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Lee GOSTON *v.* STATE of Arkansas

CA CR 95-983 930 S.W.2d 384

Court of Appeals of Arkansas
Division III
Opinion delivered September 18, 1996

Rice, Adams, & Pace, by: *Kelly M. Pace*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant Lee Goston was found guilty by a jury of the second-degree battery of a police officer and sentenced to six years in the Arkansas Department of Correction. Appellant was excluded from the courtroom during the trial and denied the right to represent himself because, in the 60 days preceding this trial, he had been violent and disruptive in court several times. On appeal he argues that (1) the trial judge erred by excluding him from the courtroom during his jury trial in violation of his constitutional right to be present and to confront the witnesses against him, and (2) the trial judge erred by denying him the right to conduct his trial pro se. We agree with appellant's first assignment of error and, therefore, reverse and remand.

Before the trial began, the judge informed appellant that he was going to be excluded from the courtroom because on a previous occasion he had to be carried into the courtroom because he refused to walk, and he had been disruptive in court.

Appellant objected and told the judge that when he had caused the previous disruptions, he had been under deep emotional stress and was having hallucinations; that he had been on "major drugs"; and that his mind was telling him that all white people are devils and to do the things he was doing.

Appellant also told the judge that he did not want his attorney to represent him, he wanted to represent himself, and at the very least he wanted to sit in the courtroom and assist his attorney.

The judge again explained to appellant that he was being excluded from the courtroom because the last time he was in court he lay "on the table there and didn't speak," and at another time appellant had given the judge his word that he would behave if his

shackles and handcuffs were removed, but when they were removed, appellant had "cursed at the jury."

Defense counsel then told the judge that, because of appellant's threats to "strike past counsel," he would be very uncomfortable sitting next to appellant in court if appellant was not shackled. Appellant insisted that since counsel was afraid to sit beside him without him being shackled, he wished to fire counsel and represent himself. Nevertheless, the judge denied appellant's request to proceed as his own counsel and ordered appellant excluded from the courtroom.

Appellant first argues that a defendant has a right to be present at every essential part of his trial. He contends that during the in-chambers conference the morning of his trial in the instant case, he was not violent, threatening, or disruptive. Under these circumstances, he maintains, it was error to exclude him from the courtroom during his trial.

The Sixth Amendment to the United States Constitution and Article 2, section 10, of the Arkansas Constitution provide that the accused has the right to be present and confront the witnesses against him. This gives him the right to be physically present and the opportunity to conduct effective cross-examination. *Delaware* v. *Fensterer*, 474 U.S. 15 (1985); *Winfrey* v. *State*, 293 Ark. 342, 738 S.W.2d 391 (1987).

In *Lewis* v. *U.S.*, 146 U.S. 370 (1892), the Court reversed a criminal conviction due to jury selection being conducted by listing the challenges, as opposed to the defendant seeing the potential jurors face to face. The Court said:

> A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner . . . .[I]n felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial.

146 U.S. at 372.

In *Badger* v. *Cardwell*, 587 F.2d 968 (9th Cir. 1978), the defendant was accused of assault to commit murder of a prison guard, and was acting as his own attorney with stand-by counsel, when he was expelled from the courtroom three times. The first time, appellant

had taunted the court, held up a clenched fist, and argued with the judge. The appellate court found expulsion at that time to be appropriate. The next two times, however, appellant had only been argumentative with the judge and the witnesses he was questioning. The appellate court held that it was error to exclude appellant from the courtroom simply because he asked irrelevant, repetitious and argumentative questions.

In *Terry* v. *State*, 303 Ark. 270, 796 S.W.2d 332 (1990), the Arkansas Supreme Court said:

> In *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970), the United States Supreme Court was faced with the issue of "whether an accused can claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." The Court concluded that a defendant can lose his right to be present at trial if, after being warned that he will be removed from the courtroom, he nevertheless conducts himself in such a manner that his trial cannot proceed. The Court further held that the right to be present at trial could be reclaimed as soon as the defendant is willing to conduct himself in a manner that is consistent "with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.* at 343.
>
> Appellant's right of confrontation under the sixth amendment to the Constitution of the United States was not violated. He became disruptive, and ignored the court's warnings to return to his seat. Although the court did not specifically warn appellant that he might be removed from the courtroom before he was actually removed, the court immediately suspended the trial and, along with other essential persons, went to appellant's cell to try to convince him to return to the courtroom without being opprobrious, warned appellant that the trial would proceed with or without him, and informed him that he could return at any time as long as he did so without contumacy. Appellant clearly relinquished his right to be present at his trial because of his own actions. He subsequently reclaimed the right by conducting himself in a manner consistent with the decorum that is essential in judicial proceedings.

303 Ark. at 272, 796 S.W.2d at 334.

The State points out that in previous trials before this judge, and before another Pulaski County judge, appellant had promised to behave but had then caused such disruptions that forty jurors and ten witnesses had to be paid and dismissed. Furthermore, appellee notes, this judge had knowledge that, in evaluating appellant's mental condition and fitness to stand trial, doctors at the State Hospital thought appellant had attempted to feign mental illness. Therefore, appellee argues, it was reasonable for this judge to exclude appellant from the courtroom, thereby depriving appellant of the opportunity to disrupt another trial.

In support of this argument the State relies upon *U.S.* v. *Stewart*, 20 F.3d 911 (8th Cir. 1994), in which the appellant was forced to go to trial in leg irons. The court held that it was permissible for a trial court to rely upon the presiding judge's knowledge of the defendant's prior misbehavior in court as the factual basis for restricting the defendant's constitutional right to be present during his trial. 20 F.2d at 915.

We think the United States and Arkansas Constitutions require the judge at every trial to give the defendant the opportunity to be in the courtroom with the witnesses and jury, regardless of his or her previous conduct. *See Larson* v. *Tansy*, 911 F.2d 392 (10th Cir. 1990). For that reason, we reverse and remand the instant case for a new trial. However, we note that a trial judge does not violate the defendant's right of due process when, because of the defendant's disruptive behavior in the courtroom, the trial judge orders the defendant removed. *Illinois* v. *Allen*, *supra*; *Terry* v. *State*, *supra*; *Morris* v. *State*, 249 Ark. 1005, 462 S.W.2d 842 (1971).

Appellant also argues that it was error for the trial court to deny his request to proceed pro se. Since we are remanding this case for a new trial the issue may arise again. Therefore, we direct the trial judge to the law as stated in *Oliver* v. *State*, 323 Ark. 743, 918 S.W.2d 690 (1996), and *Barnes* v. *State*, 15 Ark. App. 153, 691 S.W.2d 178 (1985).

Reversed and remanded.

ROBBINS and GRIFFEN, JJ., agree.

Marilyn Moody SCHWARZ *v.* Randy Lee MOODY

CA 94-695 928 S.W.2d 800

Court of Appeals of Arkansas
Division II
Opinion delivered September 18, 1996
[Petition for rehearing denied October 23, 1996.]

[redacted]

T.B. Patterson, Jr., P.A., for appellant.

No response.

JOHN F. STROUD, JR., Judge. In this one-brief case, appellant Marilyn (Moody) Schwarz appeals from a chancery court order entered on October 27, 1993. The order, among other rulings, denied her motions to change custody from appellee, Randy Lee

Moody, and to terminate child support. After appellant filed her notice of appeal, she requested and was granted various stays of appeal by this court while other matters were addressed by the chancellor. On November 17, 1994, the chancellor entered two additional orders. In one, he denied appellant's motion to recuse and supplemented a March 11, 1992, supplemental order by making definite the amount of attorney's fees appellant and her husband, Karl "Bill" Schwarz, had previously been ordered to pay appellee's attorney, David H. Williams. In the other, he sanctioned appellant, her husband Bill Schwarz, and their attorney T.B. Patterson, Jr., jointly and severally, for violations of ARCP Rule 11. Appellant filed her amended notice of appeal on November 28, 1994, in which Mr. Schwarz and Mr. Patterson joined pursuant to Rule 3(c) of the Rules of Appellate Procedure. We affirm the chancellor's rulings.

The background facts of this case are too long and tortuous to recount in great detail. It is sufficient to state that the parties were divorced in 1984. Custody of the two minor children was originally granted to appellant and then subsequently awarded to appellee. Their daughter, Brandi, was five years old at the time of the divorce. She is now seventeen. Appellant and appellee subsequently married each other's ex-spouses. The intervening years have been filled with vitriolic motions and hearings, culminating in this appeal.

CHANGE OF CUSTODY

In her first point of appeal, appellant argues that the chancellor erred in denying a change of custody with respect to Brandi. There was no error.

On June 4, 1991, appellant filed a motion for change of custody. At that time, appellant and her husband, Bill Schwarz, were living in Virginia. Brandi made allegations of sexual abuse against her father, the appellee; however, she also subsequently recanted the allegations, explaining that her stepfather, Mr. Schwarz, had threatened to harm her mother, appellant, if Brandi did not make the allegations. There were also proceedings concerning these sexual-abuse allegations in the juvenile division of chancery court. The juvenile court dismissed the petition for lack of sufficient evidence. Brandi had also made allegations of sexually inappropriate conduct against Mr. Schwarz. The chancellor held approximately three days of hearings on the change of custody

request and other pending motions. The chancellor's March 11, 1992, order left custody with appellee, and ordered that Brandi remain temporarily with her paternal grandparents.

On May 17, 1993, appellant filed yet another motion "renewing" her motion for change of custody of Brandi. In it she alleged appellee was not cooperating in scheduling counseling for Brandi and consequently her therapeutic needs were not being met. Hearings on the motion were held June 7, 1993, and October 14, 1993. Brandi was represented by an attorney ad litem. Dr. Janice Church, a clinical psychologist, testified at the hearings on this motion. In the June 7, 1993, hearing she testified that she did not believe Brandi had received, nor would she receive, support for treatment while living with appellee; that, ideally, a more neutral living situation would allow Brandi to work on issues regarding appellant; that she did not feel it would be in Brandi's best interest to be with her mother, appellant, at that time; and that Brandi had never recanted to her the allegations of sexually inappropriate conduct involving Mr. Schwarz.

In the October 14, 1993, hearing Dr. Church testified that appellee had cooperated with counseling in the beginning but not recently; that she had not seen Brandi since April; that she was in a difficult position to answer where Brandi should be placed; and that she was not certain custody should be suddenly changed to appellant. After the October hearing, the chancellor entered his October 27, 1993, order. In it he determined that no sufficient change in circumstances existed to require a change in custody.

In deciding a petition for change of custody, the chancellor must first determine whether there has been a significant change in the circumstances of the parties since the most recent custody decree. If a significant change has occurred, then the chancellor determines custodial placement with the primary consideration being the best interest of the child. *Riley* v. *Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994). Although we review chancery cases de novo, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. *Id.* Since the question of the preponderance of evidence turns largely upon the credibility of the witnesses, this court defers to the superior position of the chancellor to make such determinations. *Id.* Child custody cases cast a heavier burden upon the chancellor to utilize to the fullest extent all powers of perception in evaluating the witnesses,

their testimony, and the children's best interests. *Clark* v. *Reiss*, 38 Ark. App. 150, 831 S.W.2d 622 (1992). We have reviewed this case de novo. The chancellor's finding that there was no significant change in the parties' circumstances was not clearly against the preponderance of the evidence. We defer to his superior position in this case to determine the credibility of the witnesses and the best interests of the child.

CHILD SUPPORT

In her second point of appeal, appellant argues that the chancellor erred in refusing to terminate child support. In the March 11, 1992, order the chancellor ordered appellant to pay child support in the amount of $30.00 per week and one-half of medical expenses not covered by insurance. He did so despite the fact that she was unemployed. Appellant asserts that although she was unemployed when such support was awarded in 1992, she had become unable to work by the time the October 27, 1993, order was entered. She maintains that those circumstances represent a significant change which warranted the termination of support. We disagree.

A change in circumstances must be shown before a court can modify an order regarding child support. *Irvin* v. *Irvin*, 47 Ark. App. 48, 883 S.W.2d 862 (1994). A chancellor's determination as to whether there are sufficient changed circumstances to warrant a change in child support is a finding of fact, and this finding will not be reversed unless it is clearly erroneous. *Id.* Appellant was unemployed when the support amount was first set. She remained unemployed when the chancellor refused to terminate support. The chancellor's finding that appellant's inability to work did not represent a significant change in circumstances is not clearly erroneous. *See Barnes* v. *Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992) (finding no error when chancellor set support at the minimum level required of an unemployed person). In fact, if appellant is now unemployable rather than merely unemployed, there exists the possibility she may be entitled to monetary benefits that would not previously have been available to her.

ATTORNEY'S FEES

The third point of appeal challenges the chancellor's award of attorney's fees, arguing that they should be set aside as an abuse of discretion, as outside of the chancellor's jurisdiction with respect to Bill Schwarz, and as lacking proof of amount. Furthermore, the

chancellor's finding that the fees were so intertwined with custody and support issues as to be directly related to support is challenged. The arguments have no merit.

We have recognized the inherent power of a court of equity to award attorney's fees in domestic-relations proceedings. *Irvin* v. *Irvin*, 47 Ark. App. 48, 883 S.W.2d 862 (1994). Whether to allow such fees and in what amounts are matters within the chancellor's discretion. *Price* v. *Price*, 29 Ark. App. 212, 780 S.W.2d 342 (1989). In the absence of a clear abuse of discretion in fixing the fee, we will not disturb the chancellor's decision on appeal. *Id.* After carefully reviewing the voluminous record in this case, we find no clear abuse of discretion.

The chancellor awarded attorney and other professional fees in the supplemental order filed March 11, 1992. Specific dollar amounts were entered for the other professional fees, but not for attorney's fees. However, the percentage basis of the award and the persons charged with its payment, the Schwarzes, were set forth. During the December 1991 hearing that resulted in the March 11, 1992, order the only issue raised with respect to the court's award of attorney's fees challenged any connection of those fees to child support. No other issue argued here was raised at that hearing. Ordinarily, we would dispose of those issues on that basis alone. However, subsequent events in this unique case make it necessary to set forth additional facts and other bases for our affirmance.

At the time of the December 1991 hearing, two cases were being tried together before the chancellor. One was the instant case, which involved appellant, Marilyn (Moody) Schwarz, and appellee, Randy Moody. The other case involved Bill Schwarz and Lois (Schwarz) Moody, appellee's wife. Mr. Patterson represented both Marilyn and Bill Schwarz in their respective cases.

The Schwarzes subsequently filed for bankruptcy. Mr. Williams was listed as a creditor in the Chapter 7 bankruptcy filed by appellant and her husband, even though the exact amount of his fees was not then known. One of the pleadings from the bankruptcy proceedings was entitled, "Stipulation by the Parties." Included in the stipulations was the fact that Mr. Floyd Healy, the Schwarzes' bankruptcy attorney, had examined Mr. Williams's files and records concerning his services rendered in the chancery case and in the juvenile proceedings, and that they contained sufficient

documentation to support Mr. Williams's affidavit for services in the amount of $16,794.56. By order entered September 12, 1994, the bankruptcy court ruled on a motion filed by the debtors, Bill and Marilyn Schwarz:

> After hearing arguments, this Court finds that the motion is without merit and will deny the same. The chancery court by previous order determined that 80% of the plaintiff's legal services were in the nature of support. This Court conducted an evidentiary hearing on July 29, 1994 and at this hearing, the parties stipulated that the plaintiff's files and records contained sufficient documentation to sustain the plaintiff's request for 80% of $16,794.56 and is entitled to an award and judgment of $13,435.65 which is non-dischargeable.

The parties subsequently returned to chancery court and, following two hearings, the chancellor entered the November 17, 1994, order that set forth the specific amount of attorney's fees owed by the Schwarzes to Mr. Williams, $13,435.65. An amended notice of appeal was then filed in which Bill Schwarz joined pursuant to Appellate Rule of Procedure 3(c).

We first address the argument that Bill Schwarz was outside the chancellor's jurisdiction regarding attorney's fees. Not only has Mr. Schwarz provided us with no authority or convincing argument regarding this issue, we cannot discern any. See *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977) (assignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal unless it is apparent without further research that they are well taken). The cases were tried together, and both Marilyn and Bill Schwarz were represented by the same attorney. Furthermore, we endorse the chancellor's following determination:

> [O]n the basis that I'm tired of dancing around about this thing that I've been doing since I took this office several years ago. That Bill Schwarz has driven this thing from the start. That he doesn't want to pay. He's trying to dodge it. It's unjust. It's unfair. It causes a lot of trouble for a lot of people. It clogs up the docket in this court. He has lost, and he can't accept it.

The arguments regarding the chancellor's abuse of discre-

tion and an alleged failure of proof regarding the amount of fees are without merit. Any problems with the March 1992 supplemental order regarding the lack of a specific dollar amount were cured by the subsequent events in this case. The debt was recognized and listed in the subsequent bankruptcy proceedings. Bill and Marilyn Schwarz stipulated through their attorney via pleadings submitted in the bankruptcy case that "Mr. Williams' files and records did contain documentation sufficient to sustain his affidavit for services rendered in the sum of $16,794.56." The bankruptcy court relied upon those stipulations in determining the amount of the fees. In the absence of fraud, a client is bound by the acts of his attorney within the scope of his authority. *White* v. *White*, 50 Ark. App. 240, 905 S.W.2d 485 (1995). The chancellor entered the same amount as the bankruptcy court in the chancellor's November 1994 order, following additional hearings on the matter in chancery court. Bill and Marilyn Schwarz cannot now deny the accuracy of this stipulated amount. *See Daley* v. *City of Little Rock*, 36 Ark. App. 80, 818 S.W.2d 259 (1991); *Womack* v. *Womack*, 73 Ark. 281, 83 S.W.2d 938 (1904).

Finally, the chancellor's finding that the attorney's fees were so intertwined with custody and support issues as to be directly related to support is challenged. Once again, the argument has no merit. A chancellor is not limited to support issues in awarding attorney's fees in a domestic-relations proceeding. Moreover, the chancellor's use of the phrase, "so intertwined" does not necessarily mean the fees represented a majority of time devoted exclusively to support. Rather, it can as easily mean merely that the fees were "so intertwined" as to directly relate to support.

SANCTIONS

The fourth point of appeal asserts that the chancellor erred in awarding sanctions under ARCP Rule 11 against Marilyn Schwarz, Bill Schwarz, and Mr. Patterson, jointly and severally. There was no error.

ARCP Rule 11 provides in pertinent part:

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

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

When a violation of Rule 11 occurs, the rule makes sanctions mandatory. *Crockett* v. *Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995). Whether a violation of Rule 11 occurred is a matter for the court to determine, and this determination involves matters of judgment and degree. *Id.* In reviewing a trial court's determination, we do so under an abuse of discretion standard. *Id.*

In addressing this point we note again the protracted nature of this case. Brandi was five years old at the time of her parents' divorce and she is now seventeen. The intervening years have been filled with various allegations, pleadings, and hearings. The pleading that resulted in sanctions may well be regarded as the straw that broke the camel's back. The backs of many camels would have broken much sooner. The brief submitted in this case acknowledges that the provisions of ARCP Rule 11 are designed to stop the needless delay and expense of pleadings interposed without a good faith belief in their validity. The brief also acknowledges that the pleading in question raised "what may be considered technical defenses," including standing, laches, jurisdiction, and inequitable enforcement. There was no abuse of discretion in the chancellor's award of sanctions in this case.

RECUSAL

Appellant's final point of appeal is that the chancellor should have recused. The argument has no merit.

The chancellor disclosed early in the proceedings that he knew appellee's brother, an attorney, and that the brother's office had been located close to that of the chancellor's. Disqualification is discretionary with the judge, and the court's decision in that regard will not be reversed absent an abuse of discretion. *Korolko* v. *Korolko*,

33 Ark. App. 194, 803 S.W.2d 948 (1991). The party seeking disqualification bears a substantial burden to prove partiality. *Id.* There was no abuse of discretion in the chancellor's refusal to recuse on this basis.

Appellant acknowledges that no prejudice could be shown with respect to any particular ruling, but argues that the "cumulative effect" demonstrated bias. Only external matters are considered for purposes of recusal. Otherwise, antagonizing judges would become a tool of trial strategy. The development of opinions, biases, or prejudices during a trial does not make the trial judge so biased as to require his or her disqualification from further proceedings. *Allen* v. *Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987). See also *Carle* v. *Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993).

ABSTRACTING ABUSES

We cannot ignore the abstracting abuses of appellant's counsel. Excessive abstracting is as violative of our rules as omissions of material pleadings, exhibits, and testimony. *Saint Paul Fire & Marine Co.* v. *Brady*, 319 Ark. 301, 891 S.W.2d 351 (1995). Appellant's abstract consisted of three volumes, totaling 575 pages. Much of this information could have been abridged or deleted for purposes of this appeal. This court's efforts to resolve this matter on appeal would have been aided considerably by the scrupulous adherence to our abstracting rule. See Sup. Ct. R. 4-2(a)(6).

MOTION

Mr. David H. Williams filed a motion to dismiss this appeal. We considered and denied the motion.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.

Lee GOSTON *v.* STATE of Arkansas

CA CR 95-1133 930 S.W.2d 387

Court of Appeals of Arkansas
Division II
Opinion delivered September 25, 1996

William C. McArthur, for appellant.

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

JOHN B. ROBBINS, Judge. Appellee Lee Goston was convicted by a jury of aggravated robbery and was sentenced to twenty-five years in the Arkansas Department of Correction. Mr. Goston now appeals, arguing that the trial court erred in denying his motion to dismiss for lack of a speedy trial. In addition, Mr. Goston contends that the trial court erred in denying him his constitutional right of confrontation by excluding him from the courtroom throughout his trial. We find no error and affirm.

The evidence shows that the victim, Eugene Lamb, was working at a convenience store on the night of September 30, 1991, when two men entered the store. One of the men picked up two twelve-packs of beer and proceeded to leave the store. When Mr. Lamb tried to stop him, the other man pointed a gun at Mr. Lamb, after which the two men exited the store with the beer. Mr. Lamb later viewed a photographic lineup, and from this lineup identified Mr. Goston as the individual who pointed a gun at him on the evening of the robbery. Based on this information, Mr. Goston was arrested on October 4, 1991.

Mr. Goston's first argument for reversal is that he was denied his right to a speedy trial. Rule 28.1(b) of the Arkansas Rules of Criminal Procedure provides:

> Any defendant charged with an offense in circuit court and incarcerated in prison in this state pursuant to conviction

> of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

In the instant case, Rule 28.2 mandates that the twelve-month period commenced running at the time of Mr. Goston's arrest. It is undisputed that he was arrested on October 4, 1991, and was not tried until April 20, 1995. Mr. Goston acknowledges that, pursuant to Rule 28.3, some of the time between his arrest and trial was excludable for speedy-trial purposes. However, he contends that a total of 434 days was not excludable, and since this time period exceeds twelve months, the charge against him should have been dismissed.

In his argument, Mr. Goston asserts that three separate time periods combined to deny him a speedy trial. After his arrest on October 4, 1991, a trial was scheduled for March 4, 1992, but was later continued and the court ordered him to undergo a mental examination on March 10, 1992. Mr. Goston asserts that the 158 days between October 4, 1991, and March 10, 1992, were not excludable. Mr. Goston was found competent to stand trial on October 26, 1992, and a trial was then rescheduled for February 17, 1993. Mr. Goston asserts that this period of 114 days also counted towards the speedy-trial deadline. Finally, Mr. Goston concedes that his attorney waived a speedy trial on his behalf on February 17, 1993, and again on April 7, 1993. However, he asserts that after the April 7, 1993, waiver, another mental evaluation was conducted and he was again found competent to proceed on October 31, 1994. The trial was then set for April 11, 1995, which ultimately resulted in a mistrial and postponement until April 20, 1995. Mr. Goston argues that the 162 days between October 31, 1994, and April 11, 1995, were not excludable. The sum of the three time periods referred to by Mr. Goston is 434 days, and as a result he submits that his right to a speedy trial was violated.

■ From the abstract provided, we cannot agree that the trial court erred in refusing to dismiss for lack of a speedy trial. It is the duty of the appellant in a criminal case to abstract such parts of the record as are material to the points to be argued in the appellant's brief. *Manning* v. *State*, 318 Ark. 1, 883 S.W.2d 455 (1994). In the case at bar, Mr. Goston has failed to abstract his motion to

dismiss, which was presumably filed prior to the April 11, 1995, hearing that resulted in a mistrial. More importantly, he has failed to abstract the trial judge's original ruling on the motion. The abstract of the April 20, 1995, hearing does not indicate that a motion for speedy trial was made at that time, although it does contain comments by the trial judge that pertain to the issue. The trial judge made reference to Mr. Goston's speedy-trial waiver of April 7, 1993, when the appellant "may have been bonded out." The trial judge then "affirmed" what the trial judge in the April 11, 1995, hearing found, and stated that "the speedy trial has not been violated in this case." We find no error in this ruling.

It may be that the October 4, 1991, to March 10, 1992, and October 26, 1992, to February 17, 1993, periods were not excludable for speedy-trial purposes. However, the sum of these periods is only 272 days, which fails to exceed the maximum period of twelve months. It is undisputed that Mr. Goston's attorneys waived his right to a speedy trial both on February 17, 1993, and April 7, 1993. The abstract does not reveal that these waivers contained any conditions or limitations. Therefore, all of the time that elapsed between February 17, 1993, and the date of the trial appears to be excludable for speedy-trial purposes. The abstract does not support Mr. Goston's contention that, despite the waivers, the period spanning October 31, 1994, through April 11, 1995, was not excludable.

In connection with his first argument, Mr. Goston also contends that, since the trial court did not set forth all excluded periods in writing as prescribed by Rule 28.3(i), his conviction should be dismissed. However, Mr. Goston failed to raise this issue before the trial court, and may not now raise it on appeal. *See Keys* v. *State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

Mr. Goston's remaining argument is that the trial court erred in excluding him from the courtroom during his trial. The trial judge ruled that because of Mr. Goston's behavior at a pretrial hearing he could not be present in the courtroom during the trial. The Sixth Amendment to the United States Constitution and Article 2, section 10, of the Arkansas Constitution guarantee that an accused has the right to be present in a criminal prosecution against him. Mr. Goston now contends that he was erroneously denied this constitutional right.

Despite the constitutional right to be present at one's criminal prosecution, this right may under certain circumstances be waived by a defendant's belligerent or disruptive behavior. In *Illinois* v. *Allen*, 397 U.S. 337 (1970), the United States Supreme Court listed three possible ways for a trial judge to handle an obstreperous defendant: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." The Supreme Court further stated that "trial judges confronted with disruptive defendants must be given sufficient discretion to handle different situations which may arise in their courtrooms." *Id.*

In the instant case, we find no abuse of discretion in the trial court's handling of Mr. Goston's disruptive behavior. During the pretrial hearing, the trial judge noted that Mr. Goston's April 11, 1995, trial resulted in a mistrial because of his belligerent behavior. During the pretrial hearing, Mr. Goston repeatedly used grossly inappropriate language and profanity toward the trial judge. In addition, Mr. Goston threatened to kick a table over and proclaimed, "We are going to fight up in here." After viewing this disruptive behavior, the trial judge stated, "There is no way that you can sit in this courtroom and act the way you are doing." The trial judge then made the decision to try Mr. Goston in absentia.

It is significant that, after a jury was selected, the trial judge proceeded to the holding cell where Mr. Goston was being detained. At this time, the trial judge asked Mr. Goston if he would promise to behave in the courtroom, indicating that if he would make such a promise he would be allowed to be present for his trial. Mr. Goston remained silent and refused to speak to anyone. Thereafter, the trial proceeded in Mr. Goston's absence. Because Mr. Goston was ultimately given a chance to display proper courtroom decorum during his trial but refused to do so, we find no merit to his contention that he was erroneously prevented from being present at his trial.

Affirmed.

STROUD and GRIFFEN, JJ., agree.

Ross HARRINGTON *v.* Kristi HARRINGTON

CA 95-1125 928 S.W.2d 806

Court of Appeals of Arkansas
Division II
Opinion delivered September 25, 1996

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Sam Hilburn* and *Dorcy Kyle Corbin*, for appellant.

Everett O. Martindale, for appellee.

JOHN B. ROBBINS, Judge. The parties in this case were divorced by decree filed on March 18, 1994. Appellant Ross Harrington was awarded custody of the parties' two minor children, Amanda, now age 10, and Jessica, now age 8. In May 1995, appellee Kristi Harrington alleged that there had been a material change of circumstances and sought a change of custody. The chancellor awarded her custody in July 1995. Appellant contends on appeal that the chancellor erred in finding that a material change had occurred that justified a change in custody. We agree and reverse.

This court has stated numerous times that a material change in circumstances must be shown before a court may modify an order regarding child custody, and the party seeking modification has the burden of showing a change in circumstances. *Jones* v. *Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995); *Riley* v. *Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994). Although we review chancery cases de novo, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. *Riddle* v. *Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989).

At the hearing in the trial court, Zella Willis, appellee's mother, testified that appellee resided with her and Ms. Willis's mother. Appellee is unemployed due to a seizure disorder and cannot drive a vehicle. Ms. Willis stated that "I think it's best for the girls to come and live with their mother. The girls are getting older, they're progressing into an age where a girl just naturally needs a mother's influence." On cross-examination Ms. Willis acknowledged that appellant Ross Harrington had had custody for almost two years and was a good father.

Appellee Kristi Harrington testified in her own behalf at the hearing. She stated that she wanted custody, "Well, because I'm always there, they're little girls, I think it would be best that they be with their mother. You know, they're growing and I just think that little girls would be best with their mother and I'm always at the house." On cross-examination, appellee was asked what change of circumstances has occurred that she believed justified her receiving custody. Appellee replied:

> Well, the girls are growing. They're becoming little women. Amanda right now is especially. Some little girls will start, they will become, they grow different from others. I mean Ross is kind of shy. He will not go to the store, he will not

> know the size bra that Amanda is fixing to be having to wear. She is growing right now, I mean she was asking me one night when I was giving them a bath and she asked, "Mommy, feel of this, what is wrong?" And she's just becoming a little lady. Ross isn't going to know what size bra to get for that child to wear. And then when she starts filling out to become, it's usually teenage [sic] age is when it was for me, but some girls grow — it starts earlier.

Appellant Ross Harrington testified that he has cared for the children's daily needs for almost two years and has had no problems. Appellant has recently moved into a home in which the girls would each have a room of their own. The girls would remain in the same school and area of town. In response to appellee's allegation that he would not know what bra sizes the girls would need, appellant stated that the girls have a drawer full of bras at his home and they had shopped together for such items. Appellant went on to testify that nothing has changed since he was awarded custody, other than the girls were now a year and a half older.

The chancellor in this case found that a material change in circumstances had occurred which justified appellee being awarded custody. The chancellor ruled from the bench as follows:

> BY THE COURT: I find that there is a change in circumstances, the change in circumstances being the age of the little girls and the fact that they're living solely with the father, and I feel as though, at their age, that they need their mother because of the growing age where they now are. One of them will be a teenager before we know it. And so I'm going to give the mother the custody of the two children....

It is obvious that the chancellor's ruling was based on his general view that girls of this age should be raised by their mother and that he employed this presumption in deciding the custody issue. This is clearly contrary to Ark. Code Ann. § 9-13-101 (Repl. 1993), which provides:

> In an action for divorce, the award of custody of the children of the marriage shall be made without regard to the sex of the parent but solely in accordance with the welfare and best interests of the children.

This statute abolished any gender-based presumption or legal preference in child custody actions. *See Fox* v. *Fox*, 31 Ark. App. 122, 788 S.W.2d 743 (1990). We stated in *Fox*:

> Under its terms, the chancellor must abandon generalizations and decide questions of custody on an individualized basis: the question is not whether young girls should, in general, be placed in the custody of their mothers, but rather whether the welfare and best interests of these particular children would be best served by granting custody to this particular mother or father.

Id. at 123, 788 S.W.2d at 744.

We agree with the appellant that the chancellor's sole basis for finding a material change was that the girls were a little older and needed their mother. In this day and age, such broad generalizations have no place in deciding custody issues. To reopen the issue of custody solely on the basis that the children are now fourteen months older, as in this case, could permit annual custody battles. This would eventually reward the parent with the greater stamina rather than accommodate the best interests of the children involved. It is apparent from the record that there have not been any material change in circumstances to justify a change in custody, and the chancellor's finding to the contrary is clearly against the preponderance of the evidence.

Reversed.

STROUD and GRIFFEN, JJ., agree.

HUGH CHALMERS CHEVROLET-CADILLAC-TOYOTA, INC. *v.* Margaret Turner LANG

CA 95-424 928 S.W.2d 808

Court of Appeals of Arkansas
Division II
Opinion delivered September 25, 1996

[redacted]

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *William H. Edwards, Jr.* and *Derek J. Edwards*, for appellant and cross-appellee.

David Hodges, for appellee and cross-appellant.

JOHN F. STROUD, JR., Judge. This appeal and cross-appeal arise from a lawsuit filed by Margaret Turner Lang, appellee/cross-appellant, against Hugh Chalmers Chevrolet-Cadillac-Toyota, Inc., appellant, and General Motors Corporation, cross-appellee. The case was tried and submitted to the jury on interrogatories. The jury found Chalmers liable on theories of strict liability, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. Lang was awarded

$37,500.00 in damages. General Motors was exonerated of any liability. Following the verdict the trial court held a hearing on the issue of attorney's fees and awarded Lang $18,500.00. This appeal and cross-appeal followed.

In January 1992, Lang purchased a previously owned 1991 Chevrolet Lumina from Chalmers. At the time of purchase, the automobile had been driven approximately 13,000 miles. It was manufactured by General Motors. In February 1992, it was destroyed by fire and portions of Lang's carport and house were damaged. On the day of the fire, Lang returned home from work and parked her car in her carport at approximately 4:00 p.m. At approximately 11:00 p.m. she heard a loud bang, and her neighbors informed her that her car and carport were on fire.

For reversal, appellant Chalmers argues: (1) that the trial court erred in denying the motion for directed verdict on the implied warranty theories, (2) that the trial court erred in granting Lang's request for attorney's fees, (3) that the trial court erred in overruling Chalmers' peremptory strike pursuant to a *Batson* challenge, and (4) that the trial court erred in denying Chalmers' motion for a mistrial based on reports of other engine fires that were the subject of a motion in limine.

Cross-appellant Lang argues: (1) that the trial court erred in overruling her peremptory strike pursuant to a *Batson* challenge, (2) that the trial court erred in denying her motion in limine and permitting reference to subsequent, irrelevant acts, and (3) that the jury's verdicts in favor of General Motors, cross-appellee, were not supported by substantial evidence.

We find merit in the arguments raised by both appellant Chalmers and cross-appellant Lang with respect to their efforts to exercise peremptory strikes in the jury selection process. We therefore reverse and remand on both the appeal and the cross-appeal. Moreover, because we are reversing the judgment based on the trial court's failure to excuse two jurors, we discuss only the points likely to arise at a new trial.

APPELLANT CHALMERS' PEREMPTORY STRIKES

Lang is an African-American woman. Following voir dire, Chalmers exercised peremptory strikes against three African-American women. Lang challenged those strikes pursuant to *Batson* v.

Kentucky, 476 U.S. 79 (1986) and *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991). With respect to two of the three peremptory challenges, either Lang conceded that there was an independent, nondiscriminatory basis for the strike, or the trial court so determined. With respect to Margie Brown, the third juror, however, the trial court overruled Chalmers' peremptory strike. The trial court erred in doing so.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause guarantees a criminal defendant that the State will not use peremptory challenges to exclude members of the defendant's race from the jury venire based solely on race. This principle has been extended to protect private litigants in civil cases. *Edmonson*, 500 U.S. 614; *see Wingate Taylor-Maid Transp., Inc.* v. *Baker*, 310 Ark. 731, 840 S.W.2d 179 (1992); *Sonny* v. *Balch Motor Co.*, 52 Ark. App. 233, 917 S.W.2d 173 (1996).

When a *Batson* objection is raised, the party making the objection must demonstrate a prima facie case that racial discrimination is the basis of a juror challenge. If the party is able to demonstrate a prima facie case, then the burden shifts to the party exercising the peremptory challenges to establish that the peremptory strikes were for racially neutral reasons. The trial court must then determine from all relevant circumstances the sufficiency of the striking party's explanation. If the party's explanation appears insufficient, then the trial court must conduct a sensitive inquiry into the basis for each of the peremptory challenges. *Sonny* v. *Balch Motor Co.*, 52 Ark. App. 233, 917 S.W.2d 173 (1996).

Chalmers does not challenge whether a prima facie case for discrimination was established; rather, it asserts error in the trial court's rejection of the reason proffered by Chalmers for the strike. The following exchange took place in pertinent part between the trial court and Chalmers' counsel:

> THE COURT: In view of our hearing before commencing voir dire and in light of the development in voir dire and your strikes, the Court will require the defendant to make some offer or showing of some independent reason for exercising your peremptory challenges to exclude the two female black American prospective jurors other than based on race.

> [COUNSEL FOR CHALMERS]: Your honor, I think voir dire and the process goes not just to the questions asked by the lawyers, but also questions asked by the Court in qualifying these jurors.
>
> The voir dire process extends not just to verbal responses but also visual clues, body language, general appearance of the witnesses.
>
> . . .
>
> I exercised my strikes based on the non-responsiveness of her attitude, failure to make eye contact during voir dire and appearance.
>
> . . .
>
> [THE COURT]: The reason stated by the defense for the exercise of the peremptory challenge of Ms. Brown certainly does not meet that standard, if there be a standard. I perceive there is some standard at least established by the Supreme Court, the U.S., as well as local, for reasons of race.
>
> While I personally think there needs to be some preservation of the peremptory challenge, that feeling based on simply appearance and response or lack of response of a juror which could give one a strong feeling, justified or otherwise, whether or not they would or would not be a good juror, a fair and impartial juror, that alone does not come up to the standard, standards prescribed by the Court to justify and the Court so holds.

