL, JJ., agree.

W.W.C. BINGO *v.* Sandra ZWIERZYNSKI

CA 95-541 921 S.W.2d 954

Court of Appeals of Arkansas
Division II
Opinion delivered May 22, 1996

Murrey L. Grider, for appellant.

John Bartlett, for appellee.

MELVIN MAYFIELD, Judge. This is the second appeal in this workers' compensation case involving a claimant/appellee and an uninsured employer/appellant. In the first appeal the only issue was

compensability. The Commission had held that appellee had sustained a compensable injury and was entitled to workers' compensation benefits. We affirmed the Commission's decision. After another hearing the appellee was awarded temporary total disability benefits from July 11, 1991, through November 16, 1991, medical expenses, and attorney's fees. On appeal the appellant/employer argues:

> I. "WHETHER OR NOT THE APPELLEE SUFFERED AN INJURY TO THE EXTENT AND NATURE AS SHE CLAIMED."
>
> II. "THE COMMISSION ERRED IN UPHOLDING VARIOUS DISCOVERY AND EVIDENTIARY RULINGS BY THE ADMINISTRATIVE LAW JUDGE."

The appellee was injured while selling bingo cards on the floor of appellant's bingo parlor. On July 11, 1991, she was running from one side of the room to the other, and something slick on the floor caused her to fall. This injured her back and leg. At the second hearing the appellant contended, even though this court had said appellee sustained a compensable injury and was entitled to workers' compensation benefits, that appellee was entitled only to the medical expenses incurred at the emergency room on July 12, 1991, and that all other medical expenses after that date were not reasonable or necessary.

Medical records from St. Bernard's Regional Medical Center show that on July 12, 1991, appellee reported she had fallen at work the night before and injured her back and knee. X-rays were made on both of appellee's knees, her pelvis, and her lumbar spine. On July 16 a CT scan was performed and on July 20 an MRI was performed. All were essentially normal.

Dr. Steven C. Golden, appellee's family doctor, sent appellee to the Northeast Arkansas Rehabilitation Hospital for physical therapy, and after eleven sessions she was continuing to have significant discomfort but was discharged from physical therapy on September 23, 1991. On October 1, 1991, appellee was admitted to St. Bernard's Regional Medical Center for a lumbar myelogram and post-myelogram CT scan. They were both normal. Dr. Golden's office notes of October 15, 1991, state that appellee was to get a "facet joint injection on Friday at 11:30 by Dr. Tyrer at Methodist Hospital x-ray," and on October 21, 1991, the notes reveal that appellee

was to restart physical therapy, including the wearing of a TENS unit.

A letter to Dr. Golden from Dr. A. Roy Tyrer, Jr., a Memphis neurological surgeon, dated October 22 states:

> As you have requested, on October 18, 1991 this lady was given a right lower lumbar facet block at the L3-4, L4-5, and L5-S1 disc levels under x-ray localization at Methodist Hospital of Jonesboro on an outpatient basis.
>
> She tolerated the injection well. I am very hopeful it will help her chronic back and right leg symptoms.

Appellee began physical therapy again on October 28, 1991, had a second treatment on October 30, and did not return for further treatments. On November 26, 1991, Dr. Golden wrote a letter to appellee's attorney stating:

> Ms. Zwierzynski was in to see me on November 26, 1991. At that time she indicated she was doing well and not having pain at the present time. Her strengthening exercises have helped dramatically build the strength in her leg. She is now back to baseline, perhaps maybe even a little stronger than prior to her accident. She is looking forward to going back to work, and I have released her to do so.

Appellant's first argument challenges the sufficiency of the evidence. 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 Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

Appellant argues that "A lumbar strain should not generate any pain into the leg and any treatment for problems with [appellee's] leg should not be the responsibility of Appellant." Although appel-

lee testified she hurt her knees and back when she fell and that one time after her fall, she got out of her car and her right leg "gave out on" her, the medical evidence does not indicate appellee was receiving treatment solely for a leg injury. The physical therapy may have included some leg strengthening exercises but the main thrust of the treatment was for an injury to appellee's back.