The United States Supreme Court has provided guidance with respect to the second step of a *Batson* inquiry:

> The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." . . .
>
> The [Eighth Circuit] Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i.e.*, a "plausible" basis for believing that "the person's ability to perform

> his or her duties as a juror" will be affected. It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. ... At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step 3 is quite different from saying that a trial judge *must terminate* the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
>
> . . .
>
> The prosecutor's proffered explanation in this case — that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard — is race-neutral and satisfies the prosecution's step 2 burden of articulating a non-discriminatory reason for the strike. "The wearing of beards is not a characteristic that is peculiar to any race." [Citation omitted.] And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step 3, where the state court found that the prosecutor was not motivated by discriminatory intent.

Purkett v. *Elem*, ___ U.S. ___, ___, 115 S. Ct. 1769, 1771 (1995).

The reasons proffered by Chalmers' counsel for striking the prospective juror were that she was not responsive, she lacked eye-contact, and she was unkempt in appearance. These reasons are race neutral. They are not peculiar to any race, and they were sufficient to satisfy the second prong of *Batson*. The standard of review for reversal of a trial court's *Batson* ruling is whether the court's findings are clearly against the preponderance of the evidence. *Bradley* v. *State*, 320 Ark. 100, 896 S.W.2d 425 (1995). Here, the trial court's ruling was clearly against the preponderance of the evidence and prevented the court from taking the *Batson* inquiry to the third step in the process, which involves determining whether the opponent of the strike has carried the overall burden of proving purposeful discrimination. We therefore reverse and remand for a new trial on this basis in the direct appeal.

CROSS-APPELLANT LANG'S PEREMPTORY STRIKES

Following voir dire, cross-appellant Lang exercised peremptory strikes against three white prospective jurors. Cross-appellee General Motors challenged those strikes pursuant to *Batson*. With respect to two of the three peremptory strikes, either General Motors withdrew the *Batson* challenge or the trial court determined there was an independent, nondiscriminatory basis for the strike. With respect to Charles Barfield, the third juror, however, the trial court denied Lang's peremptory strike pursuant to the *Batson* challenge. The trial court erred in doing so.

During voir dire of the prospective jurors, counsel for Lang asked the potential jurors how they felt about lawsuits and if anyone had a problem awarding damages to his client for a fair amount under the circumstances. The following exchange took place:

> JUROR [BARFIELD]: How much?
>
> [COUNSEL FOR LANG]: We're suing for in excess of $70,000. It will be between $70,000 and $80,000.
>
> JUROR [BARFIELD]: It's a damage suit, then?
>
> [COUNSEL FOR LANG]: It's a damage suit. We had the car which was—we bought it for about $13,000 and it was a total loss. We had repairs to the home. She was out of the home from February 26th till Good Friday and had to extensively remodel it. We're essentially asking you for the property involved, okay. We're not having pain and suffering or things like that. You see what I'm getting at? Do you have any problem with that and that situation?
>
> JUROR [BARFIELD]: Do you know the reason for the question?
>
> [COUNSEL FOR LANG]: I understand. I take it from that that you sort of feel like that if I had a sore neck and wanted a million dollars you would have some problems with it. But from what I stated, do you have any problems sitting as a juror in this case?
>
> JUROR [BARFIELD]: I probably don't.

Counsel for Lang subsequently exercised a peremptory strike to excuse Mr. Barfield. Counsel for General Motors then chal-

lenged the strike pursuant to *Batson*, noting that three whites had been struck with peremptory challenges.

The following exchange took place in pertinent part between the trial court and counsel for Lang:

> THE COURT: While one might certainly infer from his question and response that he had some difficulties, as counsel put it, complaining of a sore neck and seeking a million dollars, he might have some difficulty for personal injury, pain and suffering or mental anguish, matters or elements of damage of that nature. But stated he would not have any difficulty in being fair and impartial in assessing, considering damages for loss of property.
>
> Again, the Court finds that that is not a sufficiently independent reason justifying peremptor[ily] excusing a prospective juror who is a white male along with a white defendant and corporate defendant who is representative or of the white race. So that challenge will be denied.
>
> . . .
>
> What is the ultimate make up of the jury, if you have your list there and I assume designated or know which is black, which is white? Is there an inference, any support to your allegation that he's striking whites and has that effectively increase[d] the black members of the jury?
>
> . . .
>
> [COUNSEL FOR LANG]: Four out of the 12 would be black, ...
> [T]he jury questionnaire for Barfield shows that he is 65, retired. ... He has never served as a juror before and he also ... has sued another party for loan default.

Lang argues that none of the three prongs of the *Batson* analysis were satisfied by the evidence, and therefore the trial court's denial of her peremptory strike of Charles Barfield was clearly against the preponderance of the evidence. The reasons asserted by Lang for striking this juror were that he seemed to be one of those people who had some reservations about lawsuits involving damages, he was an older man that was more conservative, he had never served on a jury before, and he had sued another party for loan default. These reasons are race-neutral. They are not peculiar to any

race, and they were sufficient to satisfy the second prong of *Batson*. We therefore agree with Lang that the trial court's finding that Lang did not provide a sufficiently independent, neutral basis for the peremptory strike of Mr. Barfield is clearly against the preponderance of the evidence. We find it unnecessary to discuss the first and third *Batson* prongs with respect to this juror, and we reverse and remand for a new trial on this basis in the cross-appeal.

ISSUES LIKELY TO RECUR ON RETRIAL

Of the remaining issues raised on appeal and cross-appeal, only two are likely to arise again at retrial since the evidence presented at the second trial may well be different from the first. Both involve motions in limine.

■ Chalmers sought to exclude by a motion in limine reports regarding other engine-compartment fires. At the pretrial conference on the motion, the trial court directed the parties to avoid mentioning the evidence in opening statements until the court had a chance to rule on the motion. In connection with that tentative ruling, the trial court commented that as a guide there's got to be some similarity for engine-compartment fires to be relevant. On at least two occasions during the trial, the reports were mentioned and Chalmers sought a mistrial, which was denied by the court. Chalmers argues that the trial court erred in refusing to grant a mistrial on that basis. We do not address the mistrial issue, nor do we rule on the merits of the motion in limine, but we point out that it is incumbent upon the parties to obtain a definite ruling on the motion at retrial.

■ The second motion in limine sought to exclude any reference to Lang's statement in a discovery deposition that she had purchased another Chevrolet Lumina from Chalmers after the fire loss. Lang contended that the evidence was not relevant and that any probative value it might have would be substantially outweighed by the danger of unfair prejudice. The trial court denied the motion. It abused its discretion in doing so because any probative value the evidence might have is substantially outweighed by the danger of unfair prejudice. On retrial, reference to Lang's statement in this regard should be prohibited.

Reversed and remanded on appeal and on cross-appeal.

ROBBINS and GRIFFEN, JJ., agree.

AAA BAIL BOND COMPANY *v.* STATE of Arkansas

CA 95-1065 929 S.W.2d 723

Court of Appeals of Arkansas
Division I
Opinion delivered September 25, 1996

Robert S. Blatt and *Timothy C. Sharum*, for appellant.

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

OLLY NEAL, Judge. AAA Bail Bond Company appeals from an order of the Sebastian County Circuit Court directing that a

$3,000.00 bond issued by AAA to secure the appearance of Pradith Manyphanh be forfeited for AAA's failure to cause Manyphanh to appear at his revocation hearing. AAA advances two points in support of its contention that the order of the trial court was erroneous. We find nothing in the record to merit reversal of the trial court's decision and affirm.

Manyphanh entered a plea of guilty to the charges of breaking or entering and theft of property on December 4, 1987. As a result of the guilty plea Manyphanh received a five-year suspended sentence conditioned upon his payment of $2,586.13 in restitution, $585.25 in fines and court costs, and he was ordered to spend one day in the Arkansas Department of Correction.

On August 4, 1993, the State filed a petition to revoke Manyphanh's probation, stating that he had failed to pay $562.04 of the court ordered restitution and owed $585.25 toward his fine and court costs. Manyphanh was arrested, and on September 4, 1994, AAA issued a bail bond in the amount of $3,000.00 to secure Manyphanh's release. By letter dated September 21, 1994, AAA was notified that Manyphanh's case was scheduled for inquiry as to counsel on September 28, 1994. Manyphanh failed to appear and a bench warrant was issued for his arrest on October 5, 1994.

On February 23, 1995, the Sebastian County Circuit Court ordered a forfeiture of the $3,000.00 bail bond issued by AAA and ordered the company to appear and show cause why the bond should not be forfeited. At the forfeiture hearing, held on July 12, 1995, Manyphanh's attorney stated that he had been informed by someone in the prosecutor's office that the petition to revoke would be dismissed. AAA's counsel stated that he had relied on the information given to Manyphanh's counsel and believed that Manyphanh was free to leave the state, and therefore they thought that there was no reason to have Manyphanh present in court. The court ordered that the entire amount of the bond be forfeited. However, the forfeiture amount was reduced to $2,000.00 at the request of the prosecutor's office.

AAA contends that the bail bond forfeiture order should be reversed because AAA relied on erroneous information given to defendant's attorney by the prosecutor's office or in the alternative that the bond forfeiture amount was excessive.

We begin our analysis of this case with the basic notion

that there are certain duties that a surety must adhere to. It should be noted that the defendant, rather than being held in custody by the state, is released to the surety who assumes custody of him and is responsible to the court for his appearance at any time. *Bryce Bail Bonds, Inc.* v. *State*, 8 Ark. App. 85, 648 S.W.2d 832 (1983). Although the surety is not expected to keep the principal in physical restraint, he is expected to keep close track of his whereabouts and keep him within this state subject to the jurisdiction of the court. *Id.*

In the instant case, AAA received notice from the defendant's attorney that the defendant had left the state because he had been informed that the petition to revoke would be dismissed. AAA continued to rely upon this explanation, even after being served with notice of inquiry as to counsel and the defendant's subsequent failure to appear before the court as directed. In order to fully understand the authority of courts, with respect to a defendant's failure to appear at trial and subsequent forfeiture of bail bond, discussion of the relevant statute is necessary.

Arkansas Code Annotated §16-84-201 provides:

> (a) If the defendant fails to appear for trial or judgment, or at any other time when his presence in court may be lawfully required,... the court may direct the fact to be entered on the minutes, and shall issue an order requiring the surety to appear, on a date set by the court not less than ninety (90) days nor more than one hundred twenty (120) days after the issuance of the order, to show cause why the sum specified in the bail bond... should not be forfeited....
>
> ....
>
> (c) If the defendant is surrendered, arrested, or good cause is shown for his failure to appear before judgment is entered against the surety, the court shall exonerate a reasonable amount of the surety's liability under the bail bond. *However, if the surety causes the apprehension of the defendant, or the defendant is apprehended within one hundred twenty (120) days from the date of receipt of written notification to the surety of the defendant's failure to appear, no judgment or forfeiture of bond may be entered against the surety, except as provided in subsection (e) of this section.*

Thus, pursuant to code provisions, AAA could have received a portion or all of the $3,000.00 it had issued as surety for the defendant if it had secured Manyphanh's appearance before the court. However, where, as in this case, the surety failed to show that it exercised the effort required to return or attempt to effect the return of the defendant to custody, the forfeiture must be upheld. It must be noted that since Manyphanh was released to the custody of AAA, as surety, any reliance on the assertions of the defendant's attorney was in total disregard of the basic notion that it is the surety who is responsible for securing the appearance of its principal when so directed by the court.

It must also be noted that AAA's continued reliance upon the representations made to defendant's counsel were unreasonable in light of the fact that the court ordered forfeiture of the bond on February 23, 1995, and as of July 12, 1995, AAA had taken no steps to secure the return of the defendant.

AAA also contends that the forfeiture amount was excessive. As we have stated on previous occasions, an argument not raised at the trial court level will not be heard for the first time on appeal. *Arkansas Office of Child Support* v. *House,* 320 Ark. 423, 897 S.W.2d 565 (1995).

Affirmed.

ROGERS and MAYFIELD, JJ., agree.

Debra CARPENTER *v.* DIRECTOR of Arkansas Employment Security Department and Stark Manufacturing, Inc.

E 94-307 929 S.W.2d 177

Court of Appeals of Arkansas
Division I
Opinion delivered September 25, 1996

Jeannie L. Denniston, for appellant.

Allan Pruitt, for appellees.

OLLY NEAL, Judge. Appellant Debra Carpenter appeals a decision of the Arkansas Board of Review which affirmed a decision of the Appeal Tribunal and an earlier determination by the Arkansas Employment Security Department that appellant should be disqualified from receiving unemployment benefits under Ark. Code Ann. § 11-10-513 (a) (1987). We believe that the Board of Review's decision was not supported by substantial evidence and should be reversed.

At the Appeal Tribunal hearing, Ms. Carpenter testified that after she had worked at Starks Manufacturing for three or four months, she was notified that appellee intended to close its plant in Ozark, Arkansas. According to appellant, she refused reassignment to the facility located at Paris because the transfer would require additional driving. Appellant's family had only one automobile and Starks did not offer to increase its employees' rate of compensation. Appellant also found the $3.00 a day for sixty days' travel expenses offered by Stark insufficient to cover the additional travel expenses that would be generated. Ms. Carpenter stated that prior to the closure of the Ozark plant, she only drove ten miles to work, one-way, and that accepting the reassignment would necessitate at least sixty miles of driving daily, much of which would be on narrow, winding mountainous roads, sometimes in inclement weather. Finally, appellant Carpenter testified that, although the employer intimated to its employees that they would remain eligible for unemployment benefits should they not accept the reassignment, the employer denied such statements and controverted all claims for benefits. Ms. Carpenter's last day of work for appellee was August 25, 1994, the day Stark's Ozark facility was closed.

On appeal, we review the findings of the Board in the light most favorable to the prevailing party, only reversing where the Board's findings are not supported by substantial evidence. *Roberson* v. *Director of Labor*, 28 Ark. App. 337, 775 S.W.2d 82 (1989). Here the Board found that appellant left her last work for reasons which do not constitute good cause in connection with the work and that appellant's decision not to commute to the new location constituted failure to accept suitable work when offered without good cause.

Good cause has been defined as:

> [A] cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment. (Citation omitted). It is dependent not only on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting, but also on the reaction of the average employee.

Perdrix-Wang v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). Similarly, good cause has also been found to mean:

> A justifiable reason for not accepting the particular job offered. In other words, to constitute good cause, the reason for refusal must not be arbitrary or capricious and the reasons must be connected with the work itself.... [T]he question of good cause must be determined in the light of the facts in each case.

Wacaster v. *Daniels*, 270 Ark. App. 190, 603 S.W.2d 907 (1980). The fact that Ms. Carpenter continued to work for appellee through the day the Ozark plant closed, forecloses any finding of substantial evidence to support a finding that she left her last work for reasons which do not constitute good cause in connection with the work.

Although the relevant statute, Ark. Code Ann. § 11-10-515 establishes the distance of available work from a claimant's residence as a relevant factor in consideration of whether a claimant has refused suitable employment, our case law has not established a bright-line test for determining what distance is unreasonable. We acknowledged in *Rowlett* v. *Director*, 45 Ark. App. 99, 872 S.W.2d 83 (1994), that, "under normal conditions, a distance of several hundred miles between home and work would make commuting

unreasonable," but, on the other hand, held in *Roberson v. Director of Labor*, 28 Ark. App. 337, 775 S.W.2d 82 (1989), that a fifteen-mile commute was not unreasonable. We note that the issue of distance may not be isolated from other relevant factors, including the economic impact of the commute on the particular claimant. *See Jackson* v. *Daniels*, 269 Ark. 74, 600 S.W.2d 427 (1980).

In the case before us, in addition to the increased distance of travel necessitated by appellee, there was evidence that commuting employees would have to undertake the additional safety hazard presented by the inherent condition of the roads in the area. Also, appellant earned only $5.25 an hour and presented evidence that after the initial sixty days of compensation at $3.00 a day for travel expenses, the increased costs of gasoline would reduce the amount of her take-home. Based on those factors, we hold that the Board's findings that Ms. Carpenter left her last work for reasons that do not constitute good cause in connection with the work and that her decision not to commute constituted failure to accept suitable work when offered without good cause are not supported by substantial evidence.

Reversed.

MAYFIELD and ROGERS, JJ., agree.

Jerry PENNINGTON d/b/a K & K Construction Company *v.* Walter D. RHODES and Georgetta B. Rhodes, His Wife

CA 95-847 929 S.W.2d 169

Court of Appeals of Arkansas
Division II
Opinion delivered September 25, 1996
[Petition for rehearing denied November 6, 1996.]

[redacted]

Brockman, Norton & Taylor, by: *C. Mac Norton*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Appellees Walter D. Rhodes and Georgetta B. Rhodes, his wife, sued Jerry Pennington d/b/a K & K Construction Company ("Pennington" or "appellant") for breach of contract in the Circuit Court of Jefferson County. Their complaint alleged that Pennington contracted with them to build a house during the summer of 1988, and that Pennington built the house and was paid $68,541.40 in October 1988. The complaint also alleged that appellees later discovered defective workmanship and materials that caused structural damage to the foundation, ma-

sonry, walls, framing, roof, and floor joists of the house, for which appellees sought judgment for damages totaling $150,000. Pennington admitted contracting with appellees, building their house, and being paid $68,541.40, but denied breaching their contract and asserted that he was not notified about alleged defects in materials and workmanship so that he could cure them if they existed.

The case was tried to a jury over two days, and the jury returned a verdict awarding damages to appellees of $68,541.40, the precise amount they paid Pennington. Pennington filed a motion for judgment notwithstanding the verdict, and, in the alternative, for new trial, but his motion was denied. Judgment was, therefore, entered against him for $68,541.40, plus costs of $109.75, and attorney fees of $6854.14, from which Pennington has brought this appeal. He contends that the trial court erred in denying his motion for directed verdict at the end of appellees' case, erred in denying his post-trial motion for judgment notwithstanding the verdict or for new trial because the jury verdict is not supported by the evidence, and also that the trial court should have sustained his motion for mistrial based upon the closing argument by counsel for appellees. We hold that the verdict was not supported by the evidence. Therefore, we reverse and remand for new trial.

PENNINGTON'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

Rule 50(a) of the Arkansas Rules of Civil Procedure provides:

> [a] party may move for a directed verdict at the close of the evidence offered by an opponent and may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the extent as if the motion had not been made. A party may also move for a directed verdict at the close of all of the evidence.

Rule 50(b) provides:

> [w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not more than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon

> set aside and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not returned, that party may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed, or it may order a new trial.

The intent of Rule 50(a) is to require a party testing the sufficiency of the evidence to first submit the question to the trial court, thereby permitting that court to rule at the conclusion of all the evidence but prior to verdict, and thus preserving the specific question for appeal. *Willson Safety Products* v. *Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990). On the other hand, the motion for judgment n.o.v. is permitted by Rule 50(b) for the express purpose of not only again raising the question of sufficiency of the evidence but also all other questions properly preserved during trial, all of which are to be considered by the court in light of the verdict rendered. *Id.* The motion for a directed verdict is a condition precedent to moving for a judgment notwithstanding the verdict based on the reasoning that a motion for judgment notwithstanding the verdict is technically only a renewal of the motion for directed verdict made at the close of the evidence. *Wheeler Motor Co., Inc.* v. *Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Appellate review of a motion for a directed verdict entails determining whether the nonmovant's proof was so insubstantial as to require a jury verdict, if entered in his behalf, to be set aside. *Nicholson* v. *Simmons First Nat'l Corp.*, 312 Ark. 291, 849 S.W.2d 483 (1993). The standard of review in determining the propriety of refusing a directed-verdict motion is whether the verdict of the jury is supported by substantial evidence, that is, evidence that is sufficient to compel a conclusion one way or the other and that goes beyond suspicion or conjecture. *Barnes, Quinn, Flake & Anderson, Inc.* v. *Rankins*, 312 Ark. 240, 848 S.W.2d 924 (1993).

Pennington appears to concede that the appellees presented enough evidence to justify denial of his motion for directed verdict

as to breach of contract, and the record contains considerable evidence that the house Pennington constructed was defective. Appellee Georgetta Rhodes and seven other witnesses testified about defects in the house. The sheetrock was cracked despite Pennington's effort to repair it after appellees informed him about that problem. Although the house is totally electric and the Description of Materials provided that it would have a 200 ampere breaker, it was constructed with a 150 ampere breaker which could cause problems with inadequate voltage, according to one expert witness. Although the Description of Materials called for nine and one-fourth inches of insulation to be provided at the ceiling, witnesses testified that less than six inches was found. Two architects, a civil engineer, a retired housing inspector and electrician, and two building contractors testified concerning defects in the roof, walls, brick veneer, and foundation of the house. Although Pennington did not concede that the house was defective, the record contains no proof that these defects were not present.

However, Pennington argues that he was entitled to a directed verdict because he was not given notice of the defects and a reasonable opportunity to correct them before suit was filed. In *Pickler* v. *Fisher*, 7 Ark. App. 125, 644 S.W.2d 644 (1983), we rejected the notion that one who purchases what is alleged to be a defective new dwelling must give notice to the seller-builder of each and every defect complained of and that upon failure to do so will have waived any defects not contained in a written notice. While we declined to hold the provisions of the Uniform Commercial Code applicable to all cases involving breach of warranty in new housing, we stated that the buyer is not required to list each and every objection that he would rely on to constitute the breach. Instead, we held that notification need only be with sufficient clarity to apprise the vendor-builder that a breach of implied warranty is being asserted and to give him sufficient opportunity to inspect the premises and correct the defects. *Id.* The sufficiency of the notice and whether it was given within a reasonable time are ordinarily questions of fact for the trier of fact to determine, and we observed that in doing so the trier of fact could properly consider the superior position of the builder in determining the extent of a defect, the need for correcting it, and the consequences for failing to do so. *Id.*, 7 Ark. App. at 129, 644 S.W.2d at 646.

There was evidence in the case now before us that Pen-

nington was notified at least three times about problems with the house. He attempted to repair some of the problems, but apparently urged the appellees to let some of the observable cracks in walls "run their course." Later investigation by others revealed serious structural defects with the house, as already mentioned. Suffice it to say that the record contains ample proof to support the apparent conclusion by the jury that the house was defective and that Pennington knew about the defects so that he could have undertaken corrections had he been inclined to do so. Therefore, the trial court properly denied his motion for directed verdict on the notice issue.

Pennington also moved for directed verdict at the close of appellees' case on the ground that appellees failed to present proof concerning the value of the defective house. There was proof from three witnesses concerning the estimated cost of repairing the defects. William W. Hope, a civil engineer, testified that it would cost at least $58,000 to repair the foundation, replace and repair defects in brick veneer, walls and floors, repair the roof framing, and provide oversight and design for the work, and that although the house could be repaired the cost could exceed the $58,000 estimate. James L. Scott, a retired builder, testified that the cost to repair the house would be $41,750, but that he did not believe that the house could be repaired and that there would be "significant waste of materials" in trying to repair it. Scott testified that he would not attempt to repair the house, but that he would advise the owners to level it and rebuild. Michael James Ott, a homebuilder and repair and remodeling contractor, estimated that the cost to repair the house with its defects would be $43,540, and he believed that the house could be repaired. However, he emphasized that his estimate did not include foundation repairs which, in his view, would cost more than the total estimated for the remaining work. None of these witnesses was asked to estimate the value of the house with its defects, only the cost of repairing the defects.

■ In cases involving breach of warranty for a newly constructed house, Arkansas has recognized two ways of proving damages. The preferred measure of damages in construction contract cases involving new structures is to use the cost of repairing the defects so that the vendee-owner recovers an amount that will repair the house to the quality expected when the parties struck their bargain. *Daniel* v. *Quick*, 270 Ark. 528, 606 S.W.2d 81 (1980). The other method is to fix damages as the difference in the house's

value as defective versus its value without defects. *See Carter* v. *Quick*, 263 Ark. 202, 563 S.W.2d 461 (1978). In *Williams* v. *Charles Sloan, Inc.*, 17 Ark. App. 247, 706 S.W.2d 405 (1986), we reversed a judgment based on a jury verdict of $28,000 in favor of purchasers of a defective house because the verdict was not supported by the evidence based on the difference in value measure of damages, and we cited the two methods of determining damages where breach of a construction contract results in incomplete or defective construction. The Restatement (Second) of Contracts, § 348(2) (1979) defines these methods as follows:

> § 348. Alternatives to Loss in Value of Performance
>
> . . . .
>
> (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on
>
> (a) the diminution in the market price of the property caused by the breach, or
>
> (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

Comment c to Section 348 speaks to the incomplete or defective performance situation, and is instructive concerning when the cost-of-repairs standard may be preferred over the diminution-in-value standard:

> Sometimes, especially if the performance is defective as distinguished from incomplete, it may not be possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects. Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be under-compensated by being limited to the resulting diminution in the market value of his property.
>
> Sometimes, however, such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that the cost to remedy the defects will be clearly disproportionate to the probable loss in value

> to the injured party. Damages based on the cost to remedy the defects would then give the injured party a recovery greatly in excess of the loss in value to him and result in a substantial windfall. Such an award will not be made. It is sometimes said that the award would involve "economic waste," but this is a misleading expression since an injured party will not, even if awarded an excessive amount of damages, usually pay to have the defects remedied if to do so will cost him more than the resulting increase in value to him. If an award based on the cost to remedy the defects would clearly be excessive and the injured party does not prove the actual loss in value to him, damages will be based instead on the difference between the market price that the property would have had without the defects and the market price of the property with the defects. This diminution in market price is the least possible loss in value to the injured party, since he could always sell the property on the market even if it had no special value to him.

Restatement (Second) of Contracts § 348 cmt. c (1979).

Although the Restatement approach to determining if the repair costs are disproportionate looks to the probable loss of value caused by the defective construction, Arkansas looks to whether the repair costs are disproportionate to the results to be obtained from curing the defects where the building is a dwelling built on the owner's property for his occupancy. *Carter* v. *Quick*, 263 Ark. 202, 563 S.W.2d 461 (1978). In that case the Supreme Court addressed the proper measure of damages applicable in cases involving a suit by a vendee-owner against a vendor-builder alleging defective construction of a new house, and observed that the underlying purpose in awarding damages for breach of contract is to place the injured party in as good a position as he would have been had the contract been performed. *Id.* (citing *Rebsamen Companies, Inc.* v. *Arkansas St. Hosp.*, 258 Ark. 160, 522 S.W.2d 845 (1975)). However, the Court also observed that the difference in the value of a building as erected and its value if it had been constructed according to the contract is not always appropriate where the contractor's performance is defective, particularly where a house is built on the owner's property for his own occupancy and the aesthetic value of enjoying a properly constructed home is involved. *Carter, supra.*

We stated in *Williams* that although judicial preference for the cost-of-repairs measure and the economic-waste exception is an effort to avoid the situation where the contractor is required to tear down a structure or otherwise commit economic waste to correct a defect that does not detract from the market value as much as it would cost to repair it, this preference for the cost-of-repair measure and the economic-waste exception does not limit the injured buyer to only one measure of damages. 17 Ark. App. at 251, 706 S.W.2d at 407. Writing for the court in *Williams*, then Judge (now Justice) Corbin stated that "the court would be correct in applying the cost of repairs measure to determine the damages where the injured buyer asserts damages based on the difference in market value *and the contractor presents evidence that the cost of repairing the defects would be less than the difference in market value.*" *Id.* (Emphasis added.) We ultimately held that the $28,000 verdict for the homeowner in *Williams* was not supported by substantial evidence because the evidence in that case only supported a verdict of $6,500 based on the difference between the market value of the house as defective at the time of the breach, and its value had it been constructed in accordance with the contract. However, we rejected the builders' contention that they were entitled to a judgment notwithstanding the verdict because the trial court had used an improper measure of damages (difference in market value) where the builders presented no evidence that cost of repairs was the correct measure of damages.

The same reasoning applies in this case, although we are presented with the opposite situation. Here, the buyers presented proof concerning the cost of repairs but no proof on the difference in market value of their house. As the *Williams* opinion indicated, preference for the cost-of-repairs measure and the economic-waste exception does not limit the injured buyer to only one measure of damages. If Pennington believed that cost of repairs was not the correct measure of damages, he had an opportunity to present evidence on the difference in market value caused by the defects. The mere fact that appellees presented no proof on the difference in market value did not mean that the jury was forced to conjecture or surmise before it could return a verdict on the cost-of-repairs measure of damages.

However, once appellees presented sufficient proof to go to the jury on the cost-of-repairs measure, the burden shifted to

Pennington to produce evidence showing either (a) that repairing the defects was unreasonable because it would have involved more destruction of quality workmanship than would have been warranted considering the value likely to be added to the house by making the repairs, or (b) that the repair costs would have been disproportionate to the probable increase in value to appellees resulting from proper construction, so that difference in value would have been the proper measure of damages. Either approach would have required proof regarding the value of the house as defectively constructed and its value if constructed without defect as the contract contemplated. Pennington clearly did not produce that proof, either when appellees rested their case or at the close of all the proof, so the trial court properly denied his motion for directed verdict.

It is true that appellees presented proof from a real-estate appraiser showing the value of the house to be $87,000 without defects. It is also true that appellees paid $68,541.40 to Pennington under their contract. Nevertheless, the contract price certainly should not be deemed the value that the parties agreed the house would have due to the defective construction. There was no proof regarding the value of the house as defectively constructed. The evidence was conflicting on whether the house could be repaired, or whether repairing it was economically feasible, thus presenting a question of fact for the jury to resolve. Before the cost-of-repairs measure of damages could be deemed improper on the ground that the cost of repairs was disproportionate to the probable value that might be gained from making them, Pennington was obligated to either prove that it would have been unreasonable to repair the defects because doing so would have necessitated the loss of quality construction greatly exceeding whatever benefit that might have been added to the house by the repairs, or prove that the repair costs were disproportionate to the value that would have been added to the house by making the repairs. Either approach required proof of what the house is worth in its defective state. Pennington's failure to present that proof justified denial of his motion for directed verdict and his motion for judgment n.o.v. based on the measure-of-damages argument.

In summary, the general rule preferred in Arkansas in cases involving defective performance of a contract for a newly constructed house is that the cost of correcting the defects, rather

than the difference in value, is the proper measure of damages where the repairs will not involve unreasonable destruction of quality construction, or the repair cost will not be grossly disproportionate to the benefit to be obtained from making the repairs. This standard applies even when the value of a newly constructed but defective house exceeds the contract price, because the owner's interest "is in having defective construction corrected so that he and his family may enjoy a properly constructed dwelling and he is not concerned with offsetting any loss on a possible resale of the property. In such a case, aesthetic values are properly involved." *Carter* v. *Quick*, 263 Ark. at 209; 563 S.W.2d at 465. Nevertheless, the buyer-owner is not limited to the cost-of-repairs measure of damages. *Williams, supra.* The seller-builder of the defective new dwelling has the burden of proving that the cost-of-repairs standard is improper. This proof may take the form of evidence showing that repairing the defects will involve unreasonable destruction of quality construction or that the cost of repairs would be grossly disproportionate to the increase in value to be obtained from making them. If the seller-builder fails to present that proof, as in this case, he is not entitled to a directed verdict or judgment notwithstanding the verdict where the owner has introduced proof showing the cost of repairs.

PENNINGTON'S MOTION FOR NEW TRIAL

Pennington also contends that the trial court erred by denying his motion for new trial pursuant to ARCP 59, arguing that the verdict is clearly contrary to the preponderance of the evidence and clearly contrary to law. We agree that the verdict is not supported by the evidence.

The jury returned a verdict for appellees of $68,541.60, the precise amount that appellees paid Pennington under their contract. There was no proof that this amount equaled the cost of repairing the defects to the house. There was no proof that the house was worthless; indeed, appellees introduced proof through witness Hope, the civil engineer, that the house was worth repairing even if the cost of repairs equaled or exceeded $58,000. Although another witness testified that he did not believe that the house could be repaired and would not counsel trying to repair it, that testimony did not mean that the house was worthless, rather that the witness did not believe that the defects could be repaired.

The jury was apparently persuaded to return a verdict awarding the appellees the amount they paid Pennington based on the closing argument by counsel for appellees. During that argument, counsel for appellees told the jury that it could return a verdict awarding the money that appellees had paid. Counsel for Pennington objected. The trial court overruled the objection on the ground that arguments of counsel are not evidence. We decline to disturb that ruling out of deference to the exercise of the trial judge's discretion, and find no abuse of discretion in the ruling. *See also Fraught* v. *Ligon Specialized Hauler, Inc.*, 273 Ark. 259, 619 S.W.2d 627 (1981).

We are constrained, however, to hold that the verdict is not supported by the evidence where it did not conform to any of the cost-of-repairs proof and the record contains no proof about the value of the house as defectively constructed. In effect, the jury awarded the appellees the same relief that they might have obtained upon a complaint for rescission of the contract and restitution. The fundamental difference, however, is that while return of the purchase price is permissible in an action for rescission on the theory that the fundamental purpose of the contract has failed resulting in the complaining party receiving *no benefit* from its bargain, an action for breach of contract implies that the complaining party received *less benefit* than it had a right to expect because of the other party's breach. In this case, appellees proved that they paid $68,541.40, and that Pennington built a house that was defective. They sued contending that Pennington had built a defective house, not that the house is worthless. Therefore, the jury verdict awarding them their purchase price is not supported by the evidence and must be reversed.

The appellees produced evidence through one witness that it would cost at least $58,000 to repair the defects. Pursuant to our decision in *Williams* v. *Charles Sloan, Inc.*, *supra.* we reverse the judgment below and remand to the trial judge with an instruction that the verdict be reduced to $58,000 to conform to the evidence, if appellees agree. If appellees do not agree to the remittitur, the trial judge should enter an order granting Pennington's motion for new trial.

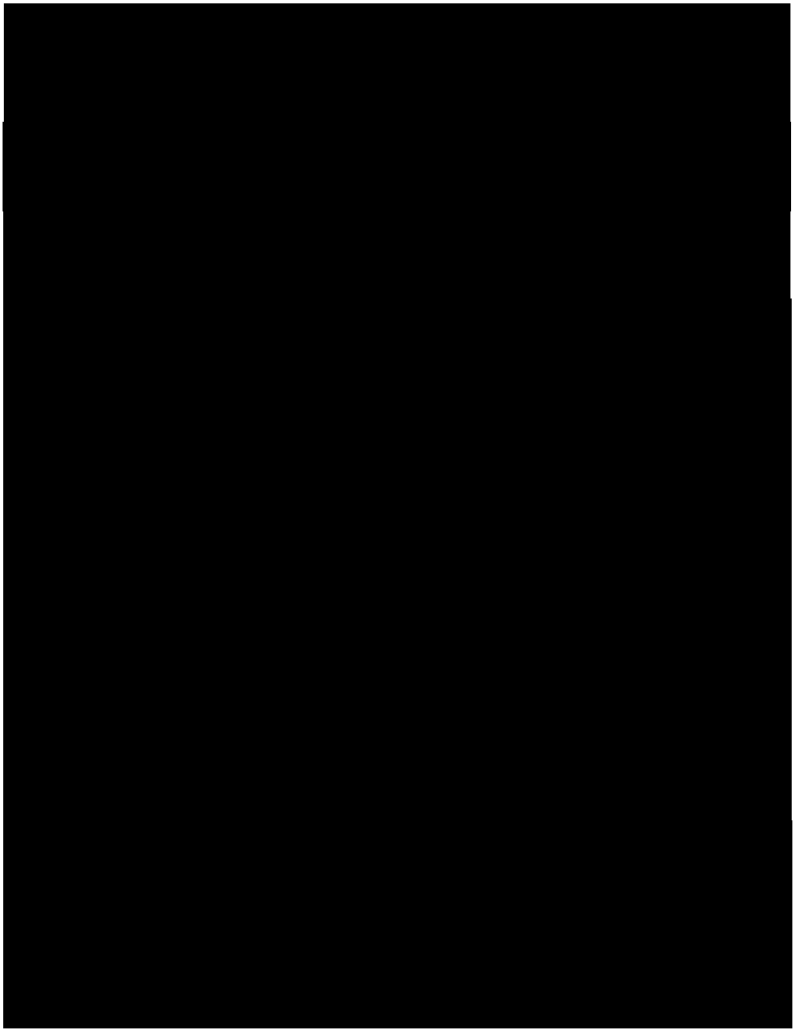
Reversed and remanded.

ROBBINS and STROUD, JJ., agree.

Teresa O'NEAL *v.* Robert Wesley O'NEAL

CA 95-1135 929 S.W.2d 725

Court of Appeals of Arkansas
Division III
Opinion delivered October 2, 1996



J. Patrick McCarty, for appellant.

Annie Powell and *Eddie N. Christian*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Teresa O'Neal, and the appellee, Robert Wesley O'Neal, were married in October 1993. The final divorce decree, entered June 28, 1995, provided in part that $35,000.00 that appellee received from his employer, Smith Barney, be characterized as deferred compensation and nonmarital in character. Teresa O'Neal appeals this finding and the denial of her motion for continuance. We affirm.

Appellant first argues that the chancellor erred in ruling that the moneys appellee received were nonmarital property.

Chancery cases are reviewed *de novo* on appeal, but the appellate court will not disturb the chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Jones* v. *Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

Appellee changed jobs after the parties were separated but before the divorce decree was entered. At the time of the final divorce hearing, appellee had a right to but had not received the $35,000.00 from his new employer, Smith Barney. Appellee said that he signed an employment contract with Smith Barney on April 21, 1995, prior to the final divorce hearing on May 10, 1995. His employment contract provided that he would receive a $35,000.00 advance as compensation during the period of job transition and as he developed clientele. Appellee said that to avoid repaying the money, he had to be employed by Smith Barney a minimum of four years.

Clifton Ladd, a Smith Barney manager, testified that the money was a "forgivable loan," with twenty-five percent of the loan being forgiven for each year that appellee remained through the four years. Ladd testified that the forgiven portion of the loan becomes taxable income to appellee and that the loan was part of appellee's compensation package.

Appellant argues that the $35,000.00 is marital property because appellee had access to it prior to entry of the divorce decree. It is true that assets acquired after separation and prior to

divorce are marital property. *Cavin* v. *Cavin*, 308 Ark. 109, 823 S.W.2d 843 (1992). In considering whether property is marital, the determining factor is the time that the right to the property is acquired. *Dunn* v. *Dunn*, 35 Ark. App. 89, 811 S.W.2d 336 (1991). Here, even though appellee acquired the right to the $35,000.00 during the marriage, he did not *earn* it during the marriage. The testimony was that the money was compensation for future services and contingent on appellee's future performance; thus, it was not earned during the marriage and is not marital property. *See Wilson* v. *Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987); *Dunn*, *supra*; *Dillard* v. *Dillard*, 28 Ark. App. 217, 772 S.W.2d 355 (1989). The court's determination that the money was advanced compensation and not marital property is not clearly erroneous.

Next, appellant argues that it was error to deny her motion for continuance. The parties separated in March 1995, and a final hearing was set for May 10, 1995, because the initial trial setting of May 16, 1995, created a schedule conflict for appellant's counsel. Appellant's attorney agreed to the expedited trial date conditioned on appellee's attorney timely supplying information requested in interrogatories which appellant served on appellee on April 4, 1995. Appellee responded on May 5, 1995. Appellant moved for a continuance based on new information revealed in the interrogatories regarding appellee's not yet received $35,000.00 payment. Counsel renewed his motion at the beginning of the May 10 hearing, and the court denied it stating that "if it develops that we need more information, more fully developed, then we will make arrangements for that to occur." Appellant testified that she did not have enough information regarding her interest in the money. During the trial the money was discussed at length; however, appellant's counsel never requested further information nor renewed the motion for continuance.

■■ Whether to grant a continuance to allow further discovery is a matter within the trial court's discretion. *Alexander* v. *Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995). For this court to reverse the denial of the continuance, appellant must show that the trial court abused its discretion and that the additional discovery would have changed the outcome of the case. *Id.* Because all of the evidence before the court conclusively demonstrated that the money was compensation for future services, we cannot determine that the court abused its discretion in denying a continuance or that

appellant demonstrated that additional discovery would have changed the outcome.

Appellee, alleging that appellant's abstract failed to comply with the appellate rules, asks for an award of costs for preparation of a supplemental abstract. We find no merit in this argument, and the motion is denied.

Affirmed.

JENNINGS, C.J., and HAYS, Special Judge, agree.

Keith CRAWFORD *v.* PACE INDUSTRIES

CA 95-1266 929 S.W.2d 727

Court of Appeals of Arkansas
Division II
Opinion delivered October 2, 1996

Conrad T. Odom, for appellant.

James D. Sprott, for appellee.

JOHN B. ROBBINS, Judge. Appellant Keith Crawford filed a workers' compensation claim, alleging that he injured his back while working for appellee Pace Industries on the evening of November 2, 1993. The Administrative Law Judge found that he was entitled to benefits. However, the Commission reversed, finding that Mr. Crawford failed to prove that he sustained a compensable injury. Mr. Crawford now appeals, raising three points for reversal. First, he argues that the Commission erred in requiring him to

identify a specific time and place of his injury. Next, Mr. Crawford contends that the Commission erred in refusing to recognize a CT scan as objective medical evidence. Finally, Mr. Crawford argues that the Commission erred in determining that he failed to prove a compensable injury by a preponderance of the evidence. We find no error and affirm.

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

In the instant case, Mr. Crawford testified on his own behalf. He stated that he worked the 3:00 p.m. to 11:00 p.m. shift for the appellee and that his job included lifting stacks of aluminum castings weighing from 60 to 100 pounds. Mr. Crawford testified that, on the evening of November 2, 1993, he was performing his duties when his back started hurting. Mr. Crawford finished his shift that night and worked an eight-hour shift the next day. Then, on November 4, 1993, he first informed his supervisor that he had suffered a work-related injury on November 2, 1993. Mr. Crawford subsequently sought medical treatment, including visits to the hospital emergency room on November 4, 1993, and November 9, 1993.

Mr. Crawford's supervisor, David Rudisel, recalled that he was first informed of Crawford's alleged back injury on the evening of November 4, 1993. He testified that he did not fill out an accident report, because the injury was not reported on the day that it occurred. Steve Flynn, personnel manager for Pace Industries, also testified on behalf of the appellee. He was informed of the alleged back injury on November 5, 1993. At that time, Mr. Flynn determined that the injury was not compensable. Mr. Flynn stated, "I based this conclusion on the lag time between when Crawford allegedly hurt himself, the fact that he could point to no specific

incident, and based on [Crawford] stating to me, and his supervisor that he wasn't sure how he hurt himself."

Mr. Crawford's first argument on appeal is that the Commission misapplied the law in requiring him to identify the time and place that his injury occurred. Arkansas Code Annotated § 11-9-102 (Repl. 1996) provides, in pertinent part:

> (5)(A) "Compensable injury" means:
>
> (i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, 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 of occurrence;
>
> (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
>
> * * *
>
> (b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

Mr. Crawford asserts that, because he was claiming an injury to his back, he was not obligated to prove the time and place of the injury.

Mr. Crawford's first argument fails because the Commission's decision to deny benefits was not based on his failure to prove the time and place of his back injury. In its opinion, the Commission mentioned that, under Act 796 of 1993, a claimant must show that an injury is caused by a specific incident identifiable by time and place unless the alleged injury falls under an exception to this general rule. However, in denying Mr. Crawford's claim the Commission gave the following explanation:

> In the present claim, we find that the claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment

> on November 2, 1993, as he alleges. Other than the claimant's own testimony, there is no evidence to support his contention that he sustained an injury on November 2, 1993. Furthermore, his actions and statements to others are not consistent with his contention that he sustained a work-related injury on that date. In this regard, he did not report his alleged back problems until he had almost completed his shift on November 4, 1993, and, when he did report the problems, both Mr. Rudisel and Mr. Flynn testified that he indicated that he did not know whether he had injured his back at work or elsewhere. Notably, despite the severity of the condition described by the claimant, he did not seek any medical treatment whatsoever from November 9, 1993, to March 1, 1993 [*sic*]. Consequently, any conclusion that the claimant injured his back at work would be based on speculation and conjecture, and speculation and conjecture can never be substituted for credible evidence, no matter how plausible. *Dena Construction Co.* v. *Herndon*, 264 Ark. 791, 575 S.W.2d 151 (1980).

From the Commission's opinion, it is clear that it made no finding as to whether or not Mr. Crawford proved the time and place of an injury. Rather, it found his testimony that he sustained a work-related injury to be incredible, and further found that his claim was barred because he failed to support his claim with objective medical evidence.[1]

Mr. Crawford next takes issue with the Commission's finding that his claim of injury was not met with objective medical findings. Specifically, Mr. Crawford asserts that a CT scan provided objective evidence of his back injury.

■ We find substantial evidence to support the Commis-

[1] We direct appellant's counsel to Rule 4-2(a)(6) of the Arkansas Rules of the Supreme Court and Court of Appeals, which provides that "[t]he appellant's abstract or abridgment of the record should consist of an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision." (Emphasis in original.) In the present appeal, appellant's counsel was grossly deficient in abstracting the opinion of the Commission. Appellant's abstract was misleading in that it purported to reflect that the Commission required appellant to prove the time and place of his back injury, while the record clearly demonstrates the contrary.

sion's finding in this regard. The records from Mr. Crawford's emergency room visits indicate nothing more than subjective complaints of pain. In addition, the CT scan that was performed on March 1, 1994, also failed to confirm any objective signs of injury. The post-operative report stated that "[n]o disc protrusions suggestive of disc herniation are recognized." The report concluded with the following impression:

> No significant abnormalities identified. The minimal degree of disc bulging noted at the three levels covered, is probably within the limits of normal.

After examining Mr. Crawford and reviewing the report from the CT scan, Mr. Crawford's family doctor noted "no marked abnormalities" and suggested that Mr. Crawford return to work. Upon review of the medical evidence presented, we cannot find that the Commission erred in its determination that Mr. Crawford's claim was not supported by objective medical findings.

Mr. Crawford's remaining argument is that the Commission erred in its assessment of the facts and in finding that he failed to prove a compensable injury. He asserts that he was a credible witness and that his account of his injury was uncontradicted. He submits that the Administrative Law Judge was in a better position than the Commission to judge credibility, and that we should defer to the Administrative Law Judge's findings.

■ We first address Mr. Crawford's assertion that the Commission and this court should defer to the credibility determinations that were made by the Administrative Law Judge. It is well-settled that the Commission reviews an ALJ's decision de novo, and it is the duty of the Commission to conduct its own factfinding independent of that done by the ALJ. *See Willmon* v. *Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). Moreover, in reviewing workers' compensation cases, this court reviews only the findings of the Commission and ignores those of the ALJ. *Scarbrough* v. *Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991); *Mack* v. *Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989); *Tyson Foods, Inc.* v. *Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988); *Oller* v. *Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Therefore, any reliance by Mr. Crawford on the findings of the ALJ was misplaced.

■ We have often stated that the weight and credibility of a

witness's testimony are exclusively within the province of the Commission, and the Commission does not have to believe the appellant over other evidence presented. *See Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). In the instant case the Commission noted that Mr. Crawford's testimony was uncorroborated and the Commission was presented with evidence that Mr. Crawford failed to report any injury until two days after it allegedly occurred. Moreover, the Commission was not convinced from the medical evidence presented that Mr. Crawford had, in fact, suffered any injury. The Commission was entitled to weigh the evidence presented and conclude that Mr. Crawford failed to prove that he injured his back in the manner described, and we find that this conclusion is supported by substantial evidence.

Affirmed.

STROUD and GRIFFEN, JJ., agree.

James DRAY *v.* DIRECTOR, Employment Security Department, and City of Bentonville

E 94-171 930 S.W.2d 390

Court of Appeals of Arkansas
Division I
Opinion delivered October 2, 1996

Conrad T. Odom, for appellant.

Allan Pruitt, for appellees.

OLLY NEAL, Judge. Appellant James Dray, a former sergeant of the Bentonville Police Department, takes this appeal from an order affirming the denial of his request for unemployment benefits entered by the Arkansas Board of Review on June 29, 1994. The Board agreed with the Arkansas Appeal Tribunal in its findings that the Appeal Referee presiding at the hearing on appellant's claim correctly found that appellant was discharged for misconduct connected with his employment. We disagree and reverse the Board's decision.

Appellant's alleged work-related misconduct occurred about 2:00 a.m., December 20, 1993, at the Bentonville Police Department. On that date, appellant was notified by one of his fellow officers that appellant's 15-year-old son, Casey, had been arrested on a charge of public intoxication, and would only be released to a parent or legal guardian. When appellant arrived at the police station, his son was very intoxicated, argumentative, and belligerent toward the police officers who arrested him and toward his father. Appellant slapped his son on the face twice in response to the conduct. Appellant was terminated effective January 25, 1994, and on March 2, 1994, was notified by the Arkansas Employment Security Department of his disqualification to receive benefits.

At the hearing before the Appeal Tribunal, appellant testified that prior to his termination he had been employed by the City of Bentonville as a police officer for almost ten years. Mr. Dray stated that when he received the call from the police department concerning his son's arrest, he was off duty on sick leave due to an accident he had in November 1993. Appellant was not in uniform when the incident occurred. According to Mr. Dray, he had no responsibilities that called for contact with juveniles and would not have been at the police station if the juvenile who was arrested had not been his son. Mr. Dray admitted that he struck his son in the face and testified that he did so because his son "smarted off" to him after being admonished for being disrespectful to other officers.

Appellant also presented documentary evidence consisting of his own Employment Security Department Worksheet and State-

ment concerning his discharge, the statement of City of Bentonville's Mayor, John W. Fryer, concerning the discharge and transcripts of interviews with the police officers who witnessed the incident. Appellant's worksheet reflected that appellant had been issued a manual containing rules and regulations of the employer in 1991 and that at the time of the issuance, appellant's supervisor indicated he was not happy with the manual and was only passing them out because everyone "was complaining about no set of rules and regulations." Appellant claimed in his statement that he had never been warned that his type of behavior could result in his termination and that he was not aware of the employer's policy on the subject.

Mayor Fryer, on the other hand, acknowledged in his statement that appellant had never received any warnings concerning his specific behavior, but claimed that appellant was aware of the general policy against striking "handcuffed prisoners" by virtue of his nine and one-half years of employment as a police officer.

A transcription of a December 22, 1993, interview with appellant regarding the slapping incident was also introduced as evidence. During the interview, appellant admitted that he struck his son in the police station, but claimed he wasn't trying to hurt him. Appellant stated that he only slapped the boy hard enough "to get his attention because he was mouthy and cussing." Appellant also stated that the slap did not leave any marks or imprints or bruises. After the incident, appellant immediately took his son home.

Appellant's statement was somewhat corroborated by the testimony of Lieutenant Jerry Williams in a separate interview which occurred on December 21, 1993, the day before appellant was interviewed. Lieutenant Williams stated that Casey Dray was completely uncooperative and "mouthing and carrying on and yelling and screaming" from the time he was picked up until he was confronted by appellant. Williams stated that no bruises or other marks resulted from the slapping and that no serious damage was done.

■ On appeal, we review the findings of fact of the Board of Review in the light most favorable to the prevailing party, only reversing where the findings are not supported by substantial evidence. *Roberson* v. *Director of Labor*, 28 Ark. App. 337, 775 S.W.2d 82 (1989). Substantial evidence is such evidence that a reasonable

mind would find adequate to support a conclusion.

Misconduct has been defined as "more than mere inefficiency" or unsatisfactory judgment; it is "some act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, or a disregard of the standard of behavior the employer has a right to expect of its employees." *Baker* v. *Director of Labor*, 39 Ark. App. 5, 832 S.W.2d 864 (1992); *Feagin* v. *Everett, Director*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); Ark. Code Ann. § 11-10-515(b) (1987). In order for an employer to show that his employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

> [T]hat the employee's conduct (1) had some nexus with her work[,] (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Feagin, supra, at 68.

In the case at bar, the record is sufficient to support the findings that an implied contract prohibiting certain behavior existed between appellant and his employer. However, no copy of any of the specific rules or regulations is a part of the record. It is, therefore, impossible on appeal to ascertain what the exact prohibitions were and whether appellant was guilty of violating any of them. Also, appellant testified that when he struck his son he was reacting as a parent to the boy's behavior, and didn't think that his conduct would reflect adversely on the department. Appellee offered nothing to refute appellant's contention that he had no intention of harming his employer's interest.

The employer also had the burden of showing that some actual harm resulted from appellant's conduct. The only evidence offered in this regard is that some of appellant's subordinate officers and one civilian were present in the same building in which the incident occurred. There is no evidence that the one civilian witnessed the incident or that any of the officers present interpreted the act as having any implications toward their own dealing with prisoners or inmates to whom they had no lawful responsibility by nature of a parent-child relationship.

Finally, the Board's decision indicates that its decision was partially based on the fact that "the employer's rules for the use of physical force reasonably extended to the claimant's off-duty activities towards a person in the employer's custody." The record reflects, however, that appellant had been called to the police station for the very purpose of taking his son out of the employer's custody; the son therefore had impliedly been released, and was not in the "employer's custody." This tends to support appellant's contention that he had no intention of adversely affecting the employer's interest.

In sum, because appellee failed to prove that appellant possessed the requisite intent when he violated a rule, regulation, or occupational standard of the employer, we cannot say the Board's decision is supported by substantial evidence.

Reversed.

MAYFIELD, J., agrees.

ROGERS, J., concurs in result.

Jane AHREND *v.* DIRECTOR, Employment Security Division

E 94-191 930 S.W.2d 392

Court of Appeals of Arkansas
Division II
Opinion delivered October 2, 1996

Stephen Tedder, for appellant.

Allan Pruitt, for appellees.

WENDELL L. GRIFFEN, Judge. It is undisputed that the appel-

lant, Jane Ahrend, voluntarily quit her work at the Arkansas Industrial Development Commission ("AIDC"). She had worked for the AIDC for seventeen years. For about eleven years her immediate supervisor was Rob Middleton, a boss in whom she confided and with whom she shared her frustrations about what she considered harassment from others within the AIDC. In 1988 or 1989, Middleton suggested, and the appellant began to receive, psychiatric help for her stress that was undisputedly job-related. The stress and the harassment appear to have stemmed from what the appellant deemed misappropriation of funds within the AIDC and her unsuccessful attempts to point out and correct the problems.

In 1993, Middleton was fired and replaced by Kathryn Leapheart. On Friday, January 7, 1994, the end of the first week of reporting to her new boss, the appellant had a meeting with Leapheart during which the appellant questioned the purchase of some office furniture as well as other expenditures. According to appellant, Leapheart condoned the questioned purchases. Leapheart denied sanctioning any unlawful expenditures. The next day (Saturday, January 8) a friend (Deborah Pipkins) found appellant sitting in a fetal position at home in a chair, tearful and almost incoherent. Pipkins eventually gave notice to the director of the AIDC of the appellant's inability to work and her intent not to come back, and it was Pipkins who actually cleaned out appellant's desk at work.

The appellant applied for unemployment benefits and was denied. Both the Appeal Tribunal and the Board of Review affirmed the denial of benefits, finding that she voluntarily left her last work without good cause under Ark. Code. Ann. § 11-10-513 (1987). She filed a timely appeal to this court raising five points for reversal. We find no merit in any of the five points and affirm.

■ In her first point, the appellant challenges the voluntariness of her decision to quit. She argues that she was incapable of making a rational decision due to her extreme emotional distress. Her testimony, however, belies this argument. Appellant testified that she sent word to her employer through Pipkins that she was quitting due to emotional distress and the strain of harassment. Although her emotional state may have been extremely poor, she has never contended, until now, that this somehow affected the voluntariness of her decision. Rather, it seems that her emotional distress, heightened by her January 7 meeting with Leapheart, helped solidify her decision to leave. We do not address arguments

made for the first time on appeal. *Sinks* v. *State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993).

The appellant contends in her second point that she should have been excused from attempting to resolve her problems at work through the available grievance procedures because the same individuals responsible for her harassment were in charge of the grievance procedure. This violates the clear statutory language of the Arkansas Employment Security Law.

> No individual shall be disqualified under this section if, *after making reasonable efforts to preserve his job rights*, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification or if, *after making reasonable efforts to preserve job rights*, he left his last work because of illness, injury, pregnancy, or other disability.

Ark. Code Ann. § 11-10-513(b) (Repl. 1996) (emphasis added). The Board of Review adopted the findings and conclusions of the Appeal Tribunal and specifically added a new conclusion that "the evidence fails to establish that the claimant made reasonable efforts to preserve her job rights."

The undisputed proof was that, while appellant shared her concerns with her new boss, she never asked for a leave of absence, actually turned down an offer for a different job within the department, and left after working only one week under her new boss. In addition, in the final meeting with appellant, Leapheart encouraged her to put her concerns in writing and told her they would be shared with the director of the AIDC and the governor. Leapheart testified that she never received the appellant's complaints in writing.

We hold that an attempt at the employer's grievance procedure is part and parcel of the "reasonable efforts to preserve job rights" under the statute. This is so even if the prospects for resolution under the available grievance procedure may not appear promising from the employee's perspective. The Board of Review held that the appellant had failed to make these reasonable efforts. Applying the substantial evidence standard of review as we must to the Board's decision, we cannot say the Board erred on this point. *Perdrix-Wang* v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

The appellant has not directed us to any new facts or law[1] that convinces us otherwise.

In her third point, the appellant contends that there is no substantial evidence to support the Board's conclusion that the AIDC was not misappropriating funds. Therefore, appellant further contends, there is no substantial evidence to support the conclusion that she left the AIDC without good cause. As an initial matter, we note that neither this court nor the Board of Review need decide in this unemployment matter whether the AIDC's actions were legal. Our sole focus is on the Board of Review's decision and, in this particular case, its decision with respect to good cause.

Good cause has been defined as a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment. *Teel* v. *Daniels*, 270 Ark. 766, 606 S.W.2d 151 (1980). It is dependent not only on the *reaction* of the average employee, but also on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting. *Id.* (Emphasis added.) What constitutes good cause for leaving employment is ordinarily a question of fact for the Board to determine from the particular circumstances of each case. *Perdrix-Wang, supra.*

Whether the appellant *perceived* that illegality had occurred, or continued to occur, at the AIDC, and whether her *reaction* to that perception was within the parameters of good cause was a question of fact. We find no reason to overturn the conclusion from that factual inquiry by the Board under the substantial-evidence standard. The taking of appropriate steps to prevent a perceived misconduct from continuing is an element to be considered in determining whether an employee had good cause to quit work. *Brown* v. *Director*, 54 Ark. App. 205, 924 S.W.2d 492 (1996). The Board appeared to base its holding not only on the appellant's failure to invoke the grievance procedure, but also on her ten-year

[1] The appellant failed to cite any authority whatsoever for her first three points on appeal. For her last two points, the appellant cited no Arkansas authority, but instead directed us to cases from other jurisdictions, none of which were recent. This court has long held that assignments of error unsupported by convincing argument or authority will not be considered on appeal. *Rogers* v. *Rogers*, 46 Ark. App. 136, 877 S.W.2d 936 (1994). All of the points on appeal, particularly points one, two and three, could have been affirmed on this basis alone.

delay in taking any action other than speaking to her supervisor. These factors seemed to weigh at least as heavily in the good-cause determination as any perception the appellant might have had of wrongdoing within the AIDC.

Fourthly, the appellant argues that her situation constituted a "personal emergency" or an "illness" contemplated by Section 11-10-513(b). We disagree. A condition precedent to both exceptions is that the employee must make reasonable efforts to preserve her job rights. The Board of Review expressly amended the Appeal Tribunal's opinion to include a finding that appellant did not make reasonable efforts. As discussed above, there is substantial evidence to support this legal conclusion. If, for example, we consider appellant's illness or emergency to have begun when her psychiatrist diagnosed her with depression (at least three years before she left her employment), her only efforts to preserve her job rights after that point was to talk with her supervisor. If we consider her illness or emergency to have begun on January 7th (her last meeting with Leapheart) or January 8th (when Ms. Pipkins discovered her emotionally distraught at home), she did nothing after either date to preserve her rights. Instead, she quit without notice. Accordingly, we do not reach the question of whether the appellant's plight rises to the level of an emergency or an illness because the Board of Review's finding that she did not first make reasonable efforts to preserve her job rights is supported by substantial evidence.

Finally, appellant urges that her good cause for leaving and her good-faith effort to preserve her job is proven under a totality of the circumstances. We are cited to no employment security cases that employ a totality-of-the-circumstances test, and we are aware of none. The standard of review is substantial evidence. We hold that substantial evidence exists in this case to support the Board's decision regarding good cause, good faith, and every other issue raised on appeal. *Brown, supra*; *Perdrix-Wang, supra.*

Affirmed.

ROBBINS and STROUD, JJ., agree.

Florastene ROSSER *v.* COLUMBIA MUTUAL INSURANCE COMPANY and The Jacobs Company

CA 95-560 928 S.W.2d 813

Court of Appeals of Arkansas
Division II
Opinion delivered October 2, 1996

Heather Patrice Hogrobrooks, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Dan F. Bufford* and *Bridges, Young, Matthews & Drake PLC*, by: *Stephen A. Matthews*, for appellees.

WENDELL L. GRIFFEN, Judge. Florastene Rosser appeals from the decision of the Circuit Court of Monroe County which granted summary judgment in favor of appellee, The Jacobs Company, on Rosser's complaint in which she sought $50,000 in damages for what she terms misrepresentation, unconscionable business practices, conflict of interest, and breach of fiduciary duty.[1] We hold that the trial court did not err when it granted summary judgment in favor of appellee on its motion asserting that there were no genuine issues of material fact and that appellee was entitled to judgment as a matter of law. We also find that the motion by appellee for attorney fees and costs because of gross defects in appellant's abstract is well-founded and should be granted because appellant's abstract is in flagrant violation of Rule 4-2(b) of the Rules of the Supreme Court. Therefore, we affirm the judgment below, and award an attorney's fee of $750 and brief cost of $42 to appellee, to be paid by counsel for appellant.

This litigation arose from appellant's purchase of a house located at 208 Karen Lane in Clarendon, Arkansas, pursuant to an offer and acceptance that she executed on April 5, 1991, which was

[1] As will be seen later in this opinion, appellant's theory of alleged liability is unclear, whether judged from the language of her complaint or the summary judgment pleadings. Unfortunately, her brief contains no abstract of the pleadings. However, because the argument section of her brief mentions "the tort of fraud, misrepresentation, or deceit," we have reviewed her appeal from the entry of summary judgment from the perspective of that allegation, notwithstanding what we find to be flagrant and inexcusable deficiencies in her abstract and brief regarding this and other areas of the appeal.

accepted by William M. Smith and Wanda K. Smith (the sellers of the house) the same day. Appellant agreed to pay $33,500 for the house, made a $14,000 down payment, and financed the balance of the purchase price through a loan from Merchants and Planters Bank of Clarendon. The transaction closed on April 19, 1991, and appellant moved into the house during the weekend of July 4, 1991. The house had been listed by appellee, The Jacobs Company, on behalf of the sellers. Appellant requested that The Jacobs Company procure a homeowner's policy for her, and a policy was issued by Columbia Mutual Insurance Company for an initial coverage period covering April 19, 1991, to April 19, 1992. The policy was later extended for the period from April 19, 1992, to April 19, 1993, but was not renewed after the 1993 expiration date.

Sometime in February 1993, appellant notified David Jacobs, of The Jacobs Company, that water was standing on the roof of the house. Jacobs reviewed the Columbia Mutual policy and informed appellant that the problem was not an insured loss under its terms. According to appellant, the roof began leaking sometime between May and July 1993. Appellant filed this litigation on July 28, 1993, against Columbia Mutual and The Jacobs Company, alleging that Columbia had breached a duty of good faith and fair dealing, had acted in bad faith by refusing to pay a valid insurance claim, and had wrongfully canceled the homeowner's policy. Appellant alleged that The Jacobs Company was liable for damages because of conflict of interest and breach of fiduciary duties owed to her, and that both defendants were liable because of unconscionable business practices. The complaint sought damages of at least $50,000 from the defendants, jointly and severally, for alleged economic losses, mental anguish, emotional pain, and attorneys' fees and costs.[2] No service, however, was had on Columbia Mutual. The Jacobs Company filed its answer denying the allegations of the complaint, followed by

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[2] The pertinent provision of appellant's complaint regarding the damages allegation reads as follows:

> As a result of defendants [sic] joint and severable conduct, plaintiff has suffered economic losses, mental anguish, emotional pain and the attorneys fees and cost necessitated by their conduct.
>
> Accordingly, plaintiff request [sic] that the jury award her the sum of money which will compensate her for her loss, compensate her personal injuries and cause defendants reason to give considerable reflection and contemplation to proceeding on the same course of conduct made the basis of this complaint in the future.

interrogatories and requests for production of documents and appellant's deposition. Appellee then moved for summary judgment, supported by appellant's responses to the interrogatories, her deposition testimony, and the sworn affidavit of David Jacobs. Appellee's motion was based on the ground that appellant had no cause of action against it arising from its conduct as real estate broker or as an insurance agent. Appellant filed a response, but offered no opposing affidavits or supporting documents. The trial judge heard oral arguments on the motion, and then entered an order granting summary judgment in favor of The Jacobs Company based on its finding that the parol evidence rule and Statute of Frauds prevented consideration of oral proof pertaining to the real estate purchase contract. The trial judge also found that appellant failed to assert a cause of action against The Jacobs Company in tort, and that no cause of action had been asserted against that party in its capacity as agent for Columbia Mutual Insurance Company.

On appeal, appellant argues that the trial judge erred in dismissing her complaint for failure to state a cause of action upon which relief could be granted, and contends that the complaint asserted a cause of action for misrepresentation. That is the only argument raised by appellant on appeal, so there is no reason for us to review the trial court's decision regarding the Statute of Frauds and parol evidence rulings concerning appellant's purchase contract pursuant to the longstanding principle that on an appeal from circuit court the appellate court only reviews errors assigned. *Arkansas Power & Light Co.* v. *City of Little Rock*, 243 Ark. 290, 420 S.W.2d 85 (1967).

There are five elements to the tort of fraud, misrepresentation, or deceit: (1) a false representation of material fact; (2) knowledge that the representation is false, or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Wheeler Motor Co.* v. *Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993). Appellant testified in her deposition that David Jacobs represented to her that the house she purchased was in good condition and would not need major repairs. She also testified that her "gut feeling" was that Jacobs knew that there was a problem with the roof but that she did not know whether he knew that there was. Even if there was an issue of material fact concerning

whether Jacobs represented to appellant that the house was in good condition and would not need major repairs (an assertion that Jacobs denied in the affidavit submitted in support of the summary-judgment motion), appellant was obligated to produce specific facts showing that Jacobs knew that the representations were false. Her deposition testimony demonstrates her failure and inability to do so. She was unable to establish the first and second elements of a claim for misrepresentation. Representations are considered to be fraudulent when made by one who either knows them to be false or, not knowing, asserts them to be true. *Miskimins* v. *City National Bank*, 248 Ark. 1194, 456 S.W.2d 673 (1970). Appellant offered no facts to support either conclusion in her response to the summary-judgment motion. Furthermore, we hold that appellant's failure to produce facts showing that any reliance on her part was justifiable warranted the trial court's decision to grant summary judgment against her and in favor of the appellees.

Appellees have moved for an award of attorney's fees and brief cost because of alleged defects in appellant's brief. That motion is well-taken and should be granted. Although appellant's brief asserts that the trial court's dismissal of her complaint for failure to state a claim upon which relief could be granted is the basis of her appeal, she failed to abstract the complaint or any other pleading, including the summary-judgment pleadings that resulted in the decision from which her appeal is taken. She failed to abstract the order by the trial court that granted summary judgment against her. These infractions are sufficient to justify summary dismissal of the appeal for failure to comply with Rule 4-2 of the Rules of the Supreme Court because the deficiencies in the abstract are so flagrant that a decision based on it alone would have been impossible. *McAdams* v. *Automotive Rentals, Inc.*, 319 Ark. 254, 891 S.W.2d 52 (1995); *Haynes* v. *State*, 313 Ark. 407, 855 S.W.2d 313 (1993). But for the supplemental abstract contained in the appellee's brief, it would be impossible for us to understand the basis for the appeal or review the order on which it is based.

Rule 4-2(b)(1) provides that when an appeal is considered on its merits involving a flagrantly defective abstract which has been brought to an appellate court's attention by the appellee who has opted to submit a supplemental abstract in its brief, the appellate court may impose costs to compensate for the other party's non-compliance with the Rule. Counsel for appellee has complied with

the requirement of submitting a statement showing the cost of the supplemental abstract and his certificate showing the amount of time devoted to preparing the supplemental abstract. There is clear judicial precedent holding that attorney's fees may be assessed as costs against a party who has filed a flagrantly defective brief. *See Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Roach* v. *Terry*, 263 Ark. 774, 567 S.W.2d 286 (1978). However, we have not found cases where those costs have been assessed directly against counsel for the party on whose behalf the flagrantly defective abstract was filed. Nevertheless, in this case we believe that basic fairness requires us to grant the appellee's motion for costs and attorney's fees in preparing the supplemental abstract and brief, and assess the amount of that cost and fee against counsel for appellant. Counsel was responsible for knowing the rules regarding abstracting, preparing her client's brief, and ensuring that the rules were followed. Rather than impose the cost of the flagrant dereliction in this regard against appellant, we grant the motion by appellee for the costs associated with preparing the supplemental abstract and assess that cost against appellant's attorney. Counsel for appellant is hereby ordered to pay an attorney's fee of $750 to counsel for appellee, plus $42 for the cost of the supplemental abstract.

Affirmed. Appellee's motion for imposition of cost for preparing the supplemental abstract is granted.

ROBBINS and STROUD, JJ., agree.

Wayne JOHNSON *v.* TRIPLE T FOODS

CA 95-1271 929 S.W.2d 730

Court of Appeals of Arkansas
Division III
Opinion delivered October 16, 1996
[Petition for rehearing denied November 13, 1996.]

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

No response.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the ad-

ministrative law judge's decision. The ALJ found that appellant's claim should be dismissed with prejudice because there had been no showing of any unresolved issues which would have required a determination by the Commission. The ALJ also imposed a sanction upon appellant for filing a non-meritorious claim. On appeal, appellant argues that the Commission abused its discretion in dismissing his claim with prejudice and imposing a sanction of $500. We disagree and affirm.

On February 22, 1993, appellant filed a claim for compensation for an injury that arose in November of 1992. Appellant requested a hearing, and a prehearing conference was scheduled for April 20, 1993. On April 19, 1993, the ALJ advised the parties that appellant had requested that the prehearing conference be canceled because he was receiving, or had received, all benefits that he was entitled to receive. On June 28, 1993, the Commission received a letter from appellee asking that the claim be dismissed for lack of prosecution. In response, the ALJ dismissed the claim without prejudice. Appellant appealed the ALJ's dismissal to the Commission. The Commission dismissed appellant's appeal because the Commission determined that the ALJ's decision was not an appealable order. In its decision of March 23, 1994, the Commission also noted:

> [T]he fact that the filing of a claim tolls the statute of limitations does not, in itself, justify the filing of claims where no justiciable controversy exists or justify allowing claims to remain open where all justiciable controversies have been resolved. To do so would be contrary to the purposes underlying the statute of limitations.
>
> With regard to the suggestion of the claimant's attorney that he will refile a claim even though no controversy exists, we point out that costs may be imposed against a party who institutes a claim without reasonable grounds. Ark. Code Ann. § 11-9-714 (1987). Furthermore, this Commission can impose sanctions against any attorney who files a claim without reasonable grounds to do so, including the imposition of the reasonable costs incurred by the other party as a result of the filing of the claim. Ark. Code Ann. § 11-9-717 (Supp. 1993). Certainly, a claimant has every right to refile a claim where some meritorious controversy exists which creates the need for adjudication by the Commission. However, a

> claimant may not summarily refile a claim merely because an administrative law judge dismisses a claim under either Ark. Code Ann. § 11-9-702(a)(4) (1987) or Commission Rule 13.

Prior to this decision rendered by the Commission, appellant had refiled the claim on October 22, 1993. In July 1994, appellee again filed a motion to dismiss because appellant's refiled claim remained inactive and no hearing had been requested. On July 20, 1994, the ALJ dismissed appellant's claim without prejudice for want of prosecution. Appellant appealed this decision to the Commission, and appellee filed a motion to dismiss with the Commission. On January 11, 1995, the Commission denied appellee's motion and determined that the ALJ correctly determined that appellant's claim should be dismissed for want of prosecution. However, the Commission found that the claim should have been dismissed with prejudice and that costs should have been assessed against appellant's attorney unless cause could be shown indicating that the Commission's suggested actions should not be taken. Consequently, the Commission remanded the case so that a hearing could be held to allow appellant an opportunity to show cause why the claim should not be dismissed with prejudice and why costs should not be assessed.

By agreement of the parties, no hearing was requested and the matter was submitted to the ALJ on stipulations, interrogatories and briefs. The ALJ found that appellant had been aware of the Commission's opinion of March 23, 1994, when he filed his notice of appeal of the ALJ's July 20, 1994, order of dismissal. Therefore, the ALJ determined that appellant's claim should be dismissed with prejudice because there was no showing of any unresolved issues which would require a determination by the Commission, and that sanctions would be imposed upon appellant's attorney for filing a non-meritorious claim and its appeal. The ALJ concluded that any benefits which appellant had been awarded or was receiving which had not been controverted by appellee would not be interrupted or terminated as a result of the dismissal with prejudice of the October 22, 1994, claim. The Commission affirmed and adopted the ALJ's decision, and this appeal followed.

On appeal, appellant argues that the Commission did not have the authority to dismiss his claim with prejudice. Appellant cites to Ark. Code Ann. § 11-9-702(a)(4) in support of his argument.

Arkansas Code Annotated § 11-9-702(a)(4) provides:

> If, within six (6) months after the filing of a claim for compensation, no bona fide request for a hearing has been made with respect to the claim, the claim *may*, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitations periods specified in subdivisions (a)(1)-(3) of this section. (emphasis added)

We do not find appellant's argument or citation of authority persuasive. The Commission has the authority, under Ark. Code Ann. § 11-9-205(a)(1)(A) (Repl. 1996), to make such rules and regulations as may be found necessary. Under this authority, the Commission has promulgated its Rule 13, which provides that if a party requests that a claim be dismissed for want of prosecution, the Commission may dismiss the claim. In *Loosey* v. *Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988), we addressed the issue of whether the Commission had the authority to dismiss a claim with prejudice and determined that there was substantial evidence in that case to support the Commission's dismissal with prejudice.

In this case, the record is clear that appellant filed a claim when no justiciable issue was present. It was conceded by the parties that appellant was receiving all benefits to which he was entitled. In addition, appellant was aware and given an opportunity to show cause why his claim should not be dismissed with prejudice. Appellant specifically did not request a hearing. The record also indicates that appellant's attorney intended to ignore the Commission's decisions. In a letter to the ALJ dated July 27, 1994, appellant's attorney wrote:

> Finally, I have always maintained that merely because a claimant is "receiving all benefits he is entitled to receive" that this should not prohibit him from filing a claim. ... I have been threatened in this and other cases with costs if I file additional proceedings after the case is dismissed. I am simply indicating to you at this time that I shall not be intimidated by the Commission threatening me with costs, and if this case is dismissed again, I will again file a new AR-C form.