Furthermore, Dr. Golden's medical records clearly document pain radiating into the leg from appellee's back injury. On July 15, August 5, September 30, and October 15, Dr. Golden's notes indicate that appellee was complaining of back pain and leg pain.

We think the medical records clearly support the Commission's findings that appellee suffered an injury to her back and legs when she fell on July 11, 1991; that her back pain radiated into both legs at one time or another; that the initial program of physical therapy afforded appellee no relief from the pain; that the facet joint injection relieved all of appellee's symptoms; and that she was released to return to work in November 1991, with no permanent impairment. Therefore, we affirm the Commission's holding that appellee is entitled to temporary, total disability benefits from July 11, 1991, through November 26, 1991.

The appellant also complains about certain evidentiary rulings made by the administrative law judge. One of appellee's relatives testified that another member of the family had told her that appellee was swimming and dancing the weekend after her injury. The law judge sustained a hearsay objection to this testimony and stated that he would not allow appellant to even proffer it since it was clearly hearsay. However, the testimony was not stricken from the record and, therefore, the proffer issue is moot. Moreover, the Commission has broad discretion with reference to the admission of evidence, *Linthicum* v. *Mar-Bar Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987), and we find no abuse of discretion as to the ruling on the admission of this evidence.

The owner of the appellant W.W.C. Bingo attempted to introduce into evidence the affidavit of a man stating that the appellee had done housecleaning for him on November 14, 1991. This document was not allowed into evidence but it was proffered. Through the same witness, appellant also attempted to introduce three videotapes. One purportedly showed appellee cleaning a Western Sizzlin Steak House in January, 1992, and the witness said

she was present when it was taken. This videotape was introduced into evidence. The witness testified that the other two videotapes, which apparently contained statements by four people in appellee's family that discuss situations where appellee was working, were taken after the previous hearing. Appellant's counsel said he had attempted to subpoena these witnesses, but he was unable to locate them. The administrative law judge refused to allow appellant to even proffer these videotapes, stating, "I think even as a proffer it's improper."

Appellant argues that although this evidence was hearsay, the rules of evidence do not apply to workers' compensation hearings, and that the videotapes showed how appellee was attempting to defraud the appellant and Commission, and would have attacked her credibility, citing *Davis* v. *C & M Tractor Co.*, 4 Ark. App. 34, 627 S.W.2d 561 (1982). As appellant correctly points out, even a trial court has very limited discretion in refusing to permit counsel to proffer evidence; its only discretion is in controlling the form of the proffer and the time at which it is to be made. *Sitz* v. *State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

This issue has been thoroughly discussed in the context of a chancery case. In *Jones* v. *Jones*, 22 Ark. App. 267, 739 S.W.2d 171 (1987), where a proffer of evidence had been refused, we said:

> Although the issue apparently has never arisen in this state, courts generally have held that it is error to refuse counsel the right to make a proffer of evidence excluded by the court. *State* v. *Shaw*, 90 N.M. 540, 565 P.2d 1057 (1977); *State* v. *Davis*, 155 Me. 430, 156 A.2d 393 (1959); *Ex parte Fields*, 382 So.2d 598 (Ala. 1980); *Hendrix* v. *Byers Bldg. Supply, Inc.*, 167 Ga. App. 878, 307 S.E.2d 759 (1983). In *State* v. *Shaw*, an objection on grounds of relevancy was sustained, after which the trial court refused to permit the defendant to proffer the excluded evidence. The New Mexico court held that the right to proffer evidence which has been excluded by ruling of the court is almost absolute. The court said:
>
> > Why is a tender of proof required? One reason is to advise the trial court of the nature of the evidence so that the trial court can intelligently consider it....