It is clear from this letter that appellant's attorney filed the second claim despite the Commission's decision.

We note that the Commission found in its January 11, 1995, decision that:

> By his own admission, Mr. Tolley filed these claims and instituted proceedings before this Commission even though the claimant did not seek any additional compensation. We find that he instituted or continued proceedings before this Commission without reasonable grounds to do so. By challenging the dismissal of this claim, Mr. Tolley, on behalf of the claimant, has deliberately and brazenly disregarded the previous decision of this Commission, and he has expressed his intent to continue to do so in the future.

After reviewing the record, we cannot say that the Commission exceeded its authority in dismissing appellant's claim with prejudice or that there is no substantial evidence to support the Commission's factual determinations.

Appellant also argues that the Commission abused its discretion in imposing costs against appellant's attorney. We disagree.

Under Ark. Code Ann. § 11-9-717 (Repl. 1996), an attorney who signs a claim certifies that to the best of his knowledge the claim is well grounded in fact and is not "interposed for any improper purpose or to cause unnecessary delay or needless increase in the cost of litigation." If a claim is signed in violation of Ark. Code Ann. § 11-9-717, the Commission or ALJ "shall impose an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of a claim." Ark. Code Ann. § 11-9-717(a)(4) (Repl. 1996). As noted above, appellant's attorney was aware of the Commission's decision of March 23, 1994, and still expressed in his letter on July 27, 1994, that he would file another claim despite the fact that the claim was dismissed by the Commission. Appellant's attorney also acknowledged that appellant was receiving all the benefits to which he was entitled. Therefore, it is clear from the record that appellant's attorney filed a claim that was not grounded in fact. We are not unmindful of the concerns that appellant's attorney expressed involving the claimant's possible denial of medical treatment if the doctor were informed that there was no ongoing claim because the case had been dismissed. The duty to provide medical coverage in appropriate cases, however, is clear under Ark. Code Ann. § 11-9-508 (Repl. 1996). We also realize that a claimant

must receive treatment on a yearly basis to toll the statute of limitations. However, neither of these perceived problems will be remedied by making the Commission's docket more unwieldy.

We think it clear that the specific authority to investigate claims granted to the Commission carries also the authority to make such orders and impose such sanctions as are reasonably necessary to carry out that purpose. *Harrington Constr. Co.* v. *Williams*, 45 Ark. App. 126, 872 S.W.2d 426 (1994). Consequently, we cannot say that the Commission abused its discretion in imposing a sanction of $500 against appellant's attorney.

Affirmed.

Jennings, C.J., and Robbins, J., agree.

W.D. *v.* STATE of Arkansas

CA 95-980 931 S.W.2d 790

Court of Appeals of Arkansas
Division I
Opinion delivered October 16, 1996

Jo Ellen Carson, for appellant.

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

STEELE HAYS, Special Judge. The appellant appeals from the judgment of the Juvenile Division of the Sebastian County Chancery Court adjudicating him a delinquent for committing the crime of rape and committing him to the Department of Human Services, Division of Youth Services. On appeal, he argues that the trial court erred in denying his directed verdict motions. We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). 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. *LaRue* v. *State*, 34 Ark. App. 131, 806 S.W.2d 35 (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).

The appellant argues that the evidence is insufficient to establish forcible compulsion pursuant to Arkansas Code Annotated § 5-

14-103(a)(1) (1995). He also argues, in the alternative, that he is not guilty of committing rape by engaging in sexual intercourse with a person less than fourteen years of age because the age of the victim was within two years of the appellant's age. *See* Ark. Code Ann. § 5-14-103(a)(3).

The appellant, who was twelve years old at the time of the offense, was convicted of raping a ten-year-old girl. Dr. Merle Edward McClain, a pediatrician, examined the victim approximately one month after the incident. Dr. McClain testified that the victim stated that her brothers let the appellant into their house on the night in question and that the appellant later "got on top of her and put his thing" into her pudendum. The doctor testified that the victim complained of constipation and explained that it was not unusual for a child who had been sexually molested to complain of abdominal pain.

The victim testified that the appellant was friendly with her brothers. She testified that the appellant came into their house through a window in the bedroom in which she was sleeping with her brother, Tyrus. She testified that she was awakened at one point during the night to find that the appellant had taken off her clothes. She then felt something "going into" her. She testified that "at first he would not let me up. He just kept on doing what he was doing. Then he stopped and I hurried up and got up." The victim spent the rest of the night in another room.

The victim's brother, Tyrus, testified that the appellant was present in the bedroom on the night in question. He testified that when he awoke the next morning, the appellant was sleeping next to him where his sister had previously been sleeping. Jennifer Campbell, the mother of the victim, testified that the victim began complaining of stomach aches. She stated that the victim subsequently told her that the appellant had raped her.

We do not address the appellant's argument regarding forcible compulsion because we find the evidence sufficient to sustain his conviction under § 5-14-103(a)(3), which provides:

> (a) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:
>
> . . .
>
> (3) Who is less than fourteen (14) years of age. It is an

> affirmative defense to prosecution under this subdivision that the actor was not more than two (2) years older than the victim.

The appellant contends that he is not guilty of committing rape under this section because the age of the victim was within two years of his age. The appellant presented evidence that he was two years, four months, and one day older than the victim on the date of the offense. The trial court concluded that the affirmative defense was not applicable because the appellant was over two years older than the victim. The appellant argues that the two-year statutory language should be two years including any months and days which follow the two-year anniversary up to the three-year anniversary year.

In *State* v. *Joshua*, 307 Ark. 79, 818 S.W.2d 249 (1991), overruled on other grounds in *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992), our Supreme Court held that "12 years of age or younger" as used in Arkansas Code Annotated § 5-13-202(a)(4)(C) defining second degree battery refers to persons whose age is less than or under 12 years as well as persons who have reached and passed their twelfth birthday but have not yet reached their thirteenth birthday. The Court, in *Joshua*, agreed with the following reasoning set out in *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986):

> If "less than fourteen years of age" or "under fourteen years of age" had been used in [the statute], the protection of that statute would terminate when a child reached the 14th birthday. Because "less than" or "under" is absent from [the statute], while fourteen years of age or younger" appears in the statute, the compelled logical conclusion is that the statute's protection extends into and throughout the year immediately following a person's 14th birthday. When the plain and unambiguous language of [the statute] is considered, to the ordinary person "fourteen years of age" means that one has passed the 14th birthday but has not reached the 15th birthday. Thus, "fourteen years of age" is a temporal condition existing on the 14th birthday and continuing until the 15th birthday. Any other construction of "fourteen years of age" would be a perversion of popular parlance.

(Citations omitted.)

When the language of a statute is plain and unambiguous, the language is given its plain and ordinary meaning. *Smith* v. *Smith*, 41 Ark. App. 29, 848 S.W.2d 428 (1993). Unlike the statutory language in *Joshua* or *Carlson*, the plain wording of § 5-14-103(a)(3) uses the limiting language of "not more than" so that any months or days beyond twenty-four months takes the defendant out of the affirmative-defense period. Thus, because the appellant was more than two years older than the victim, he could not avail himself of the affirmative defense. Therefore, we hold that the evidence is sufficient to show that the appellant committed the crime of rape by engaging in sexual intercourse with another person who was less than fourteen years of age.

Affirmed.

NEAL and GRIFFEN, JJ., agree.

Daniel CHRONISTER *v.* STATE of Arkansas

CA CR 95-1079 931 S.W.2d 444

Court of Appeals of Arkansas
Division III
Opinion delivered October 23, 1996

Robert E. Irwin, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant Daniel Chronister appeals from his conviction of driving while intoxicated, first offense.

On May 4, 1994, appellant was convicted in Russellville Municipal Court of DWI, first offense, and driving left of center. He appealed his conviction to Pope County Circuit Court, and the case was submitted to the circuit judge, sitting without a jury, on a stipulation of facts and appellant's objection that the city attorney, who was handling the case in circuit court, did not have authority to prosecute a state misdemeanor violation.

In a letter to the attorneys dated May 2, 1995, the circuit judge found that the Russellville City Attorney had authority to prosecute the case and that the appellant was guilty of driving while intoxicated in violation of Ark. Code Ann. § 5-65-103 (Repl. 1993). By judgment entered May 15, 1995, the appellant was sentenced to pay $542.15 as fine and costs, his driver's license was suspended for ninety days, he was directed to attend defensive driving school and an alcohol rehabilitation program, and was sentenced to serve one day in jail, suspended.

Appellant argues on appeal that the case should be remanded because the city attorney was without legal authority to prosecute him. Appellant argues that the city attorney of a first-class city, such as Russellville, is authorized to perform only such duties as are assigned to him by city ordinance, and Russellville City Ordinance No. 988 authorizes the Russellville City Attorney to prosecute municipal violations, but makes no mention of state law violations.

Moreover, according to appellant, Ordinance No. 1411 prohibits the city attorney from engaging in the practice of law except for his duties as city attorney, and the Russellville City Council meant for the city attorney to take care of the city's business only.

Appellant also argues that the prosecuting attorney's written authorization, in compliance with Ark. Code Ann. § 16-21-115 (1987), authorizing the city attorney to prosecute misdemeanor violations of state law occurring within the Russellville city limits was without effect because the city had expressly limited the city attorney's authority.

We affirm the judgment of the trial court because we find that the city attorney was acting as a *de facto* official.

A *de facto* official is one who by some color of right is in possession of an office, and performs its duties with public acquiescence, though having no right in fact; the acts of *de facto* officials may not be questioned based upon of the lack of legal authority except by some direct proceeding instituted for the purpose by the State or by someone claiming the office *de jure*, or when the person himself attempts to build up some right, or claim some privilege by reason of being the official he claims to be; in all other cases, the acts of an officer *de facto* are as valid and effectual while he retains the office as if he were an officer by right, and the same legal consequences will flow from them for the protection of the public and third parties. *Faucette, Mayor* v. *Gerlach*, 132 Ark. 58, 200 S.W. 279 (1918).

The rule governing validation of acts of a *de facto* official is based upon public policy, and its origin and history show it is founded in comparative necessity; the doctrine rests upon the principle of protection of the public and third parties, and was engrafted upon the law as a matter of policy and necessity to protect the interest of the public and individuals involved in the acts of persons performing the duties of an official without actually being one in law. *Landthrip* v. *City of Beebe*, 268 Ark. 45, 593 S.W.2d 458 (1980).

In *State* v. *Roberts*, 255 Ark. 183, 499 S.W.2d 600 (1973), the appellee moved to dismiss the charges against him because the information charging him with the crime was filed by a deputy prosecuting attorney who had not been duly appointed pursuant to statute. The trial court granted the motion and the State appealed. In reversing the trial court, our supreme court discussed what

constituted a "collateral attack," and quoted from a Tennessee case as follows:

> "From the above quotations can be gleaned several guidelines for determining whether a particular attack upon the title of a public official is 'collateral.' By the very definition of the word if the attack is secondary, subsidiary, subordinate, i.e., related to the main matter under consideration but not strictly a part thereof, the attack is indirect and collateral. If the official's title is questioned in a proceeding to which he is not a party or which was not instituted specifically to determine the validity of his title the attack is collateral. If the title of the officer is questioned in a proceeding in which he is a party merely because he is acting in his official capacity the attack is collateral. Lastly if the attack is made because it is necessary to show the officer's want of title to lay a basis for some other relief the attack is collateral. . . ."

255 Ark. at 186, 499 S.W. 2d at 602.

In the instant case, the prosecuting attorney authorized the city attorney to prosecute misdemeanors in accordance with Ark. Code Ann. § 16-21-115 (1987); the city attorney acted under that authorization; and the circuit court recognized the city attorney's authority.

Therefore, under the authority cited above, we think that the city attorney was a *de facto* official, and the attack made upon his authority in this case constitutes a collateral attack and cannot be maintained.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.

Kenneth SMITH *v.* STATE of Arkansas

CA CR 95-1311 931 S.W.2d 792

Court of Appeals of Arkansas
Division I
Opinion delivered October 23, 1996

[redacted]

Robert E. Irwin, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Kenneth Smith, was found guilty in a jury trial of driving while intoxicated, first offense, for which he was sentenced to a year in jail and fined $500. Appellant raises three evidentiary issues on appeal. Finding no merit in his arguments, we affirm.

Since the sufficiency of the evidence is not at issue, we briefly set out the facts necessary for an understanding of the points raised in the appeal. Belinda Shelton, a Pope County Deputy, received a dispatch concerning a car in a ditch with someone lying on the hood. When she arrived, she found appellant on the hood of the car. She testified that appellant told her that he had been driving around and had driven into the ditch so that the police would come and get him. She said that appellant spoke with a thick tongue, that his eyes were bloodshot, and that he showed signs of intoxication, but that she did not detect the odor of intoxicants. Deputy Shelton said that appellant admitted that he had snorted cocaine some time prior to the accident. She placed appellant under arrest and took him to the hospital for blood and urine testing. Shelton testified that appellant was fidgety at the hospital and that he was carrying on a conversation with a nonexistent person named "Mac," who was supposedly in the ceiling. She said that appellant was having other hallucinations as well. It was disclosed at trial that methamphetamine, amphetamine, and cannabinoids were present in appellant's urine. There was further testimony that a person who had taken a high dosage of methamphetamine might hallucinate.

During her testimony, Deputy Shelton stated that there had been a constable and a wildlife officer at the scene when she arrived. On cross-examination, she admitted that she had failed to mention this in her report and that she had not informed the prosecutor, either, explaining that the two men had told her that they had not had any contact with the appellant. It was also revealed that the blood sample taken from the appellant had not been tested because it had been sent to the wrong place and had later been destroyed. The trial court sustained the State's objection to the appellant questioning the witness about her awareness of a motion for discovery requesting the names of everyone involved. Appellant questions the trial court's ruling as his first issue on appeal.

The discovery motion referred to by appellant was one filed in municipal court where appellant had been previously found guilty and an appeal had been taken to circuit court. The trial court, noting that this was a trial *de novo*, disallowed questions pertaining to such a discovery motion because the record did not disclose that a discovery motion had been filed in circuit court. Appellant argues that the fact that no new motion for discovery had been filed did not relieve the State of its duty to disclose. We agree with the trial court's ruling.

Appeals from municipal court to circuit court are tried *de novo*. Ark. Code Ann. § 16-96-507 (1987). And, the purpose of the trial *de novo* is to conduct a trial as though there had been no trial in the lower court. *Bussey* v. *State*, 315 Ark. 292, 867 S.W.2d 433 (1993). In *Bussey* v. *State*, the appellant had filed a motion in municipal court requesting the presence of the operator and the person who calibrated the breathalyzer machine, pursuant to Ark. Code Ann. § 5-65-206(d)(2) (Repl. 1993). In the appeal to circuit court, the appellant objected to the introduction of the test results on the ground that those persons were not available for cross-examination. The supreme court upheld the trial court's ruling that the statutory notice must be renewed in the circuit court proceeding and that the appellant could not rely on the former motion because, under Ark. Code Ann. § 16-96-507, a trial in circuit court is treated as an entirely new trial, as though the case had originated in circuit court. It follows from this decision that appellant's reliance on his previous motion for discovery is misplaced.

Appellant's remaining arguments concern the testimony of Kelly Lane, a nurse at the hospital where the samples of blood and

urine were taken. Ms. Lane testified that in her work she regularly came into contact with persons under the influence of intoxicants. She said that appellant's pupils were constricted, that he was "hyper" and "very restless," and that he could not follow the commands she gave in order to draw his blood. She testified that he would sit down, but that he was "very fidgety" on the examination table. Appellant objected when the witness was asked whether appellant seemed more than simply nervous. The trial court overruled the objection and Ms. Lane testified that what stayed in her mind was that he was different from just being nervous because she had to constantly repeat commands, because he was in constant motion, was "wild-eyed," jittery, fidgety and pacing the room.

Appellant contends that the trial court erred by allowing the testimony because the witness was not qualified to offer an opinion with respect to the cause of the appellant's nervousness. It is clear from a reading of the record, however, that the witness did not offer an opinion as to *why* the appellant appeared nervous, as appellant complains. In responding to the question, the witness simply described the behaviors she observed without attributing that behavior to any particular cause. Although she testified that the behavior seemed "different" from just being nervous, we do not find that testimony objectionable. Rule 701 of the Arkansas Rules of Evidence permits a lay person to offer opinion testimony that is rationally based on the perception of the witness and is helpful to a clear understanding of his or her testimony, or the determination of a fact in issue. Thus, it is not required in all circumstances that a witness be qualified as an expert in order to state an opinion. *Whaley* v. *State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984). Whether to admit such testimony rests in the sound discretion of the trial court, and our standard of review is abuse of discretion. *Nooner* v. *State*, 322 Ark. 87, 907 S.W.2d 677 (1995). Given her stated experience and her personal observation of appellant's conduct, we find no abuse of discretion in the trial court's ruling.

Ms. Lane later testified, over appellant's objection, that she did not feel that appellant could safely drive a vehicle in his condition. Appellant contends that the trial court erred by permitting Ms. Lane to give an opinion as to whether the appellant was intoxicated because she did not know the legal definition of intoxication under the laws of this state. Again, appellant mischaracterizes the witness's testimony because she did not testify that appellant was

"intoxicated." Even so, under Rule 701, lay witnesses have been allowed to testify that in their opinion someone was intoxicated. *Clawson* v. *Rye*, 281 Ark. 8, 661 S.W.2d 354 (1983). The witness testified about her experience of regularly dealing with intoxicated persons, and her opinion that appellant was in no condition to safely drive a car was based on her observation of appellant's behavior. We find no abuse of discretion.

Affirmed.

MAYFIELD and NEAL, JJ., agree.

Yvette K. THOMAS *v.* DIRECTOR, Employment Security Department, and Sparks Regional Medical Center

E 95-229 931 S.W.2d 146

Court of Appeals of Arkansas
Division II
Opinion delivered October 23, 1996

Appellant, *pro se.*

Allan F. Pruitt, for appellees.

JOHN F. STROUD, JR., Judge. This is an appeal from a decision of the Arkansas Board of Review in which the claimant, Yvette Thomas, was denied unemployment benefits. The Board's decision affirmed that of the appeal tribunal and the Arkansas Employment Security Department, both of which had determined that claimant was discharged for misconduct in connection with her work. We reverse and remand.

For the most part, the facts are essentially undisputed. At the time of her discharge claimant had worked for the employer, Sparks Regional Medical Center, for more than nine years. She was a registered nurse. On February 19, 1995, claimant and another nurse, Hye-Ran Smith, who was also discharged, became involved in a situation with a combative and assaultive patient. Several medical personnel, including claimant and Smith, were attempting to place restraints on the patient, who was suffering from alcohol and substance abuse. The patient grabbed Smith's hands and would not release them. The patient's fingernails were scratching or puncturing Smith's hands. Claimant pinched the patient on the inside of her upper arm, causing the patient to release her hold on Smith. Claimant was discharged for pinching the patient.

An employee is disqualified from receiving benefits if he or she is discharged for misconduct connected with the work. Ark. Code Ann. § 11-10-514(a)(1) (Repl. 1996). An employee's actions constitute misconduct if they deliberately violate the employer's rules, or if they wantonly or willfully disregard the standard of behavior which the employer has a right to expect of its employees. *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987).

> 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.

Willis Johnson Co. v. *Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980) (emphasis added).

Whether an employee's actions constitute misconduct in connection with the work sufficient to deny unemployment benefits is a question of fact for the Board. *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987); *Dillaha Fruit Co.* v. *Everett*, 9 Ark. App. 51, 652 S.W.2d 643 (1983). On appeal, the Board's findings are conclusive if they are supported by substantial evidence. *A. Tenenbaum Co.* v. *Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990). The scope of judicial review is limited to a determination of

whether the Board could reasonably reach its decision upon the evidence before it; we may not substitute our findings for those of the Board even though we might have reached a different conclusion had we made the original determination upon the same evidence. *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986). This is not to say, however, that our function on appeal is merely to ratify whatever decision is made by the Board. It is essential that the Board's findings of fact be supported by substantial evidence upon which a particular conclusion could reasonably have been reached. We are not at liberty to ignore our responsibility to determine whether the standard of review has been met. *Id.*

Here, the Board determined that claimant's actions amounted to misconduct in connection with her work. We find that the Board could not reasonably have reached its decision upon the evidence that was before it. Without departing from the limitations on the scope of our review, we hold that the Board's finding that claimant was discharged for misconduct in connection with her work is not supported by substantial evidence. At most, claimant's conduct in pinching the combative and assaultive patient in order to get the patient to release her hold on another nurse was a good-faith error in judgment or discretion that was not of such a degree 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. The Board's finding otherwise is simply not supported by the evidence presented to it. Any higher degree of restraint employed or even a pinch in other circumstances might well amount to misconduct. Under the facts of this case, however, claimant's conduct could not reasonably be found to constitute misconduct in connection with the work. 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.

PITTMAN and MAYFIELD, JJ., agree.

Andre JEFFERSON *v.* MUNSEY PRODUCTS, INC.

CA 95-1347 930 S.W.2d 396

Court of Appeals of Arkansas
Division I
Opinion delivered October 23, 1996

Walker, Campbell, Ivory, Dunklin, & Davis, by: *Sheila F. Campbell,* for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Frank B. Newell,* for appellee.

STEELE HAYS, Special Judge. The appellant appeals from a decision of the Workers' Compensation Commission finding that he failed to prove that he sustained a compensable injury. On appeal, the appellant argues that the Commission's decision is not supported by substantial evidence and that Arkansas Code Annotated § 11-9-102(5)(B)(iv)(b) (Repl. 1996) violates his constitutional right to equal protection and due process. The Commission did not rule on the constitutionality of the statute; thus, we remand for the Commission to consider the constitutional issue raised by the appellant. *See Green* v. *Smith & Scott Logging,* 54 Ark. App. 53, 922 S.W.2d 746 (1996).

The appellant was injured on April 6, 1994, while working as a die-cast machine operator for the appellee. His injury resulted in the amputation of several of his fingers. A subsequent drug test revealed positive results for the presence of marijuana and cocaine.

Arkansas Code Annotated § 11-9-102(5)(B)(iv)(b) provides:

> The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

Pursuant to the statute, the Commission found that the appellant failed to overcome the rebuttable presumption that his injury was substantially occasioned by the use of illegal drugs.

Constitutional issues must be raised before the Commission in order to preserve them for appeal. *Green, supra.* The appellant challenged the constitutionality of the statute before the Commission; however, the Commission determined that the issue could only be decided by a court of law. In *Green,* we clarified the manner in which constitutional issues are to be preserved for review by this Court by holding that the Commission is required to rule on constitutional questions that are properly before it. Therefore, we remand to the Commission for further proceedings consistent with this opinion.

Remanded.

NEAL and GRIFFEN, JJ., agree.

David B. BROWN *v.* STATE of Arkansas

CA CR 95-948 932 S.W.2d 777

Court of Appeals of Arkansas
Division III
Opinion delivered October 30, 1996
[Petition for rehearing denied December 4, 1996.]

Sloan, Rubens & Peeples, by: *Kent J. Rubens* and *J. Michael Stephenson*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant David B. Brown was charged with possession of a controlled substance (methamphetamine) with intent to deliver, simultaneous possession of drugs and firearms, felon in possession of a firearm, and possession of paraphernalia with intent to use. These charges resulted from a search warrant that was executed at appellant's residence on March 13, 1994. Appellant entered a conditional plea of guilty, pursuant to Ark. R. Crim. P. Rule 24.3(b), to the charges of possession with

intent to deliver, simultaneous possession with intent to deliver, simultaneous possession of drugs and firearms, and possession of paraphernalia with intent to use, and was sentenced according to his plea. Appellant argues on appeal that the trial court erred in failing to grant his motion to suppress, contending that the search pursuant to the warrant was unlawful because the officers executed the warrant at a time other than that specified in the warrant and that the warrant failed to specify with particularity the place to be searched. We agree with the ruling of the trial court and affirm.

At the suppression hearing, several officers testified to their involvement in the case prior to obtaining the search warrant, in obtaining the search warrant, and in executing the search warrant. Testimony indicated that on March 12, 1994, Darrell Wilson was arrested in Marette with approximately one pound of methamphetamine. Mr. Wilson informed the officers that he had been "fronted" the methamphetamine by the appellant on March 12, 1994, and that he had purchased approximately five to six pounds of methamphetamine in almost daily transactions over the preceding two months. Mr. Wilson informed the officers that the appellant stated he had plenty of methamphetamine and "could go for awhile."

Based on the information provided by Mr. Wilson, in the early morning hours of March 13, 1994, Investigators Jerry Brawley and Mike Marshal took Mr. Wilson to the town of Gosnell in order for Mr. Wilson to identify the appellant's residence for the officers. After viewing the residence and writing down a description, Investigators Brawley and Marshall met other officers at the Blytheville Police Department and turned in the description of the house to Rusty Grigsby, a sergeant with the Jonesboro Police Department.

Sergeant Grigsby testified that he typed out an affidavit for a search warrant on a computer-generated form at the Blytheville Police Department. A search warrant was also prepared on a computer-generated form. The affidavit and search warrant were taken by Sergeant Grigsby, Investigator Brawley, and informant Wilson to the home of Judge David Burnett who authorized a search by signing the search warrant at 7:34 a.m. on March 13, 1994.

Sergeant Grigsby, Investigator Brawley, and other officers met back in Blytheville and proceeded to Gosnell to execute the search warrant at appellant's residence. Investigator Brawley testified that

he led the search party to the appellant's residence because he was the person who only hours before had been to the appellant's residence to obtain its description. Testimony indicated that the officers arrived at appellant's residence at approximately 8:55 a.m. on March 13, 1994, and searched his home pursuant to the warrant. Several thousand dollars of cash were recovered from appellant's home, along with more than a pound of methamphetamine, several firearms, and several different types of paraphernalia (scales, syringes, rolling papers, plastic baggies, etc.).

Appellant filed a motion to suppress in which he pointed out discrepancies in the search warrant. The trial court denied the motion, and appellant contends on appeal that the trial court erred in doing so. He contends that the search warrant was invalid because it stated that the home to be searched was in Blytheville, Arkansas, rather than Gosnell, alleging the description was invalid. Appellant also contends that the search was invalid because it was executed at 8:55 a.m., when the warrant stated the search was to be executed between the hours of 6 a.m. to 8 a.m.

In reviewing a trial court's ruling on a motion to suppress, this court makes an independent determination based on the totality of the circumstances and reverses the trial court's ruling only if it is clearly against the preponderance of the evidence. *Houston* v. *State*, 41 Ark. App. 67 S.W.2d (1993). Because the preponderance of the evidence turns heavily on the question of credibility, we defer to the superior position of the trial court in making the determination of which evidence to believe. *Dickerson* v. *State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995).

In this case, Sergeant Grigsby testified that he filled out the affidavit and search warrant in question. He testified that forms were computer-generated at the Blytheville Police Department and that he filled in the description of appellant's residence and where it was located. The following are the portions of the search warrant in question which appellant alleges were so deficient as to invalidate the search warrant. The underlined portions are the blanks filled in by Grigsby on the computer at the Blytheville Police Department:

> The State of Arkansas to any law enforcement officer of the State, I Judge DAVID BURNETT on this 13TH day of March, 1993 at 2990 RIVERLAWN hereby find that there is reasonable cause to search THE RESIDENCE OF DAVE

> BROWN, LOCATED ON THE NORTHWEST CORNER OF WEST GOSNELL AND SOUTH GOSNELL STREETS, A RED BRICK HOUSE, WITH AN ADDITION ON THE EAST OF THE HOUSE. THE HOUSE IS FACING SOUTH. THE HOUSE HAS A CHAIN LINK FENCE. THE HOUSE ALSO HAS AN OVAL SHAPED WINDOW ON THE FRONT DOOR. Located in or near Blytheville, County of Mississippi and State of Arkansas, and that my finding of reasonable cause is based on the following: AN AFFIDAVIT MADE BEFORE ME BY *INV. TERRY BRAWLEY & RUSTY GRIGSBY.*
>
> * * *
>
> This warrant shall be executed between the hours of 6 a.m. and 8 a.m.

Sergeant Grigsby testified that he was unaware that the warrant stated the search was to be conducted "in or near Blytheville," and was also unaware that the warrant stated that the warrant was to be "executed between the hours of 6 a.m. and 8 a.m." He testified that both of the errors were computer-generated on the forms that he used and that this was the first time he had typed a warrant using the Blytheville Police Department's computer. Grigsby testified that he was aware that the Arkansas Rules of Criminal Procedure states that warrants are to be executed between 6:00 a.m. and 8:00 p.m. unless a nighttime search is authorized. He testified that he believed that he had the authority to search the house pursuant to the warrant.

Investigator Jerry Brawley testified that he obtained the description of the appellant's residence for the search warrant and affidavit by traveling to the residence with informant Wilson. He also testified that he led the officers to the residence to search the home. Testimony indicated that he was unaware of the problems with the warrant but was aware that the rules of criminal procedure allow for a search between 6:00 a.m. to 8:00 p.m.

The general rule in regard to search warrants is found in Ark. R. Crim. P. Rule 13.2, which provides in part:

> (b) The warrant shall state, or describe with particularity:
>
> (i) the identity of the issuing judicial officer and the date

and place where application for the warrant was made;

(ii) the judicial officer's finding of reasonable cause for issuance of the warrant;

(iii) the identity of the person to be searched, and the location and designation of the places to be searched;

(iv) the persons or things constituting the object of the search and authorized to be seized; and

(v) the period of time, not to exceed five (5) days after execution of the warrant, within which the warrant is to be returned to the issuing judicial officer.

(c) Except as hereafter provided, the *search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days.*

(Emphasis supplied.)

Arkansas Rule of Criminal Procedure Rule 16.2(e) provides that a motion to suppress shall be granted only if the court finds that a violation is substantial or it is otherwise required by the United States or Arkansas Constitutions. Highly technical attacks on search warrants are not favored. *Watson* v. *State*, 291 Ark. 358 724 S.W.2d 478 (1987). All warrants are to describe with particularity the location and designation of the place to be searched in order to avoid the risk of the wrong property being searched or seized. *Id.*; *Jones* v. *State*, 45 Ark. App. 28 S.W.2d (1994). The test for determining the sufficiency of the description is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched. *Pike* v. *State*, 30 Ark. App. 107, 110, 783 S.W.2d 70, 72 (1990) (quoting *Lyons v Robinson*, 783 F.2d 737 (8th Cir. 1985)).

Appellant specifically contends that the warrant was invalid because it stated the home to be searched was in Blytheville. However, a clear reading of the warrant states that the residence to be searched was "located in *or near Blytheville*, County of Mississippi and State of Arkansas." Lieutenant James Sanders of the Blytheville Police Department testified that Gosnell is only two miles from Blytheville. He further testified that there is no West Gosnell or South Gosnell Street in Blytheville, as described in the affidavit and search warrant.

Testimony also indicated that, just prior to obtaining the warrant, Investigator Brawley went to the residence and obtained a location description for the warrant. Brawley was also the officer who led the search party to the appellant's residence. This court and the supreme court have held that where the officer who provides the description of the place to be searched in the warrant also executes the warrant a mistaken search is unlikely. *Costner* v. *State*, 318 Ark. 806, 887 S.W.2d 553 (1994); *Jones* v. *State*, *supra*; *Pike* v. *State*, *supra*.

Based on the testimony and exhibits presented to the trial court, we find that the description in this case was sufficient. Appellant only challenges the part of the description that states that the home is in Blytheville. However, the warrant clearly states "in *or near Blytheville*," and the testimony showed that Gosnell is only two miles from Blytheville. Also, because the officer who gave the description of the place to be searched is the same officer who led the other officers to the appellant's residence, the risk of misidentification was minimal. This point has no merit.

Appellant also specifically contends that the evidence should have been suppressed because the search occurred at 8:55 a.m. when the warrant stated the search shall be executed between 6:00 a.m. and 8:00 a.m. The trial court found that the 8:00 *a*.m. was a typographical error and an innocent mistake. We agree. Arkansas Rule of Criminal Procedure 13.2(c) provides that warrants shall be "executed between the hours of six a.m. and eight p.m." The officers testified that this was a computer-generated form that must have already contained the 8 *a*.m. mistake and that they did not notice the error. We find that this typographical error was not a fatal defect. This technical error was not a substantial violation requiring suppression of the evidence. *See* Ark. R. Crim. P. 16(c); *Jones* v. *State*, *supra*.

Under these circumstances, we hold that the alleged defects were not fatal to the warrant. We cannot say that the trial court's ruling was clearly against the preponderance of the evidence.

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

Thomas WALLACE *v.* STATE of Arkansas

CA CR 96-79 932 S.W.2d 345

Court of Appeals of Arkansas
Division II
Opinion delivered October 30, 1996

William R. Simpson, Jr., Public Defender; *Thomas B. Devine III,*

Deputy Public Defender, by: *C. Joseph Cordi, Jr.*, Deputy Public Defender.

MELVIN MAYFIELD, Judge. The appellant was found guilty by a jury of aggravated robbery and theft of property of the value of more than $200, and he was sentenced to fifteen years in the Arkansas Department of Correction for aggravated robbery and three years for theft of property, to run concurrently.

On the morning of the trial, and before any evidence was presented, appellant's counsel made a motion in limine to prevent the prosecution from offering evidence that the appellant had approached the victim and offered some type of restitution in return for the victim dropping the charges. At that time the prosecutor informed the court that, about three weeks before the trial, appellant had approached the victim at the same store where the robbery occurred, apologized to him, asked him to "go pretty easy on them," and for doing this, the appellant offered to "pay [Sawyer] some of [his] money back." The prosecutor said it was his position that this was an admission by the appellant. Counsel for the appellant argued that the apology and offer of restitution was not a direct admission and that it was too inflammatory and prejudicial for the jury to hear. The court denied the motion.

At trial Billy Sawyer testified that on February 19, 1995, he went to a convenience store near his home, the Dodge Store, at around 11:30 p.m. As he was leaving the store, he noticed two men hanging around his car. When he approached they asked him to take them to Dixie Addition, and he agreed. A few blocks down the street the man in the front seat pulled a gun, cocked it, put it to Sawyer's head, and told him this was a robbery. Sawyer identified appellant as the man with the gun, and Sawyer said the man took about forty dollars and the car from him. Sawyer described his car as a 1977 Cadillac, two-door, and said he had bought it about twelve months prior to the robbery for $1,600. He testified that the car was in good shape when it was taken, and that it was still in good shape when it was returned to him.

Mr. Sawyer also testified that during the Labor Day weekend he had gone back to the Dodge Store, and the appellant approached him and asked him if he would "go pretty easy on" him, and said he would pay Sawyer "some of your money back."

Appellant argues on appeal that the court erred in denying the motion in limine. He says that the victim's testimony regarding the offer of reimbursement of his expenses in the case was "totally irrelevant because this offer was not an admission of guilt." He suggests that civil litigants who are not liable frequently offer to settle a case to avoid the costs and risks of a trial. Similarly, he says his attempt to reach a compromise with the prosecuting witness was not an admission of guilt and should not have been admitted into evidence.

Appellant also argues that if this evidence was relevant, its relevance was outweighed by the unfair prejudice the evidence would create, and it should not have been admitted in keeping with Arkansas Rule of Evidence 403.

Arkansas Rule of Evidence 401, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Arkansas Rule of Evidence 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *McCormick on Evidence* it is said:

> The policy of protecting offers of compromise in civil cases does not extend to efforts to stifle criminal prosecution by "buying off" the prosecuting witness or victim. Indeed, such efforts are classed as an implied admission and generally admissible. The public policy against compounding crimes is said to prevail.

Kenneth S. Boun, *et al.*, 2 *McCormick on Evidence* § 266, at 198 (4th Ed. 1992). *See also State* v. *Burt*, 249 N.W.2d 651 (Iowa 1977) (defendant returned to store and offered to pay for coat he was accused of shoplifting).

In *Morris* v. *State*, 21 Ark. App. 228, 230, 731 S.W.2d 230 (1987), we held that the appellant's attempt to influence a witness to change his testimony possessed independent relevance, because it tended to show the appellant's knowledge of her own guilt. Even evidence of other crimes is admissible under Ark. R.

Evid. 404(b) if the evidence is independently relevant, and the probative value of the evidence outweighs the danger of unfair prejudice under Ark. R. Evid. 403. *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986).

We think the question is one of *unfair* prejudice. Clearly, the jury could assume that the appellant's attempt to induce the victim to drop the charges was evidence of appellant's knowledge of his own guilt. This would be a common-sense evaluation of such evidence. However, we cannot say that the trial court was wrong in its apparent conclusion that the probative value of the evidence outweighed the danger of its *unfair* prejudice. After all, in considering the evidence, the jury is not required to set aside its common knowledge but has the right to consider all the evidence in the light of its own observations and experiences in the affairs of life. AMCRI 2d 103.

Affirmed.

PITTMAN and STROUD, JJ., agree.

William Bert JOHNSON *v.* STATE of Arkansas

CA CR 95-604 932 S.W.2d 347

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

Doug Norwood, for appellant.

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

JOHN MAUZY PITTMAN, Judge. William Bert Johnson appeals from his non-jury felony conviction of driving while intoxicated, fourth offense. Appellant was sentenced to three years in the Arkan-

sas Department of Correction, with two years suspended, and was fined $2,500.00. On appeal, appellant contends (1) that the trial court erred in finding that the information properly charged a felony DWI, (2) that the trial court erred in not reducing the charge from a felony DWI to a DWI, third offense, and (3) that the trial court erred in not dismissing the information for insufficient allegations of venue. We find no error and affirm.

Arkansas Code Annotated § 5-65-111(b)(3) (Repl. 1993) provides that any person who pleads guilty, nolo contendere, or is found guilty of violating § 5-65-103 shall be imprisoned for at least one year but no more than six years for the fourth or subsequent offense occurring within three years of the first offense and shall be guilty of a felony.