> Another reason is to have the excluded evidence in the record for purposes of appellate review. If a trial court can arbitrarily deny to counsel the right to dictate into the record their offer of proof, he can prevent any consideration upon appeal as to the correctness of his own ruling as to the exclusion of certain evidence. It is obvious that this cannot be the law. (Citations omitted.)
>
> The trial court may certainly maintain control of the proceedings. A.R.E. Rule 103 specifically provides that the trial court may control the form of the proffer. He may also decide when the proffer is to be made. There may be circumstances in which the trial court is justified in rejecting a proffer. The examples given by the New Mexico court are where the request to tender proof is untimely or where the tendered proof is clearly repetitious.

22 Ark. App. at 269-70, 739 S.W.2d at 172-73.

While we certainly cannot approve of the actions of the administrative law judge in denying the appellant the opportunity to proffer this evidence, we find several problems with the evidence which render this error harmless.

First, the medical evidence in the record clearly supports the finding that appellee sustained a compensable injury for which she was entitled to compensation, and we do not believe that evidence that appellee had worked at times would nullify the medical evidence. Second, while appellant mentioned in its notice of appeal to the Commission that "the Administrative Law Judge did not consider all evidence presented by Respondent," the Commission's opinion does not mention this issue. It was the appellant's responsibility to obtain a ruling on this issue by the Commission, *Barnes* v. *Pearson Termite and Pest Control, Inc.*, 266 Ark. 635, 642-43, 587 S.W.2d 823, 827 (1979). A question not passed upon below presents no question for decision here. *North River Ins. Co. of New York* v. *Thompson*, 190 Ark. 843, 846, 81 S.W.2d 19, 20 (1935). And, finally, there was no authentication of these videotapes. It isn't clear who made the tapes, and, in fact, even the witness by whom appellant sought to introduce the tapes was not sure who the people were who were on the tapes. Under these circumstances, we cannot find that the exclusion of the tapes was reversible error.

Affirmed.

GRIFFEN, J., agrees.

PITTMAN, J., concurs.

Esther GREENBERG *v.* DIRECTOR, Employment Security Department, and Checkbureau, Inc.

E 95-181 922 S.W.2d 5

Court of Appeals of Arkansas
En Banc
Opinion delivered May 22, 1996

Appellant, pro se.

Allan F. Pruitt, for appellees.

JOHN F. STROUD, JR., Judge. Appellant, Esther Greenberg, applied for unemployment compensation benefits after she was discharged by her employer, Checkbureau, Inc., for poor job performance. The Arkansas Employment Security Department determined that appellant was entitled to benefits under Ark. Code Ann. § 11-10-514 (Supp. 1995) because she was discharged from her last work for reasons other than misconduct. Checkbureau appealed that determination to the Arkansas Appeal Tribunal, which affirmed the Department's finding. Checkbureau then appealed the Tribunal's decision to the Board of Review, and the Board reversed the Tribunal's findings and found that appellant was disqualified for benefits because she was guilty of misconduct connected with her work. We reverse.

A person is disqualified from benefits if she is discharged from her last work for misconduct in connection with the work. Ark. Code Ann. § 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.* In *Willis Johnson Co.* v. *Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980), this Court stated that:

> Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless it is of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or an employee's duties and obligations. [Citation omitted.]

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. *George's, Inc., supra.*

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* This Court will determine whether the Board could reasonably reach its results upon the evidence before it, but will not replace its judgment for that of the Board even though this Court might have reached a different conclusion based upon the same evidence the Board considered. *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987). However, we are not at liberty to ignore our responsibility to determine whether the standard of review has been met. *Riceland Foods, Inc.* v. *Director*, 38 Ark. App. 269, 832 S.W.2d 295 (1992). When the Board's decision is not supported by substantial evidence, this court will reverse. *Sadler, supra.*

After reviewing the evidence in the present case, we cannot conclude that the Board's finding is supported by substantial evidence. The employer stated that appellant was discharged for poor job performance, and the evidence showed that appellant was incompetent as a legal secretary. She failed to properly spell check documents, failed to mark dates on her employer's calendar, and failed to include important documents with a letter sent to an opposing party. In addition, the employer had documented instances of absenteeism and tardiness.