The initial information in this case alleged that appellant had had three prior "offenses." The information was amended to state that appellant had three prior "arrests." Appellant then filed two motions to dismiss. In his first motion, he argued that the amended information alleged that he had had three prior "arrests," rather than "convictions," and that it is three prior convictions that constitute an element of felony DWI, fourth offense. The State responded that appellant's prior offenses were described as arrests because, for purposes of penalty enhancement, prior DWI offenses are deemed to have occurred when the criminal act was committed, and the State used the date of arrest as the date of commission. *Rogers* v. *State*, 293 Ark. 414, 738 S.W.2d 412 (1987). Wording other than that of the statute may be used when the words convey the same meaning. Ark. Code Ann. § 16-85-405(k) (1987). An indictment or information is sufficient if the act or the omission charged as the offense is stated with a degree of certainty that enables the court to pronounce judgment on conviction. Ark. Code Ann. § 16-85-405(a)(1)(C) (1987). A variance between the wording of an indictment or information and the proof at trial does not warrant reversal unless the variance prejudices the substantial rights of the defendant. Ark. Code Ann. § 16-85-405(a)(2) (1987); *Tackett* v. *State*, 298 Ark. 20, 766 S.W.2d 410 (1989). Here, there were exhibits placed into evidence indicating that appellant had three judgments of conviction of DWI entered against him, each reflecting the date of the offense and conviction. Appellant has not demonstrated prejudice, and we find no error in the language used in the information.

In his second motion to dismiss, appellant alleged that he did not have a third-offense DWI conviction, but only a first-offense DWI, and two second-offense DWI's. He argues that one must have had three convictions, designated as first, second, and third offense, in order to be convicted of a fourth offense. Arkansas Code Annotated § 5-65-111 (Repl. 1993) sets out the elements of and penalties for subsequent offenses of DWI, and contains no requirement that the offender be punished as a third offender before he is punished as a fourth offender. It is only necessary that the defendant have been convicted of having committed, within the relevant time frame, three prior offenses. Moreover, this court has upheld a felony DWI conviction in *Dickerson* v. *State*, 24 Ark. App. 36, 747 S.W.2d 122 (1988), stating that it was not significant that a prior DWI conviction was marked as second offense since it was the defendant's third conviction within three years and the defendant knew how many times he had been convicted of DWI offenses. Similarly, we do not find error in appellant's felony DWI conviction as the record reflects that he had committed three prior offenses within three years of the fourth offense.[1]

Appellant next argues that he plea-bargained his third-offense DWI to a second-offense DWI, which conviction should be treated as a second offense for purposes of sentence enhancement. He relies on *State* v. *Crist*, 843 P.2d 368 (Nev. 1992), which held that a second conviction for driving under the influence of intoxicants that was plea-bargained to a first offense must be treated as a first offense for purposes of penalty enhancement.

The alleged plea-bargain agreement on which appellant relies is not part of this record, and we do not know the terms of any such agreement. Nevertheless, we decline to adopt the reasoning of *State* v. *Crist*, *supra*. The element of fourth-offense DWI at issue here is based on the number of prior offenses, not how they were designated. The language of Ark. Code Ann. § 5-65-111 is unambiguous. *See Dickerson* v. *State*, *supra*.

Appellant next argues that the trial court erred in allowing the prosecutor to amend the information orally during the

[1] We recognize that in *Dickerson* we mistakenly spoke in terms of three "convictions" within three years instead of "offenses." *See Rogers* v. *State*, 293 Ark. 414, 738 S.W.2d 412 (1987). However, that mistake does not affect resolution of the issue presented here.

trial to state correctly that the offense was committed in Madison County rather than Washington County. The State filed a written amended information two days after trial. Appellant argues that the information must be amended in writing prior to the case being heard on the merits. We do not agree. An information may be amended during trial if the nature or degree of the crime is not changed and if the defendant is not prejudiced through surprise. Ark. Code Ann. § 16-85-407(b) (1987); *Sellers* v. *State*, 50 Ark. App. 32, 901 S.W.2d 853 (1995). Appellant cites no authority, and we know of none, that requires that an amendment be made in writing. The nature or degree of the offense was not changed by the amendment, and appellant's counsel admitted that he was not surprised by the amendment. We find no error.

Affirmed.

JENNINGS, C.J., and HAYS, Special Judge, agree.

Naomi Stokes HOWARD, Executrix of the Estate of Frances Parette *v.* Aubrey WEATHERS

CA 95-1224 932 S.W.2d 349

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

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

No response.

JUDITH ROGERS, Judge. The appellant, Naomi Stokes Howard, as executrix of the Estate of Frances Parette, brings this appeal from an order dismissing her complaint against appellee, Aubrey Weathers. As her only issue on appeal, appellant contends that the trial court erred in finding that a valid *inter vivos* gift had been made to appellee of money belonging to the deceased as the beneficiary of an estate, but which was retained by appellee after his discharge as the executor of that estate. We find merit in appellant's argument and reverse.

Frances Parette and Juanita Richenback were sisters. Juanita died in June of 1987, and she left a will nominating appellee as the executor of her estate and naming Frances as her sole beneficiary. According to the final accounting, $34,758.72 was to be distributed to Frances upon the closing of the estate. Frances died testate in September of 1990. In her will, she appointed appellant as the executrix of her estate and designated appellant as her sole beneficiary. On behalf of Frances's estate, appellant filed this suit claiming entitlement to the proceeds of Juanita's estate which she alleged had not been distributed to Frances in accordance with Juanita's will and the order of final distribution of Juanita's estate. After a trial, the

trial court dismissed appellant's complaint, thereby accepting appellee's claim that Frances had made a gift of the money to him.

In his testimony at trial, appellee openly acknowledged that he had retained the money after the closing of Juanita's estate, but he said that he had done so at Frances's behest. He explained that, at Juanita's funeral, Frances instructed him to "take care" of the money she was to inherit and to send her $100 a month. Appellee also stated that, although he and Frances were virtual strangers, Frances told him that he could keep the remainder when she died. Introduced into evidence was a letter written by Frances to appellee, dated June 10, 1988, in which she stated, "Just send me one 100 [sic] a month. I don't want it all at once." Also introduced was a letter written by appellee to Frances, dated August 19, 1988, in which appellee informed Frances that "[t]here is now available to be distributed to you or to be held and paid over to you as you have previously directed me to do so the sum of $34,758.72." Appellee testified that he kept the money in a joint account in both of their names and sent Frances $100 a month until her death, as well as additional sums when requested. He also testified that he would have sent her "$1,000 or $10,000," if she had ever asked for it. He maintained that he had refused appellant's request to turn over the money to Frances's estate because Frances had made a gift of the money to him.

Appellee's testimony was confirmed in several respects by J.W. Green, the attorney who handled the probate of Juanita's estate, and in particular by the testimony of Reverend J.T. Welch, Frances's pastor. Reverend Welch testified, by deposition, that Frances had first asked him to hold the money under the same arrangement to give her $100 or more a month for whatever she needed and to keep the balance upon her death. He said that, when he refused, Frances told him that she was going to approach appellee, since her sister had trusted him well enough to name him as the executor of her estate. Reverend Welch testified that appellee sent him the monthly allowance to forward to Frances, who lived in a nursing home.[1] He also stated that it was his understanding that Frances could have asked appellee for all of the money if she had wanted it.

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[1] J.W. Green offered testimony that Frances believed that her receipt of the money would interfere with her staying in the nursing home.

At issue in this case is whether Frances made a completed *inter vivos* gift of the money to appellee. Gifts *inter vivos*, as well as *causa mortis*, are based on the fundamental right everyone has of disposing of his or her property as he or she so desires. While the law leaves the power of disposition complete, it regulates the methods by which it is accomplished to guard against fraud and imposition. *Krickerberg* v. *Hoff*, 201 Ark. 63, 143 S.W.2d 560 (1940). To that end, our law is clear that in order for an *inter vivos* gift to transpire it must be proven by clear and convincing evidence that (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. *Wright* v. *Union National Bank*, 307 Ark. 301, 819 S.W.2d 698 (1991).

Over the years, our courts have focused on the requirement of delivery. *Irvin* v. *Jones*, 310 Ark. 114, 832 S.W.2d 8 27 (1992). It is said that mere delivery of possession is not sufficient, but there must be an existing intention accompanying the act of delivery to pass title, and, if this does not exist, the gift is not complete. *Krickerberg* v. *Hoff*, *supra*. Thus, the effect of the delivery must be that the donor parts, not only with possession, but with dominion over, and control of, the property so delivered. *Baugh* v. *Howze*, 211 Ark. 222, 199 S.W.2d 940 (1947).

Applying these established principles to the case at bar, we must conclude that the elements necessary to establish a valid gift are sorely lacking. According to appellee's own testimony, Frances was to receive a monthly stipend, and she retained the authority to demand additional sums at her own pleasure. Therefore, it cannot be said that Frances completely surrendered dominion and control over the money by placing it in appellee's hands. It necessarily follows that she did not unconditionally or irrevocably make an immediate and final gift. At best, the evidence reflects an attempt to make a gift of the remainder upon the contingency of her death. However, a gift *inter vivos* cannot be made to take effect in the future, as such a transaction would only be a promise or an agreement to make a gift. *Krickerberg* v. *Hoff*, *supra*; *Neal* v. *Neal*, 194 Ark. 226, 106 S.W.2d 595 (1937); *Bryant* v. *Parker*, 188 Ark. 598, 66 S.W.2d 1061 (1934). For these reasons, we hold that appellant is entitled to recover the funds held by appellee, and we reverse the

trial court's contrary decision.

Reversed.

MAYFIELD and NEAL, JJ., agree.

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

CA 95-109 931 S.W.2d 795

Court of Appeals of Arkansas
En Banc
Opinion delivered November 6, 1996
[Petition for rehearing denied December 11, 1996.]

Winston Bryant, Att'y Gen., by: *Shirley Guntharp*, Deputy Att'y Gen., and *Suzanne Antley*, Ass't Att'y Gen., for appellant.

Ivester, Skinner & Camp, P.A., by: *Edward Skinner*, for appellee Arkansas Public Service Commission.

Ann E. Mealeman and *Garry S. Wann*, for appellee Southwestern Bell Telephone Company.

JOHN F. STROUD, JR., Judge. This appeal is brought by the Attorney General of the State of Arkansas from Orders No. 52, 56, 61, 62, 63, and 64 issued by the Arkansas Public Service Commission in Docket #92-260U and results from the Commission's refusal to compel Southwestern Bell Telephone Company (SWB) to respond to discovery propounded by the Attorney General. The Attorney General argues that, in denying his discovery requests, the Commission failed to pursue its authority regularly and abdicated its responsibility to regulate SWB. We conclude that the Commission has regularly pursued its authority and has not abused its discretion in denying the Attorney General portions of his requested discovery. The orders of the Commission are affirmed.

In Docket #92-260U, the Commission approved a stipulation entered into by SWB, the Staff of the Public Service Commission (Staff), and twenty other parties. This Stipulation resulted from an investigation conducted by Staff of SWB's earnings that found SWB's rates had produced earnings of $33 million in excess of SWB's reasonable revenue requirement. The Stipulation disposed of the issues raised by the excess earnings by providing that SWB would make incremental investments of $231 million over a three-year period to upgrade its infrastructure in Arkansas in lieu of potential rate reductions. The Commission approved the Stipulation in Order No. 38, but Order No. 38 also required SWB to establish a deferred account and to file quarterly reports so that the Commission could monitor the implementation of the upgrades. Order No. 38 further provided that the Commission would on an annual basis formally review the status of the deferred account, the investments made and projected investments remaining, and the revenues generated by those investments.

SWB filed a motion to clarify the procedure for developing the investment monitoring reports and also advanced a "Plan Investment Monitoring Report" form to be adopted on an interim basis. Staff supported the motion with some proposed modifications

and also recommended that SWB's monitoring report form be adopted. The Attorney General objected to SWB's motion, but he did not raise any specific objection to the adoption of SWB's proposed format for the plan investment monitoring reports, nor did he propose any additions to the format or request that any additional information be included in the monitoring reports. Commission Order No. 40 adopted SWB's motion as modified by specific provisions of Staff's response.

On April 21, 1994, and August 19, 1994, SWB filed its first- and second-quarter infrastructure reports, its plan investment monitoring reports, and monthly reports and work papers as required by Orders No. 38 and 40. The Attorney General then served SWB with thirty-six interrogatories, most containing five to six subparts, and thirty-one requests for production of documents that sought extensive and specific discovery of the information contained in the infrastructure reports. SWB objected to the Attorney General's discovery requests, contending that the information sought was irrelevant and immaterial, beyond the scope of the docket, and unduly burdensome and oppressive. The Attorney General filed a motion to compel responses to his discovery and also served SWB with a second set of interrogatories and production of documents that requested detailed information about the infrastructure report filed by SWB on October 21, 1994. SWB again objected to the Attorney General's requests, and the Attorney General moved to compel SWB to respond to his requests.

The Commission denied the Attorney General's motions in Order No. 52. It held that the monitoring reports contain extensive information on the infrastructure investments that are available to the Attorney General, and that the Attorney General has not cited any specific reason for his extensive discovery requests nor identified a specific flaw in the reports necessitating such extensive discovery. The Commission did provide, however, that, if the Attorney General knew of a specific deficiency or problem with the monitoring reports, he should bring it to the Commission's attention.

The Attorney General petitioned for rehearing of Order No. 52. He argued that the infrastructure reports did not reflect the information that Order No. 38 indicated would be necessary, i.e., whether the infrastructure upgrades are being implemented in a timely manner and in a manner which is most beneficial to the public. He also argued that the reports did not provide the informa-

tion necessary for the Commission to supervise and regulate SWB to ensure compliance with its orders. In Order No. 56, the Commission denied the Attorney General's petition for rehearing, stating that the Attorney General has not responded to Order No. 52 by citing any specific problems or deficiency in the monitoring reports or in the implementation of the infrastructure investment. The Commission noted that the Attorney General continues to argue the inadequacy of the monitoring reports adopted by Order Nos. 38 and 40, even though he had the opportunity to raise this issue during the extensive proceedings that led to the entry of Order No. 38 or to raise the issue in a petition for rehearing of that Order.

The Attorney General appealed Orders No. 52 and 56, and during this period, the Commission entered Order No. 55.[1] In response to this order, Staff and SWB each filed separate annual reports regarding the implementation of the Stipulation. The Commission then entered Order No. 58, which scheduled a public hearing to address and consider the proposed adjustments and modifications recommended by SWB and Staff to the Stipulation investments and infrastructure upgrades. The Attorney General sought additional discovery from SWB regarding its annual report. SWB answered some of the interrogatories and referred the Attorney General to its monthly infrastructure reports filed under seal with the Commission for the answers to others. SWB also filed separately its objections to the Attorney General's interrogatories and requests for production of documents.

The Commission addressed the parties' motions in Order No. 61:

> 1. Interrogatories No. 1(a), 2(a), 3(a), 4(a), 5(a), 6(a) and 7(a).
>
> SWBT responded to each of these Interrogatories by referring the AG to information contained in the Monthly Infrastructure Reports....
>
> The information sought by the AG can be obtained

[1] Order No. 55 has not been abstracted nor included in the record. This Court infers from the language in Staff's and SWB's annual reports that Order No. 55 instructed them to file annual reports regarding the implementation of the upgrades.

from the Monthly Infrastructure Reports. Pursuant to Rule 13.08(c), SWBT's answers to the above referenced Interrogatories [are] sufficient. If the AG or the AG's experts require guidance to interpret the contents of the Monthly Infrastructure Reports, the AG has the option to depose the appropriate employee of SWBT to explain the contents of the Reports.

2. Interrogatories No. 1(b)-(g), 2(b)-(g), 3(b)-(g), 4(b)-(g), 5(b)-(g), 6(b)-(g) and 7(b)-(g), and Requests for Production No. 1, No. 2, No. 3, No. 4, No. 5, No. 6 and No. 7.

In each of the above referenced interrogatory subparts the AG requests extensive and specific information on the investments which are the subject of the interrogatory, including all payees, the amounts of each payment, dates of payments and specific equipment received for expenditures....

....

The information sought by the AG does not appear on its face to be relevant to the issues which are the subject of the scheduled hearing and it is questionable whether the interrogatories are designed to lead to information relevant and material to those issues. However, the information may be relevant to the Report filed on March 10, 1995, and some of the requested information may be peripherally related to the issues which are the subject of the hearing. The task of compiling the extensive and detailed information which might be responsive to the AG's Interrogatories and Requests in one location would be burdensome and unreasonable. It is a sufficient response to allow the AG to inspect the information at the location of the information....

3. Interrogatories No. 10, No. 11, No. 12, No. 13, No. 14, No. 15, No. 16 and No. 28 and Requests for Production No. 8, No. 9, No. 10, No. 11, No. 12, No. 13 and No. 14.

In each of these Interrogatories the AG seeks "the amount of revenue that has been generated for SWB to date as a result of expenditures made pursuant to Order No. 38 ..." and other information. SWBT responded that the Quarterly Plan Investment Monitoring Reports filed with

> the Commission and provided to the AG track the revenue generated on a monthly basis.
>
> Pursuant to Rule 13.08(c), SWBT has adequately responded to the Interrogatories by specifying the records in the possession of the AG from which the answers may be derived. If the AG needs to have the records interpreted or explained, the proper course of action is to depose the appropriate SWBT employee to interpret the records.

Order No. 61 denied the Attorney General's motion to compel answers to Interrogatories No. 17 through 27 and Requests for Production No. 15 through 28. The Commission held that these interrogatories and requests for production were not relevant to the Report filed March 10, 1995, or the issues scheduled for hearing on May 9, 1995.

The Attorney General filed an additional discovery motion that complained that SWB was withholding from discovery contracts it had with certain vendors. Order No. 62 allowed the Attorney General to inspect the contracts SWB had with various vendors on the conditions stated by the vendors. The Attorney General also petitioned for rehearing of Orders No. 61 and 62, contending that these orders reflected a failure on the part of the Commission to pursue its authority regularly. Order No. 61, the Attorney General claimed, was unlawful because it held information regarding revenues generated by the Stipulation irrelevant; whereas, the Commission had said in Order No. 38 that it would review revenues annually. The Attorney General claimed that Order No. 62 was illegal because the order condoned SWB's violation of Order No. 61 and because the Commission reversed its position from Order No. 61.

Order No. 63 denied the Attorney General's petition for rehearing of Orders No. 61 and 62. The Commission again stated that the scheduled hearing was limited to the purpose of considering adjustments and modifications to the Stipulation investments and infrastructure upgrades and that the Attorney General's discovery exceeded the scope of the hearing. The Commission further stated that, if the Attorney General's discovery regarding the annual report filed by SWB leads to some legitimate issue, the Attorney General may raise that issue before the Commission in an appropriate pleading but that it would not entertain a collateral attack on

Orders No. 38 and 40. The Commission concluded that the appropriate time to deal with the overall issues of revenues generated from the Stipulation investments was at the conclusion of the three-year period of implementation, when the Commission would direct an appropriate review.

The Attorney General's petitions for rehearing of Orders No. 61, 62, and 63 were denied by the Commission in Order No. 64. The Commission held that the revenue information requested by the Attorney General was beyond the scope of the reports required by the Commission, that the Commission had allowed the Attorney General to depose a SWB employee to have the reports explained but that it did not require SWB to compile additional information, and that the Attorney General had confused discovery with an entitlement to specific answers. The Attorney General's second notice of appeal sought reversal of Orders No. 61, 62, 63, and 64 and was consolidated with his appeal of Orders No. 52 and 56.

The Attorney General has stated one point for appeal: The Commission failed to pursue its authority regularly by abdicating its responsibility to regulate SWB. The relief he is seeking is the remand or setting aside of Orders No. 52, 56, 62, 63, and 64, and the part of Order No. 61 that found his discovery requests irrelevant. He contends that the Commission in Order No. 38 gave SWB unprecedented use of over-earned ratepayer money and has joined with SWB in thwarting all of his attempts to obtain information about the actual use of the funds. In his brief, he has made numerous arguments criticizing the Commission's refusal to compel SWB to respond to his extensive discovery requests and disagrees with SWB's and the Commission's characterization of his appeal as a "discovery dispute." From our review, however, we find that the issue presented by this appeal is whether the Commission abused its discretion in refusing to compel SWB to respond to all of the Attorney General's discovery requests. We conclude that there has been no abuse.

Our review of appeals from the Public Service Commission is limited by the provisions of Arkansas Code Annotated § 23-2-423(c)(3), (4), and (5) (Supp. 1995), which define our standard of judicial review as determining whether the Commission's findings of fact are supported by substantial evidence, whether the Commission has regularly pursued its authority, and whether the order under review violated any right of the appellant under the

laws or the Constitutions of the State of Arkansas or the United States. *See Bryant* v. *Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 102, 877 S.W.2d 594 (1994). The Arkansas Public Service Commission has broad discretion in exercising its regulatory authority, and courts may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *AT&T Communications of the Southwest, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 129, 843 S.W.2d 855 (1992); *Russellville Water Co.* v. *Arkansas Pub. Serv. Comm'n*, 270 Ark. 584, 588, 606 S.W.2d 552 (1980). Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, and something more than mere error is necessary to meet the test. *Woodyard* v. *Arkansas Diversified Ins. Co.*, 268 Ark. 94, 97, 594 S.W.2d 13 (1980). To set aside the Commission's action as arbitrary and capricious, the appellant must prove that the action was a willful and unreasoning action, made without consideration and with a disregard of the facts or circumstances of the case. *AT&T Communications of the Southwest, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 40 Ark. App. at 130. This Court has often said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then this court must affirm the Commission's action. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 76, 813 S.W.2d 263 (1991).

■ The Attorney General begins his brief by arguing that the Commission abdicated its responsibility to regulate SWB by failing to observe its own discovery rules, disregarding Arkansas precedent, and not requiring SWB to follow its directives. Section 13 of the Commission's Rules of Practice and Procedure governs discovery. Rule 13.01 provides that any party may obtain discovery to the extent that it is relevant and material. Rule 13.02(a) specifically provides:

> Parties may obtain discovery regarding any matter, not privileged or subject to claim for a protective order pursuant to Rule 13.05 herein, which is relevant and material to the issues in the pending docket. Control of the frequency of use and extent of discovery rests in the sound discretion of the Commission.

Although the Attorney General argues that Rule 13.02 allows discovery of any issue remaining in a pending docket, Rule 13 specifi-

cally refers to "any matter ... which is relevant *and* material." (Emphasis added.) Order No. 52, which denied the Attorney General's discovery requests filed on August 23 and October 25, of 1994, held that the Attorney General was conducting a "fishing expedition," and had not cited any specific reason for his extensive discovery requests. Although the Commission gave the Attorney General the opportunity to demonstrate that the information he requested was relevant and material to the infrastructure reports required by Order No. 38, the Attorney General merely repeated his conclusions that the reports do not reflect the information that Order No. 38 indicated would be necessary, i.e., whether the infrastructure upgrades are implemented in a timely manner and in a manner most beneficial to the public.

In his brief, the Attorney General argues that, without the information he seeks to discover, SWB could report any number that it chooses and, therefore, it is necessary to have the supporting documentation in order to determine whether SWB is reporting accurate information. This argument further convinces us that the Commission was correct in its conclusion that the Attorney General was pursuing a "fishing expedition." A party to a pending action has no right to call for books, papers, and documents from his adversary merely for the purpose of entering into a "fishing examination" of them; to authorize their production there must be a substantial showing that the book, paper, or document sought contains material evidence in support of the cause of action or defense of the party asking for it. *Price* v. *Edmonds*, 231 Ark. 332, 337, 330 S.W.2d 82 (1959). It is not sufficient for a party to allege generally the materiality of the books or documents, as this would be the averment of a conclusion and permit the question of materiality to be decided by the applicant instead of by the court; nor is it sufficient to allege that such books or papers contain evidence relative to the merits of the action, but it must be made to appear wherein such relation exists. *Id.* at 338.

The Commission in Orders No. 38 and 40 determined the information that should be included in, and the format of, the infrastructure reports. Although the Attorney General objected to SWB's clarification of Order No. 38, he did not propose that any additional information be required, nor did he appeal from these orders. The Commission found that neither Order No. 38 nor Order No. 40 required that the information sought by the Attorney

General be included in the reports, and the Attorney General has not demonstrated that this discovery is necessary for the Commission to determine whether the upgrades are being implemented in a timely manner and in a manner most beneficial to the public.

The Attorney General also asserts that the Commission's complete disallowance of any discovery on the issue of revenues was arbitrary and capricious. The Attorney General's assertion, however, is contrary to the evidence. The quarterly reports filed by SWB contain revenue information. Commission Order No. 61, from which this Court quoted earlier in this opinion, found that much of the information the Attorney General sought was in SWB's monthly infrastructure reports but allowed the Attorney General to depose a SWB witness for the purpose of having the reports explained. The Commission further held that other information did not appear to be relevant to the issues scheduled for hearing by Order No. 58 but that it may be relevant to the March 10, 1995, report and that the Attorney General could inspect this information at its location. There was also evidence that SWB incurred approximately $6,000.00 in copying costs in its attempts to comply with Order No. 61. The Attorney General has failed to demonstrate that he was denied access to any relevant and material information.

The Attorney General next argues that the Commission abused its discretion by refusing him discovery of certain vendor contracts despite the fact that SWB had failed to apply for a protective order under Commission Rule 13.05. The Attorney General contends that the Commission allowed him to discover contracts between SWB and third-party vendors in Order No. 61 but that SWB later failed to produce the contracts, arguing that they were subject to a contractual provision prohibiting their disclosure. SWB responded that it was prohibited by the contracts from releasing them; however, it had contacted the vendors and sought their cooperation. Thereafter, AT&T responded that it would allow the Attorney General to obtain one copy of its contracts with SWB but that the Attorney General must return the copy to AT&T at the conclusion of the hearing. The Commission, in response to the Attorney General's motion for sanctions, entered Order No. 62, which allowed the Attorney General to review the AT&T contracts under the terms and conditions stated by AT&T and also held that the information sought by the Attorney General did not appear to

be relevant to the issues at the scheduled hearing. The Attorney General contends that the Commission's ruling in Order No. 62 is unlawful because the Commission reversed its position taken in Order No. 61; it ignored the requirements of Rule 13.05; it ignored supreme court precedent; and it ignored its responsibility to ensure compliance with its orders as required by Ark. Code Ann. § 23-1-103(a) (1987), which states in part that every public utility shall obey and comply with every order of the Commission in any matter affecting the business of any public utility and that it shall do everything necessary to secure compliance with its orders.

We find no merit to the Attorney General's argument. Rule 13.05 outlines the procedure for obtaining a protective order and allows a party to seek a protective order "[d]uring discovery, or during later stages of a formally docketed proceeding." Rule 13.05 also refers to Ark. Code Ann. § 23-2-316 (1987), which provides in part:

> (b)(1) Whenever the commission determines it to be necessary in the interest of the public or, as to proprietary facts or trade secrets, in the interest of the utility to withhold such facts and information from the public, the commission shall do so.
>
> (2) The commission may take such action in the nature of, but not limited to, issuing protective orders, temporarily or permanently sealing records, or making other appropriate orders to prevent or otherwise limit public disclosure of facts and information.

Clearly, under its legislative authority and internal rules, the Commission had the authority at any stage of the proceedings to find the documents were protected and limit their discovery.

The Attorney General cites *Dunkin* v. *Citizens Bank of Jonesboro*, 291 Ark. 588, 590, 727 S.W.2d 138 (1987), for his assertion that the Commission refused to follow supreme court precedent. *Dunkin*, however, concerns a defendant's refusal to answer interrogatories in a wrongful death action and bears no relevance to the proposition that the Attorney General argues here.

The Attorney General also asserts that the Commission failed to follow its own directives in Order No. 61 by not requiring SWB to answer with specificity Interrogatories 10-16 and Requests for

Production Nos. 11-14. Order No. 61 stated that SWB had adequately responded to the requests by specifying the records in the possession of the Attorney General from which the answers could be derived but allowed the Attorney General to depose a representative of SWB for the purpose of having the records interpreted or explained. The Attorney General deposed SWB witness Larry Walther and, after doing so, filed a motion to compel responses. The Attorney General claimed that, because Mr. Walther said in his deposition that the Quarterly Plan Investment Monitoring Reports reflect only a total revenue generated from the investments in all of the projects and that revenue information on individual projects does not exist, SWB had not followed the Commission's directive. The Commission disagreed. In Order No. 63, it said:

> In this Motion, the AG requests that the Commission compel Southwestern Bell Telephone Company (SWBT) to compile and create new records to respond to the AG's Interrogatories and Requests for Production. The AG acknowledges that the Commission did not require SWBT to compile and report the revenue information the AG is requesting in Order No. 38. In essence, the AG is requesting a modification of Order No. 38 over a year after the Order was entered.

The Attorney General is now attempting to convince this Court that Order No. 61 found that all revenue information the Attorney General sought through discovery was relevant and discoverable and, therefore, when the Commission did not compel discovery of all the revenue information in Order No. 63, it was disregarding its previous order. There is no merit to this argument. Order No. 61 did not find that the Attorney General's requested discovery was relevant or discoverable. It merely required SWB's representative to explain the reports it had already filed. The Attorney General has not claimed that SWB refused an explanation of its reports.

The Attorney General further claims that, by declining in Orders No. 52, 56, 61, 62, 63, and 64 to require SWB to respond to his discovery requests, the Commission arbitrarily and capriciously reversed its position from that taken by it in Order No. 38. We disagree. Order No. 38 provided:

> SWBT shall file in this docket a quarterly report reflecting the status and activity in the deferred account including interest thereon. The Commission will on an annual basis during the life of the Stipulation formally review the status of the deferred account, the investments made and projected investment remaining, and the revenues generated by those investments. The Commission will also make appropriate adjustments in SWBT's rates if necessary using the deferred account. During the annual review and/or upon petition of SWB to the Commission, the Commission will consider any proposed adjustments in the amounts allocated in the Stipulation to the various projects proposed in the Stipulation. Substantial adjustments transferring money allocated from one Stipulation project to another shall only be made after an order of the Commission is entered approving the proposed adjustment.

Although the Attorney General has repeatedly claimed that the information in the reports is insufficient for the Commission to determine whether the expenditures are most beneficial to the public or whether a reallocation of funds should be ordered, he has failed to demonstrate how his broad discovery requests are relevant and material to these issues. Furthermore, the Commission has in fact required SWB to produce additional information in response to the Attorney General's interrogatories, and it has also found that much of the information requested by the Attorney General has been provided to him in the monthly and quarterly reports.

The Attorney General argues that the Commission dramatically changed its position on the revenue issue in Order No. 63. The Attorney General states that Order No. 38 unequivocally provides that the Commission will review the revenues generated by the Stipulation investments annually but that the Commission amended this provision in Order No. 63 when it stated that "the appropriate time to deal with the overall issue of revenues generated from the stipulation investments is at the conclusion of the three-year period of the implementation, when the Commission will direct appropriate review." The evidence is overwhelming, however, that the Commission did in fact conduct an annual review as specified by Order No. 38. The Commission states at the beginning of Order No. 58 that it had directed Staff and SWB to file reports on the implementation of the Stipulation approved in Order No.

38. From the language in Staff's and SWB's Stipulation reports and Order No. 58, it appears that the Commission requested these reports in order to conduct its annual review of the deferred account as provided by Order No. 38. Order No. 64 states that the Commission had conducted the annual review:

> The Commission conducted the first annual review of Stipulation investments and upgrades based upon the reports filed by SWBT and Staff on March 10, 1995. There is no requirement that the Commission conduct public hearings or issue orders or findings in conjunction with the annual review of the Stipulation. However, in view of SWBT's request to make certain modifications and adjustments in the Stipulation expenditures, the Commission did schedule a public hearing on May 9, 1995, for the limited purpose of considering the modifications and adjustments proposed in SWBT's Report. Based upon a review of the reports filed by SWBT and Staff, the Commission determined that the proposed modification was the only issue which required further examination and the Commission scheduled a public hearing for that limited purpose.

The Attorney General argues that the Commission's failure to hold a formal hearing on the issue of revenues is contrary to its holding in Order No. 38; however, the clear wording of Order No. 38 does not support this interpretation. Furthermore, Rule 3.02 of the Commission's Rules of Practice and Procedure provides that "[a]ny matter before the Commission, including formal applications as defined in Section 4 of these Rules, may be adjudicated by administrative order based on the facts presented in the application without a hearing unless a hearing is required by law, the Commission, or these Rules." The Attorney General has not argued any rule of procedure or statute that requires a hearing in this situation, and there is no evidence that the Attorney General ever requested a hearing on the issue of revenues.

In summary, we find that the sole issue presented by this appeal is whether the Commission abused its discretion in denying the Attorney General's discovery requests. Rule 13.02(a) of the Commission's Rules of Practice and Procedure provides that "[c]ontrol of the frequency of use and extent of discovery rests in the sound discretion of the Commission." Based on our review of the pleadings, the briefs and oral arguments of the attorneys for the

parties, and the numerous orders entered by the Commission in response to the discovery requests, we cannot say that the Commission abused its discretion.

Affirmed.

JENNINGS, CJ., and PITTMAN, ROBBINS, MAYFIELD, and ROGERS, JJ., agree.

Wesley ROBERTS and Environmental Supply, Inc. *v.* David FELTMAN and D & W Textiles

CA 95-1267 932 S.W.2d 781

Court of Appeals of Arkansas
Division I
Opinion delivered November 6, 1996
[Petition for rehearing denied December 11, 1996.]

Easley, Hicky, Cline, and Hudson, for appellants.

Sharpe, Beavers, & McGill, for appellees.

OLLY NEAL, Judge. Appellants, Environmental Supply, Inc. (ESI), and Wesley Roberts, a former business partner of appellee David Feltman, appeal a Judgment and Order For Satisfaction of Judgment entered against them in the St. Francis Chancery Court on August 10, 1995. We find no error in the chancellor's ruling and therefore affirm.

The original judgment that is the subject of this litigation resulted from a foreclosure lawsuit filed by the Arkansas Industrial Development Commission (AIDC) on July 10, 1992, against Planters National Bank, appellant Wesley Roberts, appellee Feltman, and Roberts's and Feltman's joint enterprise, D&W Textiles (D & W).

The AIDC sought by its complaint to foreclose the $128,000 outstanding balance plus 5% interest remaining on an original $170,000 promissory note and mortgage executed by Feltman and Roberts and filed with the St. Francis County Circuit Clerk in January 1987. The AIDC requested that any judgment in its favor be declared a first and exclusive lien against certain real property located in St. Francis County upon which Feltman and Roberts had executed a mortgage in favor of the AIDC concurrently with the promissory note, and that a Commissioner be appointed to conduct a sale of the subject property. The complaint asserted that any interest claimed by Planters National Bank based on Deeds of Trust filed in the St. Francis County Circuit Court was subordinate to the AIDC's mortgage on the subject property.

After receiving notice and filing his separate answer to the AIDC's complaint, appellee Feltman filed a cross-complaint against Roberts, alleging that Roberts had received all the proceeds from the AIDC loan and converted them to his personal use, to the exclusion of Feltman and D&W. The chancellor ruled in favor of the AIDC on its complaint and in favor of Feltman on his cross-complaint by decree entered April 29, 1994. The chancellor also ordered that the subject property be sold at public auction in the event that Planters National Bank, Feltman, Roberts, and D&W failed to discharge the judgment entered against them within ten days from the date of judgment.

On July 28, 1994, after defendants below failed to pay the judgment within the decreed time and proper notification was given, the real estate in question was sold at a Commissioner's sale for the sum of $50,000, reducing the balance of the judgment by an equal amount. On January 11, 1994, in consideration of the sum of $40,000 posted by appellant Wesley Roberts, the AIDC assigned all its rights in the April 29, 1994, judgment to Roberts.

After learning of the AIDC assignment to Roberts, appellee Feltman filed in the chancery court a Petition for Satisfaction of Judgment, naming Roberts and AIDC as necessary parties. Feltman alleged in his March 13, 1995, petition (which he amended March 16, 1995, and April 13, 1995) that he was entitled to reimbursement from Roberts for $66 that had been taken from his bank account pursuant to an order of garnishment that had been issued in favor of AIDC. Feltman also claimed that the AIDC assignment resulted in the merger of AIDC's and Roberts's interests in the

judgment and prayed that any judgment against Feltman and D&W be declared extinguished by virtue of the judgment Feltman held against Roberts. The court scheduled a hearing for March 30, 1995, on Feltman's petition and subsequently, after learning during the course of the hearing that Roberts had executed an assignment of the judgment in favor of Environmental Supply, Inc., a Tennessee corporation, ordered the proceedings suspended pending notification of ESI. Both assignments were filed and recorded May 31, 1995. At the reconvened hearing on May 18, 1995, all parties appeared by counsel, and the chancellor entered a Judgment and Order for Satisfaction of Judgment in Feltman's favor by which it awarded Mr. Feltman his attorney fees and a $66 judgment against Roberts, and nullified the April 29, 1994, judgment against Feltman and D&W.

On appeal, appellant argues first that the chancellor erred in ordering the judgment ESI held satisfied, "even though the judgment had not been paid." The gravamen of that argument is that set-off of the judgments was an inappropriate remedy because ESI, who held the judgment at the time the final decree was entered, owed no obligation to appellee Feltman. In deciding appeals from the chancery courts, we review the evidence *de novo*, only reversing where the chancellor's findings of fact are clearly erroneous. *Clark* v. *Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992).

Here, the chancellor found that the competing or adverse judgments held by Roberts and Feltman were for the same amount and therefore, offset each other. The court's finding that the Roberts–ESI assignment was ineffective was precatory to that ruling. The chancellor articulated that his ruling did not address the relative rights of Roberts and ESI *vis a vis* each other, specifically finding that "the validity of the assignment as it affects Mr. Roberts and ESI is not before the court." The court also found that the assignment was "an attempt to establish a distance between the judgment and Mr. Roberts so that Mr. Feltman would be forced to honor and pay the judgment." That finding was supported by Roberts's admission that he was an incorporator of ESI and the fact that Roberts relinquished all his rights in the approximately $100,000 debt in exchange for ESI forgiving his debt which totaled $3,500 or 3.5% of that amount. Also, the court noted, at the hearing on Feltman's motion that Roberts did not know the exact

amount of the debt he owed ESI, and Danny Newland, president of ESI, did not know the exact amount of the judgment ESI received on assignment. Although these facts were sufficient to support the invalidation of the assignment under Ark. Code Ann. § 4-59-204 (a)(1987) as a fraudulent transfer, the court based its decision on the fact that ESI could not acquire any rights greater than those of its assignor. *See* Ark. Code Ann. § 4-58-101 (1987).

The chancellor was also correct in his ruling that Feltman was entitled to a setoff of his judgment for reimbursement and contribution against Roberts. Ark. Code Ann. § 16-65-603 provides:

> (a) Judgments for the recovery of money may be set off against each other, having due regard to the legal and equitable rights of all persons interested in both judgments.
>
> (b) The set off may be ordered upon motion after reasonable notice to the adverse party, where both judgments are in the same court, or in an action by equitable proceedings in the court in which the judgment sought to be annulled by the set off was rendered.

Ark. Code Ann. § 16-65-603 (1987).

Here, the chancellor took adequate steps to ensure that the rights, of all parties interested in the judgment were protected by first ordering a hearing on Feltman's original petition and secondly by suspending the proceedings until such time as ESI could be notified and appear to contest the matter. Both the AIDC judgment against Feltman and the Feltman judgment against Roberts resulted from the same proceeding and Feltman's petition was an equitable action brought in the same court. Because Feltman's judgment against Roberts and the judgment Roberts acquired on assignment from AIDC were rendered in the same court and the chancellor, in all respects, complied with Ark. Code Ann. § 16-65-603, we cannot say the findings of fact upon which the set-off was based were clearly erroneous.

Appellant's argument that the court erred in finding that Feltman's judgment against him "automatically" gave Feltman a right to set-off is also without merit. Ark. Code Ann. § 16-65-602 states in relevant part:

> (b)(1) Whenever a judgment is satisfied otherwise than upon an execution, it shall be the duty of the party or his

attorney within sixty (60) days thereafter, to enter satisfaction in the judgment book. . . .

(2) the court may, on motion and notice, compel an entry of satisfaction to be made.

* * *

(c)(1) If the person receiving satisfaction of any judgment or decree neglects or refuses to acknowledge the satisfaction of the judgment or decree within the time prescribed by subdivision (b)(1) of this section, the party interested may, on notice given to the adverse party or his attorney, apply to the court to have satisfaction entered.

(2) If the court is satisfied that the plaintiff . . . has received full satisfaction of the judgment or decree, an order shall be made directing the clerk to enter satisfaction on the judgment or decree, which shall have the same effect as if it had been acknowledged by the party.

(3) The costs attending the application shall be recovered of the party so refusing, by execution, as in other cases.

Ark. Code Ann. § 16-65-602 (1987).

It appears that, in this case, appellee Feltman petitioned the court under this section to have his judgment satisfied. The court conducted a hearing on the issue, giving appellant Roberts ample opportunity to dispute the proposed satisfaction. Upon the evidence presented, the court made the factual finding pursuant to section (c)(2) above that Feltman was entitled to satisfaction by virtue of his right to a setoff. While Ark. Code Ann. § 16-65-603 makes no provision for satisfaction of judgment, the chancellor used both the terms "setoff" and "satisfaction" in its final decree. The authority not expressly given by § 16-65-603 is provided in § 16-65-602. We will affirm the chancellor's decision if it is correct for any reason, *Pryor* v. *Raper*, 46 Ark. App. 150, 877 S.W.2d 952 (1994). Because it follows from the court's finding that Feltman was entitled to a complete setoff that he was also entitled to satisfaction of the adverse judgment, we cannot say the chancellor's finding in this regard was clearly erroneous.

Mr. Robert's final argument challenges the chancellor's award of costs, including attorney fees to Feltman. The court was

clearly authorized under Ark. Code Ann. § 16-65-602 (c) to award Feltman his costs, but cited no specific statute authorizing the award of an attorney's fee. Under state law and our prior decisions, an award of attorney's fees without express statutory authority is improper. *See Ark. Dept. Hum. Serv.* v. *Kistler*, 320 Ark. 501, 898 S.W.2d 32 (1995). Attorney's fees are not "costs" within the meaning of Ark. Code Ann. § 16-65-602(c) and may not be awarded unless specifically provided for by statute. *Damaron* v. *University Estates*, 295 Ark. 533, 750 S.W.2d 402 (1982). Therefore, Feltman should have only been awarded the costs he incurred in pursuing his Petition for Satisfaction of Judgment. Accordingly, the chancellor's decision is modified to reflect that Feltman is awarded $40 as his costs expended in the prosecution of his petition.

Affirmed as modified.

HAYS, S.J., agrees.

GRIFFEN, J., concurs.

Carey Wayne ALEXANDER *v.* STATE of Arkansas

CA CR 94-1299 934 S.W.2d 927

Court of Appeals of Arkansas
En Banc
Opinion delivered November 20, 1996

Appellant, *pro se*, and *Maxie G. Kizer, P.A.*, for appellant.

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

MELVIN MAYFIELD, Judge. This is a no-merit appeal, and this is the second time it has been submitted. As a result of the first submission, we issued an unpublished opinion, handed down December 13, 1995, finding that appellant's appointed counsel had failed to abstract two of the appellant's motions and the adverse rulings thereon, and had failed to offer any explanation as to why the rulings did not present arguable grounds for reversal. Therefore, counsel's motion to withdraw was denied, and he was directed to comply with the requirements of Arkansas Supreme Court and Court of Appeals Rule 4-3(j) by filing a proper abstract and brief in support of his motion.

Counsel filed a supplemental abstract and brief on January 8, 1996; the appellant filed a pro se brief on February 26, 1996; and the State filed a supplemental abstract and brief on March 25, 1996. The case is now before us for the second time.

In the appellant's supplemental brief, counsel abstracts the motions for a directed verdict, made at the close of the prosecution's case and at the conclusion of the appellant's case, which were based upon the contention that the evidence was not sufficient to support appellant's conviction.

Then, apparently thinking that the abstract of the evidence in his original brief was still before the court, counsel repeated the same argument made in his original brief. After thoroughly discussing the evidence and citing the applicable law, counsel stated that "it cannot be said" that the trial court erred in denying the motions for a directed verdict. The appellant argues, in his pro se brief, that

the evidence is insufficient to support his conviction and also contends that he was denied his right to effective assistance of counsel and to due process.

The State argues that the appellant cannot contend on appeal that the evidence is not sufficient to support his conviction because this issue was not raised at trial by proper motions for directed verdict. In its brief, the State supplemented the abstract in the brief filed for the appellant by his counsel to show that at the start of the trial the appellant himself told the Court that he wanted an "exchange of attorney" and had a letter from an attorney saying he would take the case for $500. The judge told appellant that this should have been made known "before now," but if someone shows up and presents his credentials, "I'll certainly consider it. But, otherwise, we're going to proceed on with trial." There is nothing in the record to show that another attorney showed up, and the appellant's pro se brief does not contend that one appeared.

In *Anders* v. *California*, 386 U.S. 738 (1967), the Supreme Court held that in no-merit appeals the appellate court, after receiving counsel's brief referring to anything in the record that might arguably support an appeal and after allowing the appellant to raise any points he chooses, should decide, after a full examination of all the proceedings, whether the case is "wholly frivolous." 386 U.S. at 744. Although the appellant's counsel states that there is no merit to the appellant's contention that the evidence is insufficient, and the State does not argue the point because it contends the point was not preserved at trial, from the discussion of the evidence in the appellant's pro se brief, and in the brief of his counsel, it seems clear that the evidence is sufficient. Moreover, we have the record before us and from all of the matters before us we now set out a brief summary of the evidence.

The appellant was convicted of commercial burglary committed by unlawfully entering a building to commit a crime therein. At the trial, Officer McVay testified that on March 4, 1994, shortly after midnight, he and another officer were dispatched to a grocery store and beauty shop to investigate sounds (as if someone was tearing a door down) that sounded like a burglary. McVay said that when he arrived he saw a cash register drawer on the ground in the area between the store and the shop, and the appellant was sitting behind the drawer counting money. A screwdriver and pair of gloves were lying beside the drawer.

Officer McVay asked appellant what he was doing; appellant said, "Nothing"; McVay said appellant was under arrest; and appellant stood up and put the money into his pocket. A scuffle ensued, and appellant was arrested. The officers found the point of entry into the store, an old doorway that had been boarded up, on the south side of the building. The officers entered the store, discovered the cash drawer missing, searched the building, and found no one inside.

Jessie Nelson testified that he is the owner of the grocery store, and on the night of March 4, 1994, he got a call from the police department and immediately went to his store. He identified the cash drawer and the money that came out of it, and he told the officers how much money was in the drawer. He said he did not know the man the officers had in custody, and he could not be certain that the defendant in the courtroom was the same man.

Two witnesses who worked at the University of Arkansas at Pine Bluff testified that on March 4, 1994, the appellant was employed there, and his hours were from two in the afternoon to 10 at night. The appellant testified that he left work at 10 p.m. after stripping and waxing a floor. He said he had a screwdriver with him to repair the buffer. Appellant said that after leaving work he went to a convenience store, a pool hall/beer joint about one block from where the robbery was committed, back to the convenience store, and then to his home, which was right across the street from the grocery store that was broken into. Later, he returned to the UAPB campus to make a telephone call, and while he was walking back to his home he heard dogs barking behind the grocery store. He said he peeped through the alley trying to see what was happening and, while he was walking, Officer McVay stopped him and accused him of the breaking into the store. Appellant said he did not "break" into the store.

In resolving the question of the sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the decision of the trier of fact. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989); *Ryan*, *supra*. The fact that evidence is

circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982). The jury is not required to believe the testimony of a criminal defendant, who is probably the person most interested in the outcome of the proceeding. *Zones* v. *State*, 287 Ark. 483, 702 S.W.2d 1 (1985).

Arkansas Code Annotated § 5-39-201(b)(1) (Repl. 1993) provides that a person commits commercial burglary if he enters or remains unlawfully in a commercial occupiable structure of another with the purpose of committing therein any offense punishable by imprisonment. We think the officer's testimony that appellant was found shortly after midnight with a cash drawer from a grocery store that had been broken into; that a screwdriver was found near the drawer; and that appellant put money from the drawer in his pocket is sufficient to support appellant's conviction.

In regard to the appellant's pro se motion made in open court for "an exchange of attorney," we note that appellant initially made this request in a written pro se motion for continuance filed three days prior to trial. That motion was not acted upon prior to trial, but the same issue was presented by the oral pro se motion made at the beginning of the trial. The State argues that to grant appellant's request would require a continuance and that the court did not err in its ruling. We agree. The refusal to grant a continuance in order for the defendant to change attorneys rests within the sound discretion of the trial judge, and his decision will not be overturned absent a showing of abuse; the burden of showing such abuse rests on the shoulders of the appellant. *Edwards* v. *State*, 321 Ark. 610, 906 S.W.2d 310 (1995). Moreover, the right to counsel of one's choice is not absolute; if change of counsel would require postponement of trial because of inadequate time for a new attorney to properly prepare a defendant's case, the court may consider, in granting or denying the change, such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to the defendant. *Leggins* v. *State*, 271 Ark. 616, 609 S.W.2d 76 (1980).

Here, the court noted that appellant should have made his request sooner; that trial was starting; and that if someone else showed up and properly presented his credentials to the court, the court would consider it. No one showed up; appellant did not reveal the name of any other attorney; and appellant did not state

that he had the money required to pay the unnamed attorney "who would take his case for $500."

Under the circumstances, we think it is clear that the trial court did not abuse its discretion in refusing to grant the appellant's motion for continuance or his request for new counsel.

In regard to appellant's pro se argument that his counsel was ineffective, we do not consider ineffective assistance of counsel as a point on direct appeal unless that issue has been considered by the trial court. *Edwards* v. *State*, *supra*. Even constitutional arguments cannot be raised for the first time on appeal. *See Wetherington* v. *State*, 319 Ark. 37, 42, 889 S.W.2d 34, 37 (1994). And, as the State notes in its brief, if the appellant should wish to raise an ineffective-assistance-of-counsel claim, he may do so in a petition pursuant to Arkansas Rule of Criminal Procedure 37. *See, e.g. Missildine* v. *State*, 314 Ark. 500, 863 S.W.2d 813 (1993).

Appellant has also argued that he was denied his constitutional right to due process because the trial court denied his motion for a continuance. However, as we have already held, no reversible error was committed in regard to that matter; therefore, the appellant has not been denied due process in that regard.

From our review of the record and the briefs presented to this court, even though appellant's counsel has not fully corrected the deficiencies of his first brief, it is clear from all the matters before us that the appellant's judgment of conviction should be affirmed. Therefore, in the language of *Anders* v. *California*, *supra*, we have been induced "to pursue all the more vigorously" our own review, and we have not been left with only the aid furnished by counsel's no-merit letter. *See* 386 U.S. at 745. And we have done what *Anders* requires — determined that this appeal is "wholly frivolous."

The judgment appealed from is affirmed, and counsel's motion to be relieved is granted.

Affirmed.

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

PITTMAN and ROGERS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge. This is the second time that this no-merit criminal appeal has been before us. In our initial opinion, we denied counsel's motion to be relieved because he failed to

abstract or discuss two motions in which appellant requested appointment of a new attorney. We held that, because of these omissions, counsel's abstract and brief failed to meet the requirements of Ark. R. Sup. Ct. 4-3(j). Consequently, we denied counsel's motion to be relieved and directed him to file a proper abstract and brief. *See Alexander* v. *State*, CACR94-1299 (unpub. op. del. December 13, 1995). Although counsel has now filed a supplemental abstract and brief, he has again failed to discuss the appellant's motions requesting a new attorney. Despite counsel's continued failure to address these motions, the majority has deemed the appeal frivolous and affirmed appellant's conviction. I believe that the majority has overstepped its authority in doing so, and I respectfully dissent.

Pursuant to the doctrine of law of the case, the decision in a first appeal becomes the law of the case on a second appeal and is conclusive of every question of law or fact decided in the former appeal. *Mercantile First National Bank* v. *Lee*, 31 Ark. App. 169, 790 S.W.2d 916 (1990). When this case was first submitted, we held that the omissions in counsel's abstract and brief rendered them deficient under Ark. R. Sup. Ct. 4-3(j). These deficiencies were not cured in the supplemental abstract and brief submitted by counsel in the present appeal, yet the majority has granted counsel's motion to be relieved. This is contrary to Rule 4-3(j) and contrary to the doctrine of the law of the case.

Perhaps the majority believes that, because members of this court have examined the record scrupulously and found no error, Rule 4-3(j) need not be complied with. I strongly disagree. Rule 4-3(j) is derived from *Anders* v. *California*, 386 U.S. 738 (1967), where the Supreme Court struck down a similar procedure, holding that "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client." 386 U.S. at 744. The majority in the case before us has not preserved for appellant the essential right guaranteed by *Anders*, *i.e.*, that of counsel acting in the role of an advocate. Although the majority may believe that its own inspection of the record is an adequate substitute for an active advocate, it is precisely this confusion of roles that the *Anders* Court sought to rectify. Ours is an adversary system of criminal justice, 386 U.S. at 742, and in order to function properly, attorneys must act as advocates, and judges must remain judges. The net effect of our decision today has been to deny appellant his right to counsel

on appeal, and I dissent.

ROGERS, J., joins in this dissent.

Dewayne WILLIAMS *v.* STATE of Arkansas

CA CR 93-1291 934 S.W.2d 931

Court of Appeals of Arkansas
En Banc
Opinion delivered November 20, 1996

Steve Imboden, for appellant.

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

JUDITH ROGERS, Judge. Appellant, Dewayne Williams, was found guilty by a jury of second-degree murder and was sentenced to a term of twenty years in prison. Appellant raises three issues for reversal of his conviction. Because we find merit with his first point, we reverse and remand for a new trial.

Shane Kidwell was fatally shot while sitting in his car at a housing project in Blytheville, Arkansas, and appellant was charged with first-degree murder in connection with Kidwell's death. Appellant filed a pretrial motion to prohibit the State from impeaching its own, as well as defense, witnesses with prior statements made to the police. Appellant again raised objections to the State's impeach-

ment of the witnesses at trial, which the trial court overruled. Appellant assigns the trial court's rulings as error.

■ We recently considered this issue in *Hinzman* v. *State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996). There, we recognized that unsworn statements made by a witness are hearsay, and thus cannot be introduced as substantive evidence to prove the truth of the matter asserted therein. We also acknowledged that, under Rule 613 of the Arkansas Rules of Evidence, extrinsic evidence of a prior inconsistent statement made by a witness can be admitted 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 about the statement. Conversely, if the witness admits giving a prior inconsistent statement, then extrinsic evidence of that statement is not permitted. *Id.* In *Hinzman* v. *State*, we determined that the trial court had erred by allowing the State to impeach the prosecuting witness, who candidly admitted that she had previously given false statements to the police and others, by quoting excerpts from the prior statement detailing the accusations she had made against the defendant. We reached that decision in reliance on the settled principles mentioned above and previous case law, particularly the supreme court decision of *Roberts* v. *State*, 278 Ark. 550, 648 S.W.2d 44 (1983), where it was held that a prior inconsistent statement could not be quoted into evidence as part of the impeachment process.

■ In the case at bar, Shawn Jefferson, a witness for the defense, testified on direct examination that appellant was standing in a crowd drinking when the shooting occurred and that the only person near the victim's vehicle was Jerome Woodard, who had since been killed. During cross-examination, the State asked Mr. Jefferson if he had given a statement to police officers soon after the murder of Shane Kidwell. The witness responded that he had voluntarily given a statement to the police. The following then occurred:

Q: You told them in that statement that "[appellant] went to shooting at the dude," didn't you?

A: I can't remember.

Q: Would you like to have a copy of your statement to look at?

A: Yes, sir, I would.

Q: (HANDING) I refer you to page two. The last few questions on page two. Did you make that statement to police officers?

A: (EXAMINING) I believe so.

Q: That was in a tape recorded statement?

A: Yes, sir, it sure was.

Q: That was some one or two days after this murder had taken place — the murder of Shane Kidwell. Did you in fact at that time make a statement that [appellant] had shot Shane Kidwell some four to five times?

A: Yes, sir, I did.

In its examination of the witness, the State did more than question the witness as to whether he had given a statement which was not consistent with his testimony at trial. As in *Hinzman* v. *State*, the State sought to impeach the witness with the prior statement by quoting from the statement, thereby revealing the content of the assertions which had been previously made. Moreover, the witness was not given the opportunity to explain or deny that he had given an inconsistent statement. *See Patterson* v. *State*, 318 Ark. 358, 885 S.W.2d 667 (1994). In keeping with *Hinzman* v. *State* and the case law discussed therein, we conclude that the State's attempt to impeach the witness was improper. The dissent asserts that Shawn Jefferson did not unequivocally admit the statement. It is clear from the record that Mr. Jefferson admitted making a statement but was not given the opportunity to admit or deny making a prior inconsistent statement as Rule 613 requires.

For much the same reason, we also conclude that error occurred in the State's impeachment of its own witness, Kimberly Smith.

Appellant also argues that the trial court erred in denying his motion to suppress evidence because his custodial statement was not given voluntarily but was obtained in violation of his *Miranda* rights. We disagree.

■ In reviewing the trial court's denial of a 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 the preponderance of the evidence. *Dickerson* v. *State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995).

Custodial statements are presumed involuntary, and the State has the burden of proving otherwise. *McClendon* v. *State*, 316 Ark. 688, 875 S.W.2d 55 (1994). The State must therefore make a *prima facie* showing that the accused knowingly, intelligently, and voluntarily waived his right to remain silent. *Morris* v. *State*, 302 Ark. 532, 792 S.W.2d 288 (1990). In determining whether a statement is voluntary, consideration is given to the accused's age, lack of education, low intelligence, lack of advice of constitutional rights, length of detention, repeated and prolonged questioning, and the use of physical punishment. *Henderson* v. *State*, 311 Ark. 398, 844 S.W.2d 360 (1993). The credibility of the witnesses who testify to the circumstances surrounding the defendant's custodial statement is for the trial court to determine. *Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991).

The record reveals that appellant was twenty-one years old, had an eleventh grade education, and was working on a GED. Ralph Hill, Chief of Police in Blytheville, arrested appellant on Friday, July 18, 1992, at 6:30 a.m. Chief Hill testified that he advised appellant of his *Miranda* rights. Chief Hill said that appellant acknowledged that he understood his rights, but he did not take a statement from appellant at that time because appellant was intoxicated. Mary Ann Lampe, a detective sergeant, testified that she was present at the time appellant was arrested and that he was advised of his rights. She also said that appellant was not questioned at that time because he was intoxicated.

Vernon Gann, a detective with the Blytheville police department, testified that he interviewed appellant at 9:00 a.m. on Monday, July 20, two days after his arrest. He said that he advised appellant of his rights and read the rights form to appellant. Detective Gann testified that appellant refused to sign the rights form, but that appellant indicated that he understood his rights and would cooperate and answer any questions. He said that he tape recorded their conversation, and appellant gave his statement of his own free will and was not threatened, hit, struck, or beaten. Detective Mike Marshall was also present during the interview, and he testified that appellant voluntarily waived his rights and agreed to give a statement.

Appellant testified that he was intoxicated when he was arrested. He said that Chief Hill got violent with him and began kicking his chair. Appellant testified that he requested an attorney several times over the course of the weekend and that he was struck and threatened. Appellant admitted that he refused to sign the rights form.

After reviewing the evidence, we cannot say that the trial court's finding that appellant voluntarily waived his *Miranda* rights was clearly against the preponderance of the evidence.

Appellant also maintains, however, that there was no valid waiver of his *Miranda* rights because he did not sign the written waiver. There is no requirement that an accused sign a written waiver prior to making a statement. *Hayes* v. *State*, 312 Ark. 349, 849 S.W.2d 501 (1993).

Lastly, appellant argues that he was not promptly brought before a magistrate following his arrest pursuant to Ark. R. Crim. P. 8.1. We decline to address appellant's final point because he failed to make this argument below, and we do not address issues raised for the first time on appeal. *Penn* v. *State*, 319 Ark. 739, 894 S.W.2d 597 (1995).

Reversed and remanded.

ROBBINS, MAYFIELD and NEAL, JJ., agree.

JENNINGS, C.J., and PITTMAN, J., concur in part and dissent in part.

JOHN MAUZY PITTMAN, Judge. I respectfully dissent from that portion of the majority opinion regarding the issue of the impeachment of two witnesses. I do not disagree with the abstract principles of law recited in the prevailing opinion. However, I cannot agree with the affirming judges' application of those principles to the facts of this case.

The State's witness, Kimberly Smith, testified on direct examination that she did not see anyone with a gun on the night of the shooting. The prosecutor asked if she saw anything in appellant's hand that night. She responded, "I can't say it was a gun but — I don't know what it was in his hand." When the prosecutor asked her if she had given a statement to the police, appellant's counsel sought to be heard on his motion *in limine* that the State not be

permitted to impeach its own witness with a prior statement because the effect would be to present inadmissible hearsay as substantive evidence. A hearing outside the jury's presence was conducted at that time, and the witness testified that she did not have firsthand knowledge as to the substance of the statements she made and that much of her prior statement was based on hearsay. She further testified at the hearing that she saw the print of a gun in appellant's back pocket, but that she could not say with certainty that it was a gun. Her prior statement was that she saw appellant "playing with his gun" and "saw him with it that night." The court ruled that the State could ask the witness if her trial testimony was inconsistent with the prior statement and if she said "yes," no further testimony would be permitted.

When the trial resumed, Smith stated that she did not see anything in appellant's hand that night, but did see what looked like the print of a gun in his pocket. When the prosecutor asked if her testimony was consistent with her prior statement given to the police, appellant objected, the court modified its earlier ruling, and the question was never answered. The court ruled that the probative value of the impeachment outweighed any possible prejudicial effect. The prosecutor was then allowed to ask the witness whether she said in her prior statement that appellant had a gun. The witness responded, "By hearsay, yes, I did."

Appellant first contends that the State impermissibly exposed to the jury hearsay testimony and that the probative value of the testimony was outweighed by the prejudicial effect of the jury attributing substantive value to the prior inconsistent statement. Appellant cites *Roberts* v. *State*, 278 Ark. 550, 648 S.W.2d 44 (1983), in which the supreme court held that the State knew that the witness's trial testimony would be inconsistent with a prior statement and that the only reason the State could have for impeaching its own witness would be to allow the jury to accord substantive value to the otherwise inadmissible testimony. Here, however, the prosecutor stated that the State had not spoken with the witness prior to trial because she was charged with murder in an unrelated case. Thus, unlike in *Roberts*, I cannot say that the State's impeachment of its own witness was done in bad faith. *See Gross* v. *State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983).

Appellant argues next that the State could ask the witness, without referencing the specific prior statement, only whether her

trial testimony was inconsistent with a prior statement. In *Pemberton* v. *State*, 292 Ark. 405, 730 S.W.2d 889 (1987), the court rejected the argument that questioning by referencing the prior inconsistent statement was impermissible. There, the witness was questioned by reference to a specific prior inconsistent statement, and the court held that the questioning was not unduly prejudicial. In *Gross* v. *State*, *supra*, this court stated that whether a witness could be questioned with reference to the specific statement is controlled by Ark. R. Evid. 607, 613, and 403. While the law is clear that it is impermissible to quote from the prior statement so as to essentially read it into evidence, the permissibility of a reference to the specific statement is governed by Rule 403. *Roberts* v. *State*, *supra*; *see Hinzman* v. *State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996). In the present case, the trial court held that the probative value of the impeachment of the witness's testimony outweighed its prejudicial effect. Prior inconsistent statements are relevant for impeachment purposes where they contradict testimony. *McDaniel* v. *State*, 291 Ark. 596, 726 S.W.2d 679 (1987). If the cross-examiner is restricted to referring to the prior statement only in the most general terms, the witness is not given a fair opportunity to explain the prior statement, any impeachment that may occur is negligible, and the jury is likely confused. I find no error in the impeachment of witness Kimberly Smith.

Shawn Jefferson, the second witness in question, testified at trial that the only person near the victim's car at the time of the shooting was Jerome Woodard. Jefferson's testimony cited in the prevailing opinion demonstrates that Jefferson failed to unequivocally admit the statement. One of the purposes for referring to the content of the prior statement is to call the witness's attention to the exact statement so that the witness is given a complete opportunity to explain or deny it, in accordance with Rule 613(b). When the witness does not unequivocally admit the making of the statement, but says "I can't remember" and "I believe so," then the minimal foundation required by this rule has been laid. Here, the prosecutor paraphrased Jefferson's prior statement that appellant shot the victim some four to five times and also quoted a brief excerpt from this statement that "[appellant] went to shooting at the dude." In the end, Jefferson admitted making a prior statement that he had seen appellant shoot the victim four or five times; however, the prosecution did not pursue the questioning and produced no extrinsic evidence. The State should not be limited in its impeachment

evidence when the witness does not unequivocally admit making the prior inconsistent statement. *See Hinzman* v. *State, supra.* I find no error.

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

Gary Wayne NASON *v.* STATE of Arkansas Child Support Enforcement Unit

CA 95-1059 934 S.W.2d 228

Court of Appeals of Arkansas
Division III
Opinion delivered December 4, 1996

Parker & Parker, by: *Wayland A. Parker, II*, for appellant.

Mark Woodville. for appellee.

JOHN E. JENNINGS, Chief Judge. Marie Brothers and Gary Wayne Nason were married in the 1970's and had three sons. In their 1978 divorce, Ms. Brothers was awarded custody of the children but no child support was ordered. Ms. Brothers subsequently assigned her rights to child support to the State of Arkansas, and the Office of Child Support Enforcement filed a petition for prospective and retrospective support on December 7, 1995.

Following a hearing on the petition the chancellor ordered appellant to pay child support in the amount of $51.00 per week and awarded a judgment to the State for retrospective support totaling $15,600.000 over a five-year period.

The only issue raised on appeal is whether the trial court had authority to award a judgment for retrospective child support. The propriety of the amount awarded is not at issue. We find no error and affirm.

Appellant's argument is based primarily on Ark. Code Ann. § 9-14-236(b), which states:

> In any action involving the support of any minor child or children, the moving party shall be entitled to recover the full amount of accrued child support arrearages from the date of the initial support order until the filing of the action.

Appellant contends the statute means that the court cannot award support for any time prior to "the date of the initial support order."[1] Appellant also argues that *Green* v. *Bell*, 308 Ark. 473, 826 S.W.2d 226 (1992), which was relied on by the appellee at trial, has no application because it is a paternity case.

The Arkansas Supreme Court has long held that a parent has a legal duty to support his minor child regardless of the existence of a support order. *See e.g.*, *Holt* v. *Holt*, 42 Ark. 495 (1883); *McCall* v. *McCall*, 205 Ark. 1123, 172 S.W.2d 677 (1943). It is true that *Green* v. *Bell*, cited above, was a paternity case, but in *Green* the court held that an award of past child support rests upon the equities of the particular case. It is not limited to reimbursement only but

[1] While it could be argued that the case involves a question of statutory interpretation under Ark. R. S. Ct. Rule 1-2(a)(17)(vi), the supreme court has declined certification.

rather to an amount that is fair and equitable. On this point the *Green* court cited *Ryan* v. *Baxter*, 253 Ark. 821, 489 S.W.2d 241 (1973). *Ryan* was a divorce case in which the decree was silent as to child support. It would thus seem clear that, apart from the statute, there is adequate authority for the chancellor's award of past support.

We do not agree that Ark. Code Ann. § 9-14-236(b) changes the law in this regard. In interpreting statutes, words are to be given their ordinary meaning and an attempt should be made to give effect to the intent of the legislature. *See State* v. *Gray*, 322 Ark. 301, 908 S.W.2d 642 (1995). The purpose of the statute appears to be to prohibit a court from reducing the arrearages from periodic child support after the payments have already fallen due. We see no indication that the General Assembly intended by the passage of this provision to abrogate the general rule that a parent is legally obligated to support his minor child even in the absence of a court order.

For the reasons stated the decision of the chancellor is affirmed.

Affirmed.

PITTMAN, J., and HAYS, S.J., agree.

Johnny L. ZOLLICOFFER *v.* STATE of Arkansas

CA CR 96-218 934 S.W.2d 939

Court of Appeals of Arkansas
Division II
Opinion delivered December 4, 1996

William M. Pearson, for appellant.

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

JOHN MAUZY PITTMAN, Judge. On July 2, 1993, the appellant, Johnny L. Zollicoffer, pleaded guilty to the offense of criminal attempt to obtain a controlled substance by fraud. He was sentenced to six years in the Arkansas Department of Correction, with the last three years of the term suspended. On April 3, 1995, the prosecuting attorney filed a petition to revoke the suspended portion of appellant's sentence, alleging that he had violated its conditions by committing another criminal offense. After a hearing, the trial court revoked appellant's suspension, ordered that he serve ninety days in the Arkansas Department of Community Punishment, and suspended imposition of an additional term. On appeal, appellant contends that the trial court erred in revoking his suspension because he never received any written conditions and erred in admitting into evidence medical records and statements that appellant made to physicians and pharmacists. Because we find merit in appellant's first argument, we reverse the order of revocation and dismiss the case. Consequently, we need not address appellant's second point.

At the hearing on the State's petition, appellant moved to dismiss the revocation proceeding, arguing that there was no proof that appellant was ever given any written conditions of his suspended sentence. Therefore, he argued, the trial court was without authority to revoke his suspension. The trial court acknowledged that there was no evidence and nothing in the file to indicate that appellant received any written conditions. The State did not respond to the motion, seek to re-open its case, or proffer any evidence to show that appellant was so informed in writing. Never-

theless, the trial court denied the motion to dismiss.

We agree with appellant that the trial court erred. Arkansas Code Annotated § 5-4-303 (Repl. 1993) provides that, if the court suspends the imposition of sentence on a defendant or places him on probation, the defendant shall be given a written statement explicitly setting forth the conditions under which he is being released. In *Ross* v. *State*, 268 Ark. 189, 594 S.W.2d 852 (1980), the supreme court was faced with a similar set of facts. There, the court held as follows:

> [A]ll conditions for a suspended sentence, including any requirement of good behavior, must be in writing if the suspended sentence is to be revokable. Therefore, courts have no power to imply and subsequently revoke [for violation of] conditions which were not expressly communicated in writing to a defendant as a condition of his suspended sentence.

268 Ark. at 191, 594 S.W.2d at 853; *see Neely* v. *State*, 7 Ark. App. 238, 647 S.W.2d 473 (1983).

Reversed and dismissed.

GRIFFEN and ROBBINS, JJ., agree.

Callis CHILDS *v.* MID-CENTURY INSURANCE CO.

CA 95-1198 934 S.W.2d 533

Court of Appeals of Arkansas
Division II
Opinion delivered December 4, 1996

Ricky Ashlock, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Elizabeth Fletcher Rogers*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Callis L. Childs appeals from a decision of the chancery court which held that he did not effect an attorney's lien against funds paid by appellee Mid-Century Insurance Company. For reversal, Mr. Childs argues that the chancellor erred in failing to recognize an attorney's lien, as against the appellee, in connection with his representation of James Trezvant, Jr. In addition, Mr. Childs contends that the chancellor erred in ruling that he did not represent Mr. Trezvant in the claim at issue. We find no error and affirm.

The relevant undisputed facts of this case are as follows. On May 24, 1993, Mr. Trezvant was injured in an automobile accident. Thereafter, he sought compensation from Mid-Century Insurance, as insurer of the party allegedly responsible for the accident. On June 1, 1993, Mr. Trezvant signed a retainer agreement with Mr. Childs which provided that Mr. Childs would represent him with regard to the accident. The agreement provided for Mr. Childs to receive 40% of any recovery by settlement or suit. In addition, Mr. Trezvant signed an authorization for release of information, which allowed Mr. Childs to obtain various medical records. On the same day, Mr. Trezvant and Mr. Childs went to the location of Mr. Trezvant's wrecked automobile and took several pictures of the

damage.

On June 2, 1993, Karla Henderson, claims adjuster for the appellee, received a call from Mr. Childs. During this conversation, Mr. Childs related that he represented Mr.Trezvant, and Ms. Henderson told him that he needed to send a letter confirming such representation. Mr. Childs sent a letter to this effect on June 2 and it was received by Ms. Henderson on June 7. However, on June 3 Mr. Trezvant called Ms. Henderson and informed her that he had fired Mr. Childs, and offered to settle the case for $25,000.00. Ms. Henderson responded by offering $2500.00 and requesting a letter from Mr. Trezvant indicating that he was no longer represented by Mr. Childs. Such a letter was eventually received on August 13, in which Mr. Trezvant stated that, while he initially retained Mr. Childs as counsel for a potential products-liability case against General Motors, Mr. Childs was never retained to represent him in his claim against appellee's insured.

Between June 2 and Ms. Henderson's receipt of Mr. Trezvant's letter on August 13, Mr. Childs contacted Ms. Henderson by telephone and asked her to make sure that any settlement check contained his name. During this time period, Ms. Henderson informed Mr. Childs that Mr. Trezvant wished to settle the case without an attorney. On August 20, Mr. Childs sent Mr. Trezvant a letter advising him that he was asserting a 40% lien against any settlement recovery. On August 24, Mr. Trezvant and Mid-Century Insurance did, in fact, settle the claim and Mr. Trezvant received a check for $7500.00.

On September 8, Mr. Childs sent a letter to Ms. Henderson advising her that he was asserting an attorney's lien. On September 17, he sent another letter to Ms. Henderson enclosing, for the first time, a copy of the authorization of release of information signed by Mr. Trezvant. Ms. Henderson refused to honor any lien, however, because she had already settled the claim directly with Mr. Trezvant and because "we were not provided with a court approved lien" prior to August 24, 1993.

At the trial, there was some dispute as to the extent of Mr. Childs's representation of Mr. Trezvant. Mr. Childs asserted that the parties' June 1, 1993, agreement was for the representation of Mr. Trezvant in his claim against Mid-State Insurance. Mr. Trezvant denied this assertion, stating that he only retained Mr.

Childs to represent him in a possible claim against General Motors for a defective air bag.

After the trial, the chancery court ruled that Mr. Childs did not substantially comply with the relevant attorney's lien statute and was entitled to no relief. Mr. Childs now argues that this ruling was erroneous, and asserts entitlement to a judgment in an amount equal to 40% of the $7500.00 settlement. Mr. Childs also contends that the chancellor erred in finding that he did not represent Mr. Trezvant in his claim against Mid-Century Insurance.

The statute under which Mr. Childs requests relief is Ark. Code Ann. § 16-22-304(a)(1) (Repl. 1994), which provides:

> 16-22-304. LIEN OF ATTORNEY CREATED.
>
> (a)(1) From and after service upon the adverse party of a written notice signed by the client and by the attorney at law, solicitor, or counselor representing the client, which notice is to be served by certified mail, a return receipt being required to establish actual delivery of the notice, the attorney at law, solicitor, or counselor serving the notice upon the adversary party shall have a lien upon his client's cause of action, claim, or counterclaim, which attaches to any settlement, verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof in whosoever's hands they may come.

Mr. Childs acknowledges that, prior to the settlement, he never provided the appellee with a written notice of his representation signed by Mr. Trezvant as prescribed by the statute. However, he argues that his lien was nonetheless enforceable because he substantially complied with the statute by giving Mid-Century Insurance reasonable notice that he represented Mr. Trezvant in this matter.