The Board found that appellant's failure to mark her employer's calendar on at least two occasions and her failure to include certain documents in a letter sent to an insurance company indicated an intentional disregard of the employer's interests. We hold that a reasonable mind would not accept this evidence as adequate to support the conclusion that appellant's conduct was of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of her employer's interests or her duties and obligations. The case is reversed and remanded to the Board for such further proceedings as may be necessary to determine the appellant's eligibility for benefits and the amount and duration of those benefits.

Reversed and remanded.

MAYFIELD, NEAL, and GRIFFEN, JJ., agree.

PITTMAN and COOPER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. Ordinarily, I would not write a dissent to an opinion in an unbriefed Employment Security Department case, but the majority's decision to reverse the Board's factual determination is so radical a departure from the scope of our appellate review, and is premised upon such an extreme deviation from the standard to which we are obliged to adhere, that it should not pass without comment.

Our review of Board of Review decisions is defined by Ark. Code Ann. § 11-10-529 (1987). Our jurisdiction is statutorily confined to questions of law and, if supported by the evidence and in the absence of fraud, the findings of the Board of Review as to the facts are conclusive. Ark. Code Ann. § 11-10-529(c)(1). The majority states this standard of review correctly, then ignores it and summarily reverses the Board's finding of misconduct.

An individual is disqualified for benefits if he is discharged from his last work for misconduct in connection with the work. Ark. Code Ann. § 11-10-514(a)(1) (1987). Ordinary negligence or errors are not considered misconduct under this statute unless they are of such degree or recurrence as to "manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations." *Perry* v. *Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995). Whether the employee's acts are willful or merely the result of unsatisfactory

performance is a fact question for the Board to decide. *George's Inc.* v. *Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995).

As noted above, the Board's fact findings are conclusive on judicial review if supported by substantial evidence. In determining whether substantial evidence exists to sustain the Board's findings, we are required to give the successful party the benefit of any inference that can be drawn from the testimony. *Arlington Hotel* v. *Employment Security Division*, 3 Ark. App. 281, 625 S.W.2d 551 (1981).

Far from giving the successful party in this case "the benefit of every inference," the majority has strained to reverse. The majority opinion notes that the appellee, employed as a legal secretary, failed to properly spell-check documents, failed to mark dates on her employer's calendar, and failed to include important documents with a letter sent to an opposing party.

What the majority opinion does not reveal is that these were not isolated instances. The record shows that the appellant repeatedly failed to spell-check documents as she typed. The appellant claimed to have spell-checked the documents and blamed the recurrent errors on a computer malfunction. However, an employer representative testified that he watched as the appellant spellchecked a document which she claimed to have spell-checked previously, and observed that the computer stopped at the errors he had noted on his printed copy. Nor was the failure to mark dates on her employer's calendar an isolated event. The record shows that, despite being repeatedly instructed that her first priority was to ensure that scheduled court appearances were marked on her employer's calendar, the employer missed two court hearings because the appellant failed to mark his calendar. The majority fails altogether to note evidence that the appellant repeatedly made errors in billing clients, and that such errors continued to occur even after the problem was brought to the appellant's attention.

The Board specifically found that the appellant was discharged for misconduct in connection with the work, reasoning that the instances of the appellant's failure to follow specific instructions were so numerous that her actions indicated more than a mere inability to perform the work in a satisfactory manner. This conclusion that recurrent negligence may warrant a finding of misconduct

is supported by our decisions. *See, e.g.*, *Perry* v. *Gaddy*, *supra*; *Nibco, Inc.* v. *Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981).

I dissent.

PITTMAN, J., joins in this dissent.

[redacted]