A resolution of the issue before this court requires us to review two pertinent opinions that were cited by the parties and considered by the chancellor prior to rendering his decision. The first is *Metropolitan Life Ins. Col* v. *Paul K. Roberts*, 214 Ark. 994, 411 S.W.2d 299 (1967), a case in which the supreme court found substantial compliance with the attorney's lien statute. The second is *Gary Eubanks and Associates* v. *Black and White Cab*, 34 Ark. App. 235, 808 S.W.2d 796 (1991), a case in which we found that an attorney's lien was not

effected because the attorney failed to substantially comply with the same statute.

In *Metropolitan Life Ins. Co.* v. *Paul K. Roberts, supra,* the attorney represented his client in an attempt to recover under the provisions of a life-insurance policy. The attorney notified the insurance company in writing that he was representing the policy holder, but the policyholder client failed to sign the letter. Almost a year later, the attorney notified the insurance company in writing that he had "expended a great amount of labor and time in prosecution" of his client's claim, and asserted an attorney's lien. Shortly thereafter, the insurance company settled around the attorney, and the attorney sued the insurance company for his fee. The trial court found that a valid attorney's lien existed and the supreme court affirmed. In doing so, the supreme court indicated that, although the client's signature was not present on the notice of representation sent by the attorney, the attorney had substantially complied with the statute because he made the insurance company aware of the representation and asserted a lien in writing prior to the settlement.

Gary Eubanks and Associates v. *Black and White Cab Co., supra,* on the other hand, involved a case in which the attorney failed to establish substantial compliance with the attorney's lien statute. In that case, the attorney sent a letter to the appellee stating that he represented the claimant. However, this letter contained neither the attorney's signature nor that of his client. Furthermore, the letter was not sent by certified mail and did not notify the appellee of an intention to assert an attorney's lien. Relying on these facts, we held that the appellee was not given sufficient notice of the attorney's lien and suggested that, if the appellant wished to pursue a fee, it would have to look to its client rather than the appellee.

■ Based on prior precedent and the particular facts of the case now before us, we find no error in the chancery court's ruling that Mr. Childs failed to substantially comply with the attorney's lien statute. It is undisputed that the June 2, 1993, letter on which Mr. Childs relies did not contain the signature of Mr. Trezvant. Moreover, the letter did not make Mid-Century Insurance aware of any attorney's lien. Also of importance is the fact that, on the day after Mr. Childs sent the letter which asserted representation of Mr. Trezvant, Mr. Trezvant orally notified Ms. Henderson that Mr. Childs did not represent him in this case. From that point forward, Mr. Trezvant continued to deny that Mr. Childs was his

attorney and eventually sent Ms. Henderson a letter to this effect. Under these circumstances, the chancellor correctly determined that substantial compliance had not been established.

Mr. Childs's remaining argument is that the chancery court erred in ruling that he did not represent Mr. Trezvant in this matter. We need not address this argument because the chancery court never made such a determination. Rather, it concluded that even if an attorney-client relationship existed, Mid-Century Insurance is not liable because Mr. Childs failed to substantially comply with the provisions of Ark. Code Ann. § 16-22-304(a)(1) (Repl. 1994).

It has long been established that the appellate court will only reverse the decision of a chancery court if its findings are clearly erroneous. *Lotz* v. *Cromer*, 317 Ark. 250, 878 S.W.2d 367 (1994). In the instant case, we find that the chancery court's findings were not clearly erroneous and affirm.

We acknowledge Mr. Childs' contention in his reply brief that the appellee's brief should be stricken for noncompliance with Rule 4-2(a)(4) of the Arkansas Rules of the Supreme Court. We note that the appellee followed the sequence of the points raised in Mr. Childs's appeal, with the exception of raising a different point on its own which essentially addressed equitable and public-policy considerations regarding our disposition of this appeal. We find that this constituted substantial compliance with Rule 4-2(a)(4). Consequently, we considered all arguments prior to issuing this opinion, including those raised by the appellee.

Affirmed.

PITTMAN and GRIFFEN, JJ., agree.

Larry R. BAYSINGER *v.* AIR SYSTEMS, INC.

CA 96-92 934 S.W.2d 230

Court of Appeals of Arkansas
Division I
Opinion delivered December 4, 1996
[Petition for rehearing denied January 15, 1997.]

Stephen M. Sharum and *Timothy C. Sharum*, for appellant.

Daily, West, Core, Coffman & Canfield, PLLC, by: *Eldon F. Coffman* and *Douglas M. Carson*, for appellee.

JOHN F. STROUD, JR., Judge. Appellant worked as a welder for Air Systems, Inc., which manufactures custom-made, stainless-steel equipment for commercial restaurants. He was diagnosed with carpal tunnel syndrome shortly before he quit working there on Octo-

ber 1, 1993. The administrative law judge found that his condition was a compensable injury. The Workers' Compensation Commission reversed in a 2-1 decision, finding that he had failed to prove by a preponderance of the evidence that his carpal tunnel syndrome was caused by rapid repetitive motion. On appeal, Mr. Baysinger contends that the Commission erred in its interpretation of "rapid repetitive motion" under Ark. Code Ann. § 11-9-102(5)(A)(ii)(a), and in finding that he failed to prove that his carpal tunnel syndrome was caused by rapid repetitive motion. Air Systems cross-appeals, contending that the administrative law judge erred in admitting the deposition of appellant when appellant failed to appear at his own hearing. We reverse and remand because we agree with appellant that the Commission erred in its interpretation of "rapid repetitive motion."

In deciding this case, the Commission examined the job duties of appellant. Testimony by three of appellant's co-workers showed that his tasks included shaping, molding, finishing, and polishing stainless-steel equipment. His work with metal involved grinding, polishing, finishing curved edges, and removing burrs. The Commission found that although appellant's duties varied during the day according to the particular item being manufactured, his duties required him to grip vibrating tools and to use a ball-peen hammer, and that each of the duties involved fairly constant stress and shock to the hands, wrists, and arms.

As the Commission noted, this case is controlled by Ark. Code Ann. § 11-9-102(5)(A)(ii)(a), which is a partial codification of Act 796 of 1993. The statute establishes categories of compensable injuries and includes the following language:

> (5)(A) "Compensable injury" means:
>
> . . . .
>
> (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
>
> (a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;

Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) (Repl. 1996). The burden

of proof for such injuries shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(5)(E)(ii) (Repl. 1996).

Finding that appellant did not meet his burden of proof, the Commission stated:

> [T]he requirement that the condition be caused by rapid repetitive motion requires proof that the employment duties involved, at least in part, a notably high rate of activity involving the exact, or almost exactly, the same movement again and again over extended periods of time.
>
> . . . .
>
> In the present claim, while claimant's duties involved hand intensive labor, the evidence shows that the job did not involve the exact, or almost exactly, the same movement again and again. Instead, the description indicates that several steps were involved in performing the job, and there is no indication that the different steps involve the same movement again and again for prolonged periods of time. Therefore, we find that the claimant failed to prove by a preponderance of the evidence that his carpal tunnel syndrome was caused by rapid repetitive motion.

The Commission erred in requiring appellant to prove that his carpal tunnel syndrome was the result of the exact, or almost exactly, the same movement again and again. It appears from the findings of the Commission, quoted above, that although the evidence indicates that different portions of claimant's job duties may involve rapid repetitive motion, he is precluded from recovery because "there is no indication that the different steps involve the same movement again and again for prolonged periods of time." We feel that the Commission's interpretation of the statute is too restrictive and precludes multiple tasks — such as the hammering and grinding motions performed by claimant — from being considered together to satisfy the requirements of the statute. We reverse and remand to the Commission for a new determination on the issue of appellant's meeting his burden of proof.

The point raised by Air Systems on cross-appeal is that the

administrative law judge erred in admitting claimant's deposition when he failed to appear at his own hearing. The record reflects that Air Systems objected to claimant's deposition in lieu of his testimony at the initial hearing and that the law judge at first refused the proffered deposition but, upon review of her order, decided that she had erred in doing so. She contacted both parties, notifying them that she would allow the deposition to be submitted into the record but would reopen the case so that Air Systems could cross-examine claimant. Subsequently, the deposition was admitted with claimant present and ready for cross-examination; Air Systems renewed its objection to the introduction of the deposition and declined to call claimant for cross-examination. The hearing was then concluded.

The Commission did not rule on Air Systems's objection to the introduction of claimant's deposition in light of its decision that the evidence did not show that his job involved the exact, or almost exactly, the same movement again and again. It also noted that it had not relied on his deposition testimony in reaching its decision. Because the Commission's opinion contains no findings relating to the admissibility of claimant's deposition and did not rule upon it, the issue is not preserved for appeal and there is nothing before us to review. *See Pine Bluff Warehouse* v. *Berry*, 51 Ark. App. 139, 912 S.W.2d 11 (1995). The Commission must decide whether it is necessary to rule on this point when it reexamines the issue of appellant's meeting his burden of proof.

Reversed and remanded.

ROGERS and NEAL, JJ., agree.

Hannelore CHERRY *v.* James CHERRY

CA 95-813 934 S.W.2d 936

Court of Appeals of Arkansas
Division I
Opinion delivered December 4, 1996

Beverly C. Claunch, for appellant.

Hoyt Thomas, for appellee.

JOHN F. STROUD, JR., Judge. Appellant, Hannelore Cherry, raises three points in her appeal from the parties' divorce decree: (1) the chancellor erred in computing her percentage share of appellee's military pension; (2) the chancellor erred in considering briefs that were presented more than thirty days after the trial date; and (3) the chancellor erred in considering matters not in evidence. Finding no error, we affirm.

Appellee, James Cherry, enlisted in the United States Army in October 1968. From June 9, 1987, to April 14, 1991, he was on temporary medical retirement, during which time he received full pay. He retired permanently effective July 1, 1994.

The parties were married on September 18, 1981. Their divorce became effective on March 2, 1995.

It was not disputed at trial that military retirement pay is marital property. See *Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986). As such, military retirement pay is divided proportionately according to the number of years of marriage that coincided with the military service. *Id.*; *Askins* v. *Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986). In calculating appellant's share of appellee's military retirement pay, the chancellor used the following formula:

$$\frac{1}{2} \times \frac{\text{time in svc. for retirement during marriage (numerator)}}{\text{total time in svc. for retirement purposes (denominator)}} = \text{wife's marital share}$$

He then determined the numerator should be nine and the denominator should be 22, resulting in $\frac{1}{2} \times \frac{9}{22}$ or 20.455% of appellee's monthly retirement benefit.

Appellant's first argument on appeal challenges the chancellor's method of calculating her share of appellee's retirement pay. She argues that the numerator should be thirteen because that is the number of years the parties were married. She argues that the denominator should be twenty-six because that is the period of time from the date of appellee's enlistment until his permanent retirement. We disagree.

The chancellor used twenty-two as the denominator in the fraction because it represented appellee's total time in service for retirement purposes. Appellant also relied upon twenty-two as the denominator at the trial level, not twenty-six as she now argues on appeal. Her motion for division of personal property at the trial level asserted:

> The husband's years of credible service upon which his retirement pay is based is 21 years, 11 months and 19 days, which is the length of time of his active federal service.
>
> . . .
>
> *The parties were married for thirteen years and Mr. Cherry's retirement benefit is computed on 22 years' service. The formula to be used in computing Mrs. Cherry's share of the retirement benefit is 13/22 x 1/2, or 29.5 percent of each monthly retirement benefit amount.*

(Emphasis added.) We do not consider arguments raised for the first time on appeal. *Sebastian Lake Pub. Util. Co., Inc.* v. *Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996). Moreover, appellant was correct in relying upon the number twenty-two as the denominator at trial. That is the number of years appellee served in the military, exclusive of the period of time he was on temporary medical retirement. The following colloquy occurred between appellee and the court at trial:

> [Court]: All right sir. That four year period, that applied on

> your retirement?
>
> [Appellee]: No, sir, that was not active duty.
>
> [Court]: It did not.
>
> [Appellee]: I was for all practical purposes medically retired, was drawing retirement pay and that did not count — .... And the period from June of '87 to April of '91 was dead time, it does not count for active duty at all.
>
> . . .
>
> [Court]: And that's for retirement purposes?
>
> [Appellee]: Yes, sir. That allows me to draw $2,596.00, that's two and a half percent per year times that amount. If it had been 22 years it would have been $2,606.00, but it was 11 days short of 22 years, there's about $10.00 in there that they deducted because it wasn't an even 22 years. They get you right down to the penny.

The correctness of using twenty-two as the denominator is further evidenced by the fact that appellee introduced his Air Force DD Form 214 as an exhibit at trial, showing that the period of time he was on temporary medical retirement was not included for retirement purposes.

With respect to the numerator, we find no error in the chancellor's calculation resulting in the number nine. He calculated that the period from the date of the parties' marriage until appellee started his temporary medical retirement was five years, nine months; and the period from the date of his return from medical retirement to the date of his permanent retirement was three years, three months. The total of those two periods equals nine years. He concluded that although the parties were actually married for thirteen years, the numerator should be nine because that was the number of years of military service during their marriage that counted toward retirement. The period of time appellee was on temporary medical retirement did not count for retirement. Thus, the chancellor's division of retirement pay was proportionate to the number of years of marriage that coincided with military service. See *Young*, 288 Ark. at 34.

In *Askins* v. *Askins*, the supreme court noted that neither the statute regarding the division of marital property nor the court's

opinion in *Askins* was intended to tie the chancellor to any specific formula for dividing prospective retirement benefits. 288 Ark. at 337. Here, the chancellor explained how he decided upon the fractional interest, and we find nothing in appellant's argument to warrant a contrary finding.

In her second point of appeal, appellant argues that the chancellor erred in considering briefs that were presented more than thirty days after the trial date. We find no error.

At the end of the September 22, 1994, hearing below, the chancellor stated to the parties:

> Bev's theory is that it should be 13 over 22. Colonel's theory is that it should be 9 over 22. My theory is that it should be somewhere around 13 over somewhere around 26, all of them times one-half. But, anyhow, I'm going to get you all to write me in any event as to what each of you feel I should rule, knowing that I'm going to order all this personal property sold.
>
> . . .
>
> You all let me know how you all think that ought to be treated and particularly let me know how you think this service thing should be treated. *I've told you how I'm inclined to treat it, and I probably won't change, but anyhow each of you argue with me. ... And I don't want you to feel you need to do this by some formal brief, just write me whenever you're ready to.*

(Emphasis added.) Appellant filed her motion for division of personal property and supporting brief on December 16, 1994, and appellee replied on December 27, 1994. In addition, according to appellant, appellee also submitted a letter to the chancellor on January 17, 1995. The divorce decree was entered on March 2, 1995.

Appellant argues that the trial court erred in considering the written arguments submitted to it after the hearing. They were all dated more than thirty days after the trial date, including appellant's. She asserts that they were untimely under Administrative Order Number 3, contained in the appendix to the Arkansas Rules of Civil Procedure. The administrative order provides: "The total time for all parties to file briefs in any case in...chancery...courts is limited to a period not to exceed thirty (30) days after the trial is

completed and the case is ready for decision." She acknowledges that the administrative order allows for the trial court to extend this time limit, but argues that such an extension was not granted in this case. She concludes, therefore, that the chancellor's "ruling" at trial should have been final and the decree should have been prepared in accordance with that "ruling." We disagree.

First, the chancellor told the parties at the end of the hearing how he was "inclined" to treat the retirement issue, and he requested the parties to submit informal arguments to him supporting their positions regarding how he should rule. His comments in this respect cannot be regarded as a ruling. Furthermore, the chancellor invited the submission of informal arguments from the parties. Administrative Order Number 3 did not prohibit him from accepting those arguments more than thirty days after the hearing date.

In her final point of appeal, appellant asserts that the January 17, 1995, letter from appellee to the chancellor, which is not a part of the record before us, enclosed materials that were not submitted into evidence. She argues that the chancellor erred in considering those matters and thereby denied her the opportunity to cross-examine a witness.

The chancellor reviewed the certified record transmitted to this court pursuant to a mandate to settle the record. In his order settling the record, the chancellor found that the certified record contained "all matters on which the court based its decision of March 2, 1995." Thus, in reaching his decision the chancellor did not rely upon matters that were not in evidence, and appellant was not denied the opportunity to cross-examine any witness.

Affirmed.

ROGERS and NEAL, JJ., agree.

Timothy DALE *v.* STATE of Arkansas

CA CR 95-1297 935 S.W.2d 274

Court of Appeals of Arkansas
Division I
Opinion delivered December 4, 1996

[redacted]

Daniel D. Becker and *Michael E. Harmon*, for appellant.

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

WENDELL L. GRIFFEN, Judge. After trial in Garland County Circuit Court, a jury found Timothy Dale guilty of two counts of second-degree battery based on allegations that he burned his stepchildren with cigarettes and a cigarette lighter. The trial judge then sentenced Dale to six years in the Arkansas Department of Correction on each count and ordered that the sentences run consecutively. Dale now contends that the trial court erred when it

denied his motion for directed verdict, and that it erred by refusing to instruct the jury on sentencing alternatives as his attorney had requested. Neither contention has merit; therefore, we affirm the convictions.

Dale's argument that the trial court erred by denying his motion for directed verdict is a challenge to the sufficiency of the evidence. He properly moved for a directed verdict at the close of the State's evidence, and he specifically based that motion on the State's alleged failure to prove "the infliction of substantial pain," an element for second-degree battery. *See* Ark. Code Ann. §§ 5-13-202(a)(4), 5-1-102(14)(Repl. 1993). The following colloquy occurred after the State rested its case:

> MS. HEARNSBERGER: We rest.
>
> THE COURT: State rests.
>
> COUNSEL FOR APPELLANT: Move for directed verdict, based on sufficiency of the evidence, specifically, that there has been no showing of substantial pain which is required under the State's burden of proof.
>
> THE COURT: Motion will be denied.

The following colloquy occurred at the end of all the evidence:

> THE COURT: Defense rests.
>
> DEFENSE COUNSEL: Renew my motion for directed verdict based on sufficiency.
>
> THE COURT: Denied.

In response to the appellant's challenge to the sufficiency of the evidence, the State argues on appeal that the appellant is procedurally barred from raising the issue because he failed to specify a basis for the renewal of his directed-verdict motion. The State cites *Middleton* v. *State* which held that a "challenge to the sufficiency of the evidence, *whenever it is made*,[1] requires a specific motion to apprise the trial court of the particular point raised; a

[1] Directed-verdict motions traditionally are made at only two junctures during a trial: at the close of the opponent's case-in-chief and at the close of all the evidence. The word "whenever" implies more than one occurrence. Therefore, it is logical to assume that this language must contemplate both of these critical moments in a trial.

general 'usual motion' such as the one made by appellant will not suffice." *Middleton* v. *State*, 311 Ark. 307, 842 S.W.2d 434 (1992)(emphasis added). In *Walker* v. *State*, the Arkansas Supreme Court cited with approval *Middleton* and numerous other cases for the proposition that "a motion for directed verdict [must] state the specific grounds of the motion." *Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (1994). *Walker* also held that Rule 36.21 of the Arkansas Rules of Criminal Procedure (now superseded by Rule 33.1) is to be read in alignment with Rule 50 of the Arkansas Rules of Civil Procedure. *Id.* Rule 33.1 provides:

> When there has been a trial by jury, the failure of a defendant to move for a directed verdict at the conclusion of the evidence presented by the prosecution and again at the close of the case because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. A motion for a directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. *A renewal of a previous motion for a directed verdict at the close of all of the evidence preserves the issue of insufficient evidence for appeal.*

Ark. R. Crim. P. 33.1 (emphasis added). Rule 50 states in pertinent part:

> A party may move for a directed verdict at the close of the evidence offered by an opponent and may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the extent as if the motion had not been made. A party may also move for a directed verdict at the close of all the evidence . . . . A motion for directed verdict shall state the specific grounds therefor . . . . The motion may also be made at the close of all the evidence *and in every instance*[2] the motion shall state the specific grounds therefor.

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[2] While this phrase may not be as inclusive as the earlier cited phrase from *Middleton*, *supra* ("whenever it is made"), we see no discernable legal distinction between them. It could mean "in every trial," but neither the rule nor the case law provides guidance for this definition.

Ark. R. Civ. P. 50(a) (emphasis added).

The appellant here made a specific motion for directed verdict followed by a nonspecific renewal. In *Durham* v. *State*, the Arkansas Supreme Court held that as long as a specific basis is articulated for the original directed-verdict motion, a general renewal is sufficient to preserve the issue for appeal. *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). The comment to Rule 33.1 notes that the last sentence of the new rule was added to reflect the *Durham* holding. Although *Durham* appeared to distinguish implicitly the *Walker* line of cases (because none of those cases involved nonspecific *renewals* of directed-verdict motions), *Durham* did not address the contradictory language in *Middleton*. *See also Clay* v. *State*, 318 Ark. 550, 886 S.W.2d 608 (1994); *Jackson* v. *State*, 316 Ark. 405, 871 S.W.2d 591 (1994); *Cummings* v. *State*, 315 Ark. 541, 869 S.W.2d 17 1994)(all holding that a challenge to the sufficiency of the evidence, "*whenever it is made*," requires a specific motion). Nor did *Durham* take note of Rule 50's contradictory language that "*in every instance*" a directed verdict shall state the specific grounds therefor. To the extent that the "whenever it is made" and "in every instance" phrases differ from the holding in *Durham*, we question their continued authority and consider the *Durham* standard to now control.[3]

Consequently, in keeping with *Durham*, we deem appellant's general renewal sufficient and, accordingly, we reach the merits of his first point on appeal. The cumulative testimony of a registered nurse, an emergency-room physician, a police officer, and a Department of Human Services case worker was overwhelming. They were unanimous in their conclusions that the wounds to the children were consistent with burns from both cigarettes and cigarette lighters or an open flame. We hold that this evidence was

[3] From a practical standpoint, the rule from *Durham* is eminently sensible. To require specific renewals of already specific motions elevates form over substance. As *Durham* also pointed out, the reasoning behind this rule of specificity is to adequately apprise the trial court, as well as the appellate court, of the grounds for the motion so that both courts make informed rulings. 320 Ark. at 689, 899 S.W.2d at 473 (1995). By stating our view that the *Durham* holding controls this issue, our aim is to make our procedural rules not only practical but consistent. A flurry of recent cases and rule changes has made this area of law a procedural minefield for trial attorneys. Our sense is that some confusion still surrounds the proper manner of moving for a directed verdict. We simply want to identify questionable precedent and make the law clear.

sufficient for the jury to infer that substantial pain was the result. *See Gilkey* v. *State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993). The court did not err in denying either of appellant's motions for directed verdict.

We are compelled to comment about an abstracting error related to the directed-verdict motion because it constitutes a violation of Rule 4-2(a)(6) of our rules regarding abstracts. In the abstract, the colloquy concerning the renewal of the directed-verdict motion appears as follows:

RENEWAL OF MOTIONS FOR DIRECTED VERDICT

(T. 287)

> Counsel for Appellant moved for a directed verdict based on sufficiency of evidence, *specifically lack of showing of substantial pain.* The Trial Court denied the motion.

(Emphasis added.) The italicized phrase adds critical language to the motion that was clearly not in the record and which, therefore, was not presented to the trial court when the motion was made and denied at the close of all the evidence. To that extent, the abstract misstates the record and conveys the notion that the trial judge received and denied a newly articulated specific motion for directed verdict at the close of all the proof.[4]

Rule 4-2(a)(6) provides that the appellant's abstract should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the appellate court for decision. Ark. Sup. Ct. R. 4-2(a)(6). This obviously imposes a duty on counsel preparing the abstract not to misstate the record, as

[4] The *Durham* case and our discussion of it *supra* stand for the proposition that a general renewal of a directed-verdict motion is legally sufficient to preserve a specific motion previously made. This is independent of the appellant's abstracting duty to accurately reflect what was actually said when the motion was made. Had the appellant alerted us to the fact that his abstracted renewal of the motion was incorporating or adopting the specifics of his earlier motion, this might be a different matter. The motion as abstracted left us with the impression that he actually uttered the words "specifically lack of showing of substantial pain" in his renewal. He clearly did not.

was done in this case by the addition of language in the renewed directed-verdict motion that was not argued to the trial court. We do not deem this error to be inadvertent because the misstated language goes to the very point addressed by appellant's first point on appeal — that the trial court erred by denying the motion for directed verdict based upon the alleged insufficiency of proof regarding the substantial-pain element of the second-degree battery charge.

Lawyers are officers of the court. Courts necessarily rely upon their representations in the abstracts filed in appeals in order to decide cases. The abstract is to be a condensation of the material parts of the pleadings, proceedings, and other matters contained in the record so that the appellate court will understand the points of appeal. *McAdams* v. *Automotive Rentals, Inc.*, 319 Ark. 254, 891 S.W.2d 52 (1995). Therefore, appellate courts depend upon the honesty and truthfulness of counsel regarding the abstracts filed in appeals. Where an abstract has been knowingly prepared by counsel with misrepresentation of a central issue on appeal, we are duty-bound to state our disapproval.

Finally, we also hold that the trial court did not err by refusing to include a jury instruction requested by appellant concerning the alternative sentences of probation or a suspended sentence. Appellant proffered the following instruction based on AMCI 2d 9111:

> You will again retire to consider and complete one of the following verdict forms:
>
> (Here, the appropriate verdict form is to be read to the jury.)
>
> Timothy Dale may also contend that he should receive probation or suspended sentence. You may recommend that he receive this alternative sentence, but you are advised that your recommendation will not be binding on the court.
>
> If you recommend an alternative sentence you shall so indicate on the form reading as follows:
>
> (Here the alternative verdict forms are to be read to the jury.)
>
> Even if you do recommend an alternative sentence, however, you must still complete the other verdict form.
>
> All twelve of you must agree on the verdict, but only

the foreperson need sign the verdict.

DEFENDANT'S PROFFERED B
VERDICT FORM
ALTERNATE SERVICE (PROBATION)

We, the Jury, recommend the alternate service of probation.

_____
FOREPERSON

DEFENDANT'S PROFFERED C
VERDICT FORM
ALTERNATE SERVICE (SUSPENDED SENTENCE)

We, the Jury, recommend the alternate service of suspended sentence.

_____
FOREPERSON

AMCI 2d 9111.

It is true that our bifurcated sentencing statute, Ark. Code Ann. § 16-97-101(4) (Supp. 1995), provides that the trial court may, in its discretion, instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify, and that the jury may, in its discretion, make a recommendation regarding an alternative sentence which shall not be binding on the trial court. It is also true that Ark. Code Ann. § 5-4-104(Repl. 1993) provides that both probation and suspended sentences are "authorized" for second-degree battery. Nevertheless, authorizing a particular form of punishment is a far cry from mandating that it be considered, or that the jury be instructed that it be considered in a given case. Moreover, the permissive tone of the language in § 16-97-101(4) is unmistakable.

As we stated in a decision that predated the bifurcated sentencing statute, a criminal defendant has no right to a suspended sentence. *Bing* v. *State*, 23 Ark. App. 19, 740 S.W.2d 156 (1987). Appellant has cited us to no subsequent authority to the contrary, and we find no reason to depart from that principle. Moreover, the clearly permissive language of the bifurcated sentencing statute upon which the appellant's proffered instruction was based further affirms the principle.

Affirmed.

NEAL, J., and HAYS, S.J., concur.

OLLY NEAL, Judge, concurring. I agree that the trial court should be affirmed as to both points raised on appeal. It is my view that whether appellant preserved his sufficiency argument is controlled by *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). The State argues we should not reach the merits of the directed-verdict motion because appellant's renewal of the motion at the close of all the evidence was general in nature only. It is uncontroverted that appellant's motion for directed verdict, at the close of the State's evidence, was sufficiently specific to apprise the trial court of the grounds asserted for the motion. *See Wallace* v. *State*, 53 Ark. App. 199, 920 S.W.2d 864 (1996). In *Durham*, the supreme court said, "We do not agree that the defendant should be required to restate his grounds for directed verdict in cases..., where the defendant has made a specific motion at the close of the State's case, and incorporates the same arguments by a later renewal."

Because *Durham* is dispositive of the preservation issue, it is not necessary to reach appellant's abstracting zeal.

I respectfully concur.

STEELE HAYS, Special Judge, concurring. I write separately because I disagree with the majority's implication that the Supreme Court failed to explicitly express its intent to change prior law by adopting the rule in *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). One month after *Durham* was decided, the Supreme Court modified Ark. R. Crim. P. 33.1 to provide that a renewal of a previous motion for a directed verdict at the close of all of the evidence preserves the issue of insufficient evidence for appeal. The Court's comment to Rule 33.1 notes that this sentence was added to reflect the holding in *Durham* that a party is not required to repeat the specific deficiencies in the evidence when the motion is renewed. Furthermore, in *Aronson* v. *Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995), the Supreme Court expressly held that the rule in *Durham* is applicable in civil cases.

I think that the modification of Rule 33.1 and express mention of *Durham* in the commentary and subsequent cases explicitly established *Durham's* rule that a defendant is not required to restate

his grounds for directed verdict where he has made a specific motion at the close of the plaintiff's case. I respectfully concur.

Linda KILPATRICK *v.* DIRECTOR, Arkansas Employment Security Department, and U.S.A. Drug

E 95-137 934 S.W.2d 232

Court of Appeals of Arkansas
En Banc
Opinion delivered December 11, 1996

Appellant, *pro se.*

Phyllis A. Edwards, for appellee.

JOHN B. ROBBINS, Judge. Appellant Linda Kilpatrick appeals the Board of Review's denial of unemployment compensation benefits in accordance with Ark. Code Ann. § 11-10-514 (Repl. 1996) upon finding that appellant was discharged for misconduct in connection with the work. She argues that the decision is not supported by substantial evidence. We affirm.

We do not conduct a de novo review on the appeal of a decision of the Board of Review. The findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (Repl. 1996); *Perdix-Wang* v. *Director,* 42 Ark. App. 218, 856 S.W.2d 636 (1993). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

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

In reaching its decision the Board noted the testimony of the employer's store manager, Jim Fletcher, who testified that appellant was a single mother with four children who had been cosmetic-department manager for approximately two years. During this period of time, he arranged her work schedule so that she did not have to work nights or weekends to accomodate her child care responsibilities. In August 1994 appellant was granted a medical

leave of absence with an understanding that she would return to work on October 31, 1994. Appellant neither returned to work nor contacted him on October 31, 1994. Approximately a week later appellant contacted him seeking her old job. He testified that he explained to her that he had hired someone else to fill the cosmetic-department manager position, but that he had another department manager position available. Appellant refused the other position. A few days later the new manager of the cosmetic department quit, so he contacted appellant. He testified that he explained to appellant that because of increased business all employees were now required to work additional hours, which meant that she would have to work an occasional night and weekend shift. He said that he no longer felt the need to accommodate the appellant's child care responsibilities because she had a live-in boyfriend.

While appellant's testimony was inconsistent with Mr. Fletcher's testimony in some respects, appellant testified that she worked occasional nights and weekends for approximately a month and a half. She then contacted the employer's district manager on Friday, January 6, 1995, and informed him that she could not work the hours she was scheduled. She was told that if she could not work the scheduled hours she was discharged.

The Board of Review found that appellant refused to work her scheduled hours and that she did not show that her work schedule violated the terms of her hiring agreement. It concluded that appellant's action of refusing to work the scheduled hours was a willful disregard of her employer's best interests and was, therefore, misconduct. From our review of the record, there is substantial evidence to support the Board's findings and decision. Therefore, we affirm the Board's decision that appellant was discharged from her last work for misconduct in connection with the work.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

MAYFIELD, STROUD, and GRIFFEN, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority decision in this case. The majority has found substantial evidence to support the decision of the Board of Review which held that appellant's inability to work nights and weekends was a willful disregard of the employer's best interest and was therefore miscon-

duct. In *Carraro* v. *Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996), we explained misconduct as it has been construed in unemployment insurance cases.

> Arkansas Code Annotated § 11-10-514(a)(1) (Repl. 1996) provides that an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work. However, as we explained in *Nibco, Inc.* v. *Metcalf & Daniels*, 1 Ark. App. 114, 613 S.W.2d 612 (1981):
>
> > To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.
>
> 1 Ark. App. at 118, 613 S.W.2d at 614.
>
> On review of unemployment compensation cases, the factual findings of the Board of Review are conclusive if they are supported by substantial evidence; but that is not to say that our function on appeal is merely to ratify whatever decision is made by the Board of Review. *See Shipley Baking Company* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986). As we said in *Shipley*, "We are not at liberty to ignore our responsibility to determine whether the standard of review has been met." 17 Ark. App. at 74, 703 S.W.2d at 467. When the Board's decision is not supported by substantial evidence, we will reverse. *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corp.* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

54 Ark. App. at 214-15, 924 S.W.2d at 822.

After reviewing the evidence in the instant case, I cannot agree that the Board's finding of misconduct is supported by substantial evidence.

The opinion of the Board of Review states that the appellant had worked for U.S.A. Drug for over two years as manager of the cosmetics department. The opinion also states that the store manager, whom the opinion identifies as Jim Fletcher, testified that during that time he had assigned appellant work hours compatible with her having four children under ten years of age and no sitter and had arranged her schedule so she did not have to work nights or weekends. And the opinion states that Fletcher testified that, after a leave of absence for medical reasons, the appellant returned to work when he contacted her and offered her the job of manager of the same cosmetics department because the new manager of that department had quit. The opinion states that Fletcher told appellant that the business had increased, and she would have to work an occasional night and weekend shift. The opinion also states that Fletcher testified that during the week beginning January 9, 1995, the appellant did not report for work, and when she came in on January 13, 1995, to pick up her check, she told Fletcher that she had been fired by the district manager.

The Board's opinion goes on to state that the district manager, whom the opinion identifies as Walt Simpson, testified that on January 6, 1995, the appellant contacted him and said she was having difficulty working the scheduled hours because of her child-care responsibilities, and he told her that if she could not work the scheduled hours she was fired. And the opinion states that Simpson told her to work the following Monday and Tuesday to give the store manager an opportunity to replace her, and after the Tuesday shift, she was discharged.

The Board's opinion also states that the appellant testified that on Friday, January 6, 1995, she contacted the district manager informing him that she could not work the hours she was scheduled. She stated that he informed her that if she could not work the scheduled hours she was discharged.

I simply cannot agree that the above evidence, which the opinion of the Board sets out and relies upon, supports the Board's finding that "the claimant was discharged from last work for misconduct connected with the work."

Neither the Board nor the prevailing opinion in this evenly divided, three-to-three decision explains why the fact that the appellant's decision that her child-care responsibilities would not allow

her to work her scheduled hours constituted misconduct. Even if she erred in her evaluation of the situation, I submit that reasonable minds could not find that she was guilty of misconduct under the long-settled definition of that term as set out in the quote from *Carraro* v. *Director, supra.*

But the solution of this case involves more than deciding whether the evidence will support a finding of misconduct. The Employment Security Department denied benefits under Ark. Code Ann. § 11-10-513 (Repl. 1996) on the finding that the appellant voluntarily left her last work without good cause connected with the work.

The Appeal Tribunal found that the employer had previously made special work arrangements for appellant because of her child-care responsibilities, but the employer changed those arrangements when the appellant returned to work after a leave of absence, and the appellant was discharged because she could not work the new hours fixed by the employer. Based on this factual determination, the Appeal Tribunal made a determination that the appellant's inability to work the new hours was not an intentional or willful act against the interests of her employer under Ark. Code Ann. § 11-10-514 (Repl. 1996). Therefore, the Appeal Tribunal reversed the agency's determination and held that the appellant was entitled to benefits.

In determining the employer's appeal to the Board of Review, the Board considered only the Tribunal's decision on the misconduct issue. I think the Board should have considered the issue of voluntarily quitting work without good cause connected with the work and should have given specific consideration to the issue of voluntarily leaving work under that part of Ark. Code Ann. § 11-10-513(b) (Repl. 1996) (formerly Ark. Stat. Ann. § 81-1106(a) which provides as follows:

> (b) No individual shall be disqualified under this section if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification . . . .

There are a number of cases that have considered the above subsection. In *Wade* v. *Thornbrough, Comm. of Labor,* 231 Ark. 454, 330 S.W.2d 100 (1959), the Arkansas Supreme Court agreed with

the appellant's contention that the Commissioner of Labor applied the wrong section of the law and should have applied the above section. The court held that when Mrs. Wade's five children contracted measles and she quit work to care for them "she was confronted, in effect, with a personal emergency of such 'compelling urgency that it would be contrary to good conscience to impose a disqualification,' " and the court reversed and remanded for further proceedings consistent with its opinion. 231 Ark. at 457, 330 S.W.2d at 102.

In *Turner* v. *Daniels, Director*, 270 Ark. 418, 605 S.W.2d 465 (Ark. App. 1980), this court said that the Board of Review denied benefits under the above quoted subsection on the basis that the "claimant quit her job in order to take care of her son without taking the necessary steps to request a leave of absence or making reasonable efforts to 'preserve her job rights.' " This court held that while the record did not reflect that the claimant "specifically" requested a leave of absence there was a "substantial" compliance with that requirement and reversed the Board of Review.

In *Valentine* v. *Barnes, Acting Director*, 1 Ark. App. 308, 615 S.W.2d 386 (1981), the appellant had returned to work after having been off due to maternity leave. The very next day after returning to work, appellant advised her supervisor that the doctor had told appellant that her baby was sick and appellant needed to remain with the child for a "week or more." The supervisor told the appellant that he had to have someone to work in her place, and he was showing her as "terminated." The Board held appellant ineligible for benefits, and this court reversed on the finding that the evidence established that appellant was confronted with a personal emergency of such compelling urgency that it would be contrary to good conscience to impose a disqualification upon her.

And in *Rivers* v. *Stiles*, 16 Ark. App. 121, 697 S.W.2d 938 (1985), the appellant quit work because she was being physically abused by her husband; because she had to move out of the house in which they were living; and because she could not find another place to live, within her means, in the vicinity of the place of employment. The Board of Review found that marital difficulties did not constitute a "personal emergency," but this court did not agree and we remanded for the Board of Review to determine if the appellant had made reasonable efforts to preserve her job right.

In the instant case, I think this court should hold that the Board of Review's finding that the appellant was guilty of misconduct because of her inability to work the hours set by her employer upon her return to work is not supported by substantial evidence. Therefore, I would reverse the Board's decision, but I would remand for the Board to consider the issue of voluntarily quitting, and specifically to determine whether the appellant is entitled to benefits under Ark. Code Ann. § 11-10-513(b) (Repl. 1996).

In this connection, I would remind the Board that under the undisputed evidence the appellant was discharged by the district manager because she reported she could not work the hours scheduled by the store manager — even though he may have asked her to work two days and *then* be fired. And I would remind the Board that the appellant had the duty to make reasonable efforts to preserve her job rights but that the evidence must be viewed from a common-sense viewpoint and, after being fired by the district manager, appellant was not required to take useless action. *See Graham* v. *Daniels*, 269 Ark. 774, 601 S.W.2d 229 (Ark. App. 1980) (claimant not required to request alternative work when he had already been told there were no more openings); and *Oxford* v. *Daniels, Director*, 2 Ark. App. 200, 618 S.W.2d 171 (1981) (having been told that no other position was available to him, for appellant to make an effort to preserve his job rights would be a futile gesture).

Also, I would point out to the Board that the act providing for unemployment benefits "is remedial in nature and should be liberally construed to accomplish its beneficent purpose." *Graham, supra*; *see also Oxford, supra.*

Finally, I recognize that the appellant is *pro se* in this appeal and that in order for this dissent to have any possible effect on this case it would be necessary for the appellant to ask for review by the Arkansas Supreme Court. However, because I note that a representative of the Ozark Legal Services appeared at the hearing with the appellant, it may be that advice from that source may help the appellant to request review by the Arkansas Supreme Court.

I am authorized to state that Stroud and Griffen, JJ., join in this dissent.

Jason PYLES *v.* STATE of Arkansas

CA CR 95-1008 935 S.W.2d 570

Court of Appeals of Arkansas
En Banc
Opinion delivered December 11, 1996
[Petition for rehearing denied January 15, 1997.]

Young & Finley, by: *Dale W. Finley*, for appellant.

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

JOHN B. ROBBINS, Judge. On May 17, 1995, the appellant was found guilty of possession of a controlled substance (methamphetamine) with intent to deliver and was sentenced to ten years in the Arkansas Department of Correction. On appeal the appellant contends that the trial court erred in failing to grant his motion to suppress. We find no error and affirm.

The evidence showed that on May 19, 1994, several officers with the Fort Smith Police Department went to a residence in Barling to arrest the appellant on two misdemeanor warrants unrelated to the present case. After arriving at the residence, the officers were permitted entry by Jodie Cathers, the brother of appellant's girlfriend. Mr. Cathers was informed of the warrants and then escorted the officers to a bedroom where the appellant was in bed. Officer Steve Scott informed appellant of the warrants and re-

quested him to get dressed and accompany them to the living room. Officer Scott advised the appellant of his Miranda rights and attempted to do a "field search" of the appellant for weapons in the course of arresting him and taking him into custody.

During the search incident to arrest Officer Scott noticed a large bulge in appellant's pocket. Appellant was asked what was in his pocket and he responded that it was a 35-millimeter film canister with film in it. Scott testified that the appellant attempted to surrender the film canister to Jodie Cathers and was evasive to the officer's questions. Officer Scott took the canister from the appellant, opened it, and found three small packets of what was later identified as methamphetamine.

Appellant moved to suppress this evidence and contends on appeal that the trial court erred in failing to grant his motion. Appellant specifically argues on appeal that Ark. R. Crim. P. 12.1 did not justify a search of the container. He contends that only 12.1(a) would be applicable but that it could not apply to these facts because the search was not conducted for the officer's protection, disputing the officer's credibility.

In reviewing a trial court's decision to deny an appellant's motion to suppress evidence, we make an independent determination based on the totality of the circumstances and will reverse the decision only if it is clearly against the preponderance of the evidence. *Dickerson* v. *State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995). Because the preponderance of the evidence turns heavily on the question of credibility, we defer to the superior position of the trial court in determining which evidence is to be believed. *Folly* v. *State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

Arkansas Rule of Criminal Procedure 12.1 states:

> An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only;
>
> (a) to protect the officer, the accused, or others;
>
> (b) to prevent the escape of the accused;
>
> (c) to furnish appropriate custodial care if the accused is jailed; or
>
> (d) to obtain evidence of the commission of the offense

> for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

It appears that both Rule 12.1(a) and 12.1(d) were applicable to the fact situation of this case. The officers were conducting a lawful search incident to the execution of two arrest warrants. Pursuant to Rule 12.1(a), Officer Scott testified that the search for weapons was for the officers' personal safety, and that he looked inside the film canister for their safety and to identify any items appellant was attempting to release to Mr. Cathers.[1] The trial court could have found that it was possible that the film canister contained a weapon such as a razor blade. *See Jackson* v. *State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991). By virtue of the authorization for a search provided under Ark. R. Crim. P. Rule 12.1(a), we cannot say that the court's denial of appellant's motion to suppress is clearly erroneous.

The United States Supreme Court has held that once a lawful arrest has been made, a search incidental to the arrest may be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence; no further justification is required. *United States* v. *Chadwick*, 433 U.S. 1 (1977); *United States* v. *Robinson*, 414 U.S. 218 (1973). The Supreme Court expressed its rationale for such searches as follows:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of

[1] The concurring opinion implies that there was no common sense reason as to why the police officers should have had any concern for their safety in executing these mere misdemeanor warrants. The record, however, reveals that appellant was the principal suspect in a homicide case in which the victim's throat had been slit or stabbed. The misdemeanor warrants afforded the police a means by which they could bring the appellant in for questioning.

> the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id. at 235-236.

Arkansas Rule of Criminal Procedure 12.1(d) is also applicable to the facts of this case. While it is true that state law may offer greater protection than the United States Supreme Court holds that our federal constitution requires, Arkansas cases have interpreted Rule 12.1(d) in the same manner and used the same rationale as the Supreme Court in *Robinson*. In *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982), our supreme court held that a search incident to arrest requires no additional justification, finding that a search of containers, whether open or closed, may be conducted pursuant to a lawful custodial arrest. Our supreme court has also said that Rule 12.1(d) allows officers to search for evidence of any crime, not just the crime for which an accused is being arrested. In *Stout* v. *State*, 304 Ark. 610, 615, 804 S.W.2d 686, 689 (1991), the supreme court stated, "[P]ursuant to Ark. R. Crim. P. Rule 12.1(d), a police officer who makes a lawful warrantless arrest is authorized to search the person or property of the accused to look not only for weapons but also fruits and instrumentalities of crime. Even if the fruits and instrumentalities of any other crime are found, those are properly seized."

In the case of *Holmes* v. *State*, 262 Ark. 683, 561 S.W.2d 56 (1978), the supreme court reviewed a search conducted pursuant to a lawful arrest. In that case the officers were searching the appellant's person when they discovered a piece of aluminum foil in the appellant's pocket. The officers opened the piece of aluminum foil and discovered heroin inside. The appellant moved to suppress this evidence. Relying on Rule 12.1 and *Chimel* v. *California*, 395 U.S. 752 (1969), the court upheld the trial court's denial of appellant's motion holding that evidence of another crime discovered during a search incident to arrest may be properly seized and should not be suppressed.

In the present case, the officer was searching the appellant pursuant to a valid arrest warrant. The officer could search any container on appellant's person pursuant to Rule 12.1(a), and once evidence of another crime was discovered in the container, it could be seized pursuant to Rule 12.1(d) under the authority of the cases cited above. The trial court properly denied appellant's motion to suppress.

Affirmed.

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

GRIFFEN, STROUD, and PITTMAN, JJ., concur.

WENDELL L. GRIFFEN, Judge, concurring. If Arkansas did not have Rule 12.1 in our Rules of Criminal Procedure and if it were left to police officers to decide whether the reasons asserted for warrantless searches and seizures incidental to lawful arrests are valid, I could fully agree with the view taken by the majority concerning this case given the holding by the United States Supreme Court in *Chimel* v. *California*, 395 U.S. 752 (1969), and followed in *U.S.* v. *Robinson*, 414 U.S. 218 (1973), and *Gustafson* v. *Florida*, 414 U.S. 260 (1973). However, as the majority correctly points out, state law may expand constitutional protections beyond those articulated in U.S. Supreme Court opinions. *See Stout* v. *State*, 320 Ark. 552, 898 S.W.2d 457 (1995). Rule 12.1 does just that in Arkansas. I cannot agree to read Rule 12.1 (especially subsection (a)) out of existence; neither will I agree that it means the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the Constitution of the United States depends on whatever police officers decide to say their intent was after performing a warrantless search, particularly when their expressed intent is entirely inconsistent with the objective facts shown in the record in view of the totality of the circumstances. Therefore, I concur in the result.

Rule 12.1 states:

> An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused *for the following purposes only*:
>
> (a) to protect the officer, the accused, or others;
> (b) to prevent the escape of the accused;
> (c) to furnish appropriate custodial care if the accused is

jailed; or

(d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

Ark. R. Crim. P. 12.1 (emphasis added).

The application of the standard of review to the facts is also critical to the disposition of this appeal. It is well settled that an appellate court makes an independent determination, based on the totality of the circumstances, as to whether evidence obtained by means of a warrantless search should be suppressed, and the trial court's finding will not be set aside unless it is clearly against the preponderance of the evidence or clearly erroneous. *State* v. *Tucker*, 268 Ark. 427, 597 S.W.2d 584 (1980). This standard of review for motions to suppress in a search and seizure context has also been described as "de novo" and "in light of the entire record." *U.S.* v. *McManus*, 70 F.3d 990 (8th Cir. 1995); *U.S.* v. *Delaney*, 52 F.3d 182 (8th Cir. 1995). In other words, the appellate court is asked to step back and take a fresh look at the facts while still applying the clearly erroneous standard for errors of law.

The majority is correct insofar as it relies on subsection (d) of Rule 12.1 to reach its result. The Arkansas Supreme Court has also held that a police officer who makes a lawful warrantless arrest is authorized to search the person or property of the accused to look not only for weapons but also for the fruits and instrumentalities of crime, and that even if the fruits and instrumentalities of any other crime are found, they are properly seized. *Stout* v. *State*, 304 Ark. 610, 804 S.W.2d 686 (1991). Earlier, in *Van Daley* v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987), this court upheld the seizure of evidence discovered in the course of a proper search incident to arrest without regard to whether the seized items were connected with the offense for which the accused was initially arrested. My position is not meant to challenge the authority of law enforcement officers to conduct searches incidental to lawful arrests. Instead, I conclude that while this motion to suppress may be upheld under Rule 12.1(d), the facts of this case — in light of the standard of review for search and seizure cases—cannot support the trial court's decision under Rule 12.1(a).

As the title of the rule reveals, Rule 12.1 prescribes the *permissible purposes* under which an officer who is making a lawful arrest may conduct a warrantless search of the person or property of the accused. Although the majority opinion relies upon both subsection (a) and (d) of the rule to affirm the trial court's ruling, both parties in their briefs concluded, albeit erroneously, that the controlling provision of the rule was subsection (a).[1] That subsection permits an officer making a lawful arrest to conduct a warrantless search of the person or property of the accused "to protect the officer, the accused, or others." Ark. R. Crim. P. 12.1(a). Thus, we are obliged to make an independent determination based on the totality of the circumstances as to whether the warrantless search of appellant's property was done to protect the arresting officers, the accused, or anybody else. *Id.*, *Tucker, supra.* Our task does not end at merely finding out if the arresting officers said that they searched appellant's property out of concern for their safety. We must, instead, independently determine whether the totality of the circumstances supports their asserted rationale for the warrantless search. With all due respect to the differing opinions of my colleagues, common sense plainly shows that the asserted rationale of the police officers about concern for their safety is not borne out by the totality of the circumstances presented by this record.

At least three police officers went to a Barling, Arkansas, residence to arrest appellant on May 19, 1994, based on misdemeanor warrants otherwise unrelated to this appeal. They were admitted to the residence by Jodie Cathers, the brother of appellant's girlfriend, who escorted the officers to a bedroom where appellant was sleeping. Officer Scott told appellant about the warrants and directed him to get dressed. The officers then withdrew from the bedroom into the living room of the residence, and appellant joined them there moments later after he had dressed. Although versions of what happened next vary, no one denies that Officer Scott asked appellant about a bulge in his pants pocket, and that appellant replied that the bulge was a 35-millimeter film canister containing film. Appellant claims that he took the film canister

[1] Despite this misplaced reliance by the parties—and apparently the trial court—on subsection (a), it is proper for this court to affirm based on subsection (d). We will affirm the trial court if it reached the right result, even though it may have announced the wrong reason. *Southern Farm Bureau Cas. Ins. Co.* v. *Pettie*, 54 Ark App. 79, 924 S.W.2d 828 (1996).

from his pocket and placed it on a table, intending to leave it with Cathers. Officer Scott claims that he took the canister from appellant, opened it, and found three packets of what was later determined to be methamphetamine. Regardless to the version one adopts, nobody claims that appellant said anything, did anything, or otherwise made any overtures that were deemed *threatening* to any of the officers, Cathers, or to himself. Furthermore, there is no evidence in the record to show that any of the officers believed that they would have been threatened by leaving the canister in the residence when they left to take appellant into custody.

Courts are not required to accept statements by police officers regarding their purposes for making warrantless searches on blind faith. This is implicit in our standard of review when it asks us to make an independent determination based on the totality of the circumstances. *Tucker, supra.* This arrest and search was unusual, if for nothing else, because of its amicability. The police were granted entry into the residence with the consent of the appellant's girlfriend's brother, the appellant was permitted to dress himself unattended in his own room, and, most curiously, the appellant was not patted down or otherwise searched by one of the three officers in the room; he was simply allowed to empty his pockets. Officer Scott testified that this self-search was allowed so that the appellant could release his personal items to his girlfriend's brother before going down to the station. Scott admitted that this was not standard procedure. Although Scott eventually testified that he opened the film canister out of concern for his safety, the bulk of his testimony and the objective facts surrounding the arrest and search in no way suggest that appellant posed a safety threat at any time. If Scott and the other officers were truly concerned for their safety, and if that purported concern was at least partly based on knowledge that the appellant was a prime suspect in a murder investigation, common sense and a practical desire to minimize any risk of danger — let alone appellant's possible escape — weighed against leaving appellant alone in the bedroom to clothe himself before meeting the officers in the living room. There were three armed policemen in the living room when appellant removed the film canister from his pocket. Nobody claims that appellant was trying to keep the film canister, where it could have posed a threat to the arresting officers,

appellant, or others.[2] Instead, the record plainly shows that appellant was preparing to leave the residence, without resistance, *and that he voluntarily divested himself* of the item in question to leave it at the residence after Officer Scott questioned him about it.

I fully favor upholding warrantless searches by police officers when they are necessary to protect the officers from possible danger. However, the Fourth Amendment's protection against unreasonable searches and seizures requires that the police demonstrate a justifiable reason for conducting any search without a warrant, and it is the business of trial judges and appellate courts to determine whether asserted reasons are legitimate. When three armed police officers assert that a warrantless search of a film canister that has been surrendered by an arrested suspect whom they are removing from the site of the arrest into police custody is justified for their safety, after they have chosen to turn their backs on the suspect and leave him unattended, common sense and our standard of review dictate that the validity of the search turn on something more than the say-so of the officers. Otherwise, trial judges and appellate courts merely become rubber stamps for whatever explanations that arresting officers may give, no matter how self-serving and baseless they may be.

The Fourth Amendment's guarantee against unreasonable searches and seizures should not expose police officers to unjustified dangers while making lawful arrests, as the U.S. Supreme Court has recognized in *Chimel* and its progeny. The Arkansas Supreme Court has prescribed Rule 12.1 accordingly. However, intelligent concern for the dangers faced by the police should not cause trial judges and appellate courts to delegate to arresting officers the judicial function of determining whether the asserted reasons for a warrantless search incident to arrest exist are so in the first instance, and whether they

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[2] The majority cites *Jackson* v. *State* for the proposition that even a "matchbox could hold a razor blade." 34 Ark. App. 4, 804 S.W.2d 735 (1991). *Jackson* misses the point for several reasons. First, no one contended in this case that a 35-mm film canister could not contain something dangerous. Second, *Jackson* concerned a *Terry* stop and frisk—a type of search different from a search-incident and analyzed under different rules. *See Terry* v. *Ohio*, 392 U.S. 1 (1968). Third, even if stop-and-frisk rules applied here, *Jackson* makes my point. There, the warrantless search was upheld because the factual context gave the police officer reason to fear for his safety. The officer was outside in a high-crime area after dark, attempting to detain a suspect that had attempted to leave the scene. *Jackson, supra.* Those are precisely the type of facts missing here.

are justified in view of the constitutional right to be free from *unreasonable* searches and seizures. If this search is to be upheld, it must be done on some basis other than Rule 12.1(a). It was clear error for the trial court to consider this a *protective* search.

I respectfully concur.

I am authorized to state that Judge Stroud joins in this opinion.

Michelle LOWELL *v.* Robert E. LOWELL, et al.

CA 95-875 934 S.W.2d 540

Court of Appeals of Arkansas
Division I
Opinion delivered December 11, 1996

Booth & Honeycutt, P.L.C., by: *Frank W. Booth*, for appellant.

Gunn, Sexton, Canova & Platt, by: *Jane Watson Sexton* and

Katherine E. Platt, for appellees.

JOHN F. STROUD, JR., Judge. Appellant, Michelle Lowell, has three sons by different former husbands, who are the appellees in this case. She was first married to appellee Brian Jackson. Their son is Joshua Scott Jackson. Appellant's second husband was appellee Jimmy Smith. Their son is Brock Smith. Appellant's third husband was appellee Robert E. Lowell. Their son is Robert A. Blake Lowell. Appellant was married to Robert Lowell when Jimmy Smith filed a petition in juvenile court for determination of dependency-neglect regarding his son, Brock Smith. Appellee Robert Lowell subsequently filed for divorce from appellant in chancery court. By temporary order filed October 22, 1993, the juvenile court found probable cause to believe the children were dependent-neglected. On that same day, the other two fathers, appellees Jackson and Lowell, filed motions to intervene in the juvenile proceeding and to consolidate their divorce actions with Smith's juvenile proceeding. All three fathers sought custody of their respective sons. On November 12, 1993, the juvenile court granted Lowell's and Jackson's motions to intervene and consolidated the three actions. After several hearings, the juvenile court concluded that the children were dependent-neglected and that custody of the children should be vested with their respective fathers. Appellant raises six points on appeal, but finding no error we affirm.

Appellant's first argument is that the juvenile court erred in assuming jurisdiction of appellee Smith's dependency-neglect petition. She asserts that the chancellor in the Smiths' divorce proceeding in the judicial district where the juvenile, Brock Smith, resided had previously determined that appellant should have custody of Brock, and this prior custody determination was open for modification and should be heard in that chancery court, rather than in the juvenile court. We find no error.

The juvenile courts of Arkansas are a division of chancery. *Schuh* v. *Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990). However, juvenile courts have exclusive original jurisdiction for proceedings in which a juvenile is alleged to be dependent-neglected. Ark. Code Ann. § 9-27-306(a)(1) (Supp. 1995). The juvenile code provides that petitions for dependency-neglect may be filed by any adult. Ark. Code Ann. § 9-27-310(b)(3)(A) (Supp. 1995). Appellant argues that the juvenile courts were not intended to assume jurisdiction over ordinary custody matters. The allega-

tions of dependency-neglect, however, separated this case from those involving ordinary custody matters. Moreover, the trial judge was correct in reasoning that the consolidation of the three divorce proceedings with the juvenile action was appropriate to prevent conflicting custody orders within the same judicial district. *See Henry* v. *Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992).

Appellant next argues that the juvenile court erred in allowing appellees Lowell and Jackson to intervene in the dependency-neglect proceedings because the motion to intervene was untimely, insufficient, and improper. We disagree.

The timeliness of the motion is a matter clearly within the trial court's discretion, and it will be reversed only where that discretion has been abused. *Employers Nat'l Ins. Co.* v. *Grantors to Diaz Refinery PRP Comm. Site Trust*, 313 Ark. 645, 855 S.W.2d 937 (1993). The factors that we consider regarding the timeliness of a motion to intervene are: (1) how far the proceedings have progressed; (2) any prejudice to other parties caused by the delay; and (3) the reason for the delay. *Cupples Farms Partnership* v. *Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992). Here, the original petition for determination of dependency-neglect was filed by appellee Smith on September 14, 1993. Appellees Jackson and Lowell moved to intervene on the day the temporary order finding probable cause for dependency-neglect was entered, October 22, 1993, which was just over a month after the original petition had been filed. Appellant has not shown that there was any prejudice as a result of the intervention. We find that the juvenile court did not abuse its discretion in finding that the motion was timely.

With respect to the propriety of the intervention, Arkansas Rule of Civil Procedure 24(b) deals with permissive intervention. It provides that intervention may be permitted when the main action and an applicant's claim or defense have a question of law or fact in common. Here, the common facts and questions of law involved the proper care and custody of the three sons. As with timeliness, permissive intervention is also a matter within the trial court's discretion, and we will reverse only for abuse of that discretion. *Billabong Prods., Inc.* v. *Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983). We do not find that the trial court abused its discretion in allowing the intervention.

With respect to the sufficiency of the motion to intervene, appellant argues that Arkansas Rule of Civil Procedure 24(c) requires that the motion state the grounds for intervention and that it be accompanied by a pleading setting forth the claim or defense for which intervention is sought. She argues that no separate pleading was attached to appellee Jackson's and Lowell's motions to intervene, and therefore the trial court erred in allowing the intervention. We disagree.

Arkansas Rule of Civil Procedure 24(c) provides in pertinent part:

> (c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. *The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.*

(Emphasis added.) In *Polnac-Hartman & Assoc.* v. *First Nat'l Bank*, 292 Ark. 501, 731 S.W.2d 202 (1987), the supreme court affirmed the lower court's denial of intervention, which had been based in part upon the appellant's failure to file a pleading setting forth a claim or defense. In doing so, however, the supreme court explained:

> The failure to file a pleading with a motion to intervene was the subject of our decision in *Schact* v. *Garner*, 281 Ark. 45, 661 S.W.2d 361 (1983). In that case a party moving to intervene refused to file a pleading setting forth its claim or defense as required by Rule 24(c) but insisted on being allowed to intervene in the litigation. The trial court denied the motion, and this court affirmed, noting that the *movant had not shown entitlement to intervene as a matter of right or permissively. That, of course, is the purpose of filing a pleading. Without it, the court may not have any idea of the right asserted by the would-be intervenor. Although the appellant in this case attached the assignments to the motion, it did not state how or why they should be protected or what the claim of priority, if any, was. There was not even a statement telling the court that the assignments were, or were related to, the same properties which were the subjects of the foreclosure action.*

(Emphasis added.) Thus, the purpose of attaching to the motion a pleading that sets forth the claim or defense for which intervention

is sought is to inform the court of the right asserted by the would-be intervenor. Here, the motions to intervene contained statements of the relief sought, as well as affidavits setting forth facts and allegations in support thereof. Thus, the purpose of the rule was satisfied, and the trial court did not abuse its discretion in allowing the intervention. *See* 3B *Moore's Federal Practice* ¶ 24.14 (2d ed.) (general discussion regarding leeway that has been allowed by federal courts under Rule 24(c) of the Federal Rules of Civil Procedure, which is virtually identical to our Rule 24(c)).

Appellant's third argument is that the juvenile court erred in failing to appoint a guardian ad litem for the children and in failing to grant her motion for reconsideration on the guardian ad litem issue. At one of the early hearings, the juvenile judge stated that he would appoint a guardian ad litem for the children, but no such appointment was ever made. The parents of all three children were present with counsel at every hearing. Appellant did not complain or otherwise object to this oversight at or prior to the subsequent and final hearing on this matter held March 9, 1995. Rather, appellant merely requested in her motion to reconsider, filed March 14, 1995, that such an appointment be implemented before finalizing the order relating to custody. Accordingly, appellant cannot now argue this basis for reversal.

Appellant's fourth argument is that the juvenile court erred in denying her motion to restore custody of the minor children to her. In making this argument, appellant asserts: (1) that the fundamental goal of the juvenile code is to restore the family unit, and that the juvenile court's closing comments provided support for restoration of custody to appellant; (2) that with respect to Jimmy Smith and Brian Jackson, the only material change in circumstances that was proven was that appellant had changed for the better, a situation that should have resulted in a return of custody to her; and (3) that with respect to Robert Eugene Lowell, it was in his best interests to keep the siblings together in one household. We find no error in the juvenile court's refusal to restore custody to appellant.

On appeal from a chancery court case, we review the evidence de novo. We will not reverse the chancery court unless its decision is clearly contrary to a preponderance of the evidence. *Kerby* v. *Kerby*, 31 Ark. App. 260, 792 S.W.2d 364 (1990). A finding is clearly erroneous when, although there is evidence to support the trial court's decision, after looking at all the evidence the reviewing

court is left with a definite and firm conviction that a mistake has been committed. *Davis* v. *Davis*, 48 Ark. App. 95, 890 S.W.2d 280 (1995). As in all custody cases, the primary consideration is the welfare and best interests of the children involved. All other considerations are secondary. *Kerby*, 31 Ark. App. at 264. In these type cases, the chancellor must utilize to the fullest extent all powers of perception in evaluating witnesses, their testimony, and the best interests of the children. In no other type of case does the superior position, ability, and opportunity of the chancellor to observe the parties carry as much weight as those cases involving minor children. *Id.* Juvenile courts are a division of chancery, and therefore the same standards of review apply. *See Schuh* v. *Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990).

Here, it is true that the trial court noted that appellant's attitude and demeanor had improved and that she had responded to the wake-up call as best she could. The court also stated, however, that she still had a "way to go." Dr. Alan Tuft, a clinical psychologist, provided expert testimony in this case. The court credited Dr. Tuft's testimony that he did not believe appellant had the ability to care for all three boys for an extended period of time. Moreover, the court determined that the evidence showed that the fathers provided safe, nurturing environments and that they were the more stable custodians for the boys. Appellant acknowledged that the fathers were excellent caretakers. Furthermore, there was ample testimony that the boys had customarily spent large amounts of time with their respective fathers, which undercuts appellant's argument that they should be together in one household. In short, a review of the entire record demonstrates that the trial judge's refusal to restore custody to appellant was not clearly erroneous.

Appellant's fifth argument is that the juvenile court erred in granting Smith's dependency-neglect petition and Jackson's and Lowell's motions because doing so was against the preponderance of the evidence. In particular, appellant argues that Dr. Alan Tuft's initial report to the court favored appellant's having custody of the children, and that the doctor's only initial concern was appellant's financial ability to keep the family together as a unit. She asserts that his opinion was turned upside down by the time he testified at the hearing because of "ex parte conferences" with persons friendly to the fathers. She also relies upon the fact that everyone who comes in contact with Josh, the oldest child, has nothing but good things

to say about him. She argues that because she has had Josh fifty percent of the time, her positive parenting abilities are proven by the fact that Josh has developed so well. She concludes that the lower court's findings to the contrary are therefore against the preponderance of the evidence. We disagree.

Appellant's assertions about "ex parte conferences" with Dr. Tuft are not supported by legal authority nor well-reasoned argument. We do not consider allegations of error absent citation to authority or convincing argument. *Bank of Cabot* v. *Bledsoe*, 9 Ark. App. 145, 653 S.W.2d 144 (1983). Moreover, even though Josh has developed well and is highly regarded, that fact alone does not support appellant's position that the trial court's findings regarding custody are clearly erroneous. As stated previously in this opinion, the trial court's findings were not clearly contrary to the preponderance of the evidence.

Appellant's final argument is that the juvenile court erred in unreasonably restricting her visitation rights with the children. Appellant's visitation with the children is very restricted. However, it is clear from the visitation schedule set forth in the final order that the lower court gave careful consideration to this issue. In reviewing chancery cases, we give due deference to the trial court's superior position to evaluate the evidence, and we will not reverse the lower court's findings unless they are clearly against the preponderance of the evidence. We find no clear error in this regard.

ABSTRACTING ABUSES

We cannot ignore the abstracting abuses of appellant's counsel. Excessive abstracting is as violative of our rules as omissions of material pleadings, exhibits, and testimony. *Saint Paul Fire & Marine Co.* v. *Brady*, 319 Ark. 301, 891 S.W.2d 351 (1995). Appellant's abstract consisted of 402 pages. Much of this information could have been abridged or deleted for purposes of this appeal. This court's efforts to resolve this matter on appeal would have been aided considerably by the scrupulous adherence to our abstracting rule. See Arkansas Supreme Court Rule 4-2(a)(6).

Affirmed.

ROGERS and NEAL, JJ., agree.

Kelvin MEEKS *v.* STATE of Arkansas

CA CR 95-962 936 S.W.2d 555

Court of Appeals of Arkansas
Division I
Opinion delivered December 11, 1996
[Petition for rehearing denied January 15, 1997.]

Gregory E. Bryant, for appellant.

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

Gen. and Sr. Appellate Advocate, for appellee.

OLLY NEAL, Judge. Appellant, Kelvin Meeks, was convicted on May 11, 1995, of the offenses of negligent homicide and first-degree battery, and acquitted of carrying a weapon after a jury trial in the Pulaski County Circuit Court. On appeal, Meeks seeks only the reversal of the battery conviction, contending first that the State's evidence was insufficient to sustain the conviction, and secondly that certain inconsistencies in the jury's verdict require either dismissal of the battery charge or reversal of the conviction. Neither point of error warrants reversal or dismissal, and therefore we affirm the conviction.

The evidence presented at trial established that on December 28, 1993, appellant was involved in an altercation at the Pay More Pawnshop in southwest Little Rock, which resulted in the death of Cedric Brown and the serious injury of a three-year-old bystander. Terrence Williams, a friend of Cedric Brown's, testified that on the day of the shootings, he, Brown, and another man named Courtney Brooks were across the street from the Pay More Pawnshop when Brown spotted appellant's car and informed his companions, "[T]hat's the guy that robbed me last night." According to Mr. Williams, Brown did not actually know appellant and "had him mixed up with somebody else." Williams stated that Brown drove his automobile, a 1977 Oldsmobile to the pawnshop and parked about eight (8) parking spaces away from appellant's car, a 1987 gray Cadillac. When appellant exited the store, Brown went to the driver's side window of Meeks's car and exchanged words with appellant. Williams said he saw Brown reach for his pistol and heard shooting, but did not actually see gunfire exchanged because he immediately fled the area.

In his testimony on behalf of the State, Courtney Brooks admitted that he was with Williams and Brown when the shootings occurred. Brooks corroborated Williams's story that he, Brown and Terrence Williams entered the pawnshop parking lot so that Brown could confront appellant about a robbery that occurred the previous night, but claimed that prior to the incident, he did not know Brown was armed. Brooks testified that he saw Brown pull a gun out of his coat, heard shooting, and saw Brown fall to the ground. Brooks then got into the driver's seat of Brown's car and backed the car out in preparation to leave the store. Brown then jumped off the ground, got into the passenger seat, and was driven to a local

hospital for treatment. Brooks stated that he left Brown at the St. Vincent's Infirmary emergency room where Brown underwent emergency surgery and died a short while after being admitted.

Police officers who were dispatched to the shooting testified that upon their arrival at the pawn shop, they first noticed a Toyota truck with a bullet hole in the back window and that a small child, later identified as Robin Leath, had been injured. One mutilated lead projectile was recovered from the floorboard of the truck. None of the suspects or victims were found at the scene. Officer R.K. Brown testified that as he secured the crime scene, he found several spent rounds of ammunition and a human thumb that had been severed by a gunshot. Steven Zakrzewski, while en route to the pawnshop was dispatched to a Shell Super Stop gas station down the street from the shooting, testified that when he arrived at the gas station, he found appellant lying on the pavement. Zakrzewski stated that after appellant was transported by ambulance for medical treatment, he searched appellant's car and discovered a .357 handgun in the glove box and one (1) spent .9 millimeter hull in the back seat.

Doug Braswell, owner of Pay More, remembered the shooting incident and testified that when he first heard gunfire, he was standing outside the store, "talking to a couple about a television they had in the back of their truck." Braswell stated that when he realized that the men he saw standing by the store were shooting guns, he retreated inside the store. Other evidence revealed that three-year-old Robin Leath was struck at the base of her skull by a bullet from appellant's .357 and, after surgery at Arkansas Children's Hospital, suffers permanent brain damage. Appellant testified that he was unaware that anyone other than Brown had been shot until hearing it on the news while he was hospitalized.

Appellant first argues that the trial court erred in denying his motion for directed verdict on the first-degree battery charge, which amounts to a challenge to the sufficiency of the evidence to sustain appellant's conviction on that count. Specifically, appellant contends that the State failed to put on proof that he acted with the requisite culpability for battery first. That argument was based on the jury's finding that the killing of the primary victim occurred through negligent conduct. Our first-degree battery statute, Ark. Code Ann. § 5-13-201 provides in relevant part:

(a) A person commits battery in the first degree if:

* * *

(3) He causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life . . .

Although the culpable mental state necessary to warrant a conviction under this section is not specified in the statute, under this definition of battery first, the culpability requirement may be satisfied by showing that the defendant acted either purposefully or knowingly with regard to the attendant circumstances. *Vowell* v. *State*, 4 Ark. App. 175, 628 S.W.2d 599 (1982). That interpretation of the statute is based on the commentary to the battery statute, which relates that the offense comprehends life-endangering conduct. The *Vowell* opinion also recognizes that the severity of the punishment authorized is warranted by the conjunction of *severe injury* and *a wanton or purposeful mental state*, and points to the portion of the commentary that notes that each subsection [of the battery statute] describes conduct that would produce murder liability if death resulted. *Id.* at 187-188.

■ Although appellant's first argument raises serious and troubling questions regarding the "knowing or purposeful" element of our first-degree battery statute, we are unable to address those issues as they are not properly preserved for appellate review. *See, e.g. Johnson* v. *State*, 270 Ark. 992, 606 S.W.2d 752 (1980). While appellant made a motion for directed verdict based on the precise ground he raises on appeal at the close of the State's case, and apparently renewed his motion at the conclusion of all the evidence, nothing appears in the record from which we could find that the trial court considered or ruled on appellant's second motion. Our appellate courts have traditionally followed the requirement found in A.R.Cr.P. Rule 36.21(b) that both motions be made, *Easter* v. *State*, 306 Ark. 452, 815 S.W.2d 924 (1991), and have placed the burden of obtaining a ruling on both motions upon the defendant. Objections and questions left unresolved are waived and may not be relied upon at or for appeal. *Danzie* v. *State*, 326 Ark. 34, 930 S.W.2d 310 (1996). Although it can readily be inferred from the context of the record that the trial court denied appellant's in-chambers motion for directed verdict, *Danzie* is controlling and "form" must once again prevail over "substance." Appellant ten-

dered a supplement to the record containing proof positive that his second motion was made, but he failed to include language indicating the court's ruling on the motion. Because of that deficiency, appellant has not preserved the sufficiency issue for appeal.

Appellant also contends that the jury's decision to acquit him of the offense of carrying a weapon should have negated any finding that he acted with the requisite intent to commit a first-degree battery. That type of argument has been consistently rejected by our appellate courts. *See Jordan* v. *State*, 323 Ark. 628, 917 S.W.2d 164 (1996); *McVay* v. *State*, 312 Ark. 73, 847 S.W.2d 28 (1993); *Yedrysek* v. *State*, 293 Ark. 541, 739 S.W.2d 672 (1987). Appellant cites no authority for his proposition that "fundamental fairness" requires reversal, and we therefore won't consider that argument on appeal. It is fundamental that absent citation of authority or convincing argument, we will not consider an argument on appeal unless it is apparent without further research that it is well-taken. *Roberts* v. *State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

Affirmed.

STROUD, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I am in agreement with the decision to affirm appellant's conviction for first-degree battery on both issues raised in this appeal. Specifically, I agree that the record before us does not disclose that any question pertaining to the sufficiency of the evidence was preserved for appeal. I agree that the record does not reflect any ruling made by the trial court on appellant's motion for a directed verdict which was made at the close of the case, and while I agree that the record reflects that *a* motion for a directed verdict was made at that juncture, I am of the view that this motion was not sufficient to preserve the arguments raised in this appeal. It is for this reason that I write separately to concur in the opinion of the court.

In this case, the trial court entered an order correcting the record to reflect that appellant made a motion for a directed verdict at the close of the case. Under Rule 36.21(b) of the Rules of Criminal Procedure, it is necessary to make such a motion in a jury trial in order to preserve the issue of the sufficiency of the evidence on appeal. Also, it has been held that directed verdict motions must

state specific grounds. *Jones* v. *State*, 318 Ark. 704, 889 S.W.2d 706 (1994). A general reference to "insufficient evidence" does not satisfy the requirements of the rule. *Daffron* v. *State*, 318 Ark. 182, 885 S.W.2d 3 (1994).

The order entered by the trial court to correct the record states only the following:

> 2. The parties agree that at the conclusion of the above-captioned case, counsel for the defendant, Kelvin Meeks, made an oral motion, pursuant to Rule 36.21(b), for a directed verdict due to insufficiency of the evidence.

Significantly absent from this statement are the grounds upon which appellant moved for a directed verdict.

The record does reflect that appellant made a specific motion for a directed verdict at the end of the State's case upon the grounds which are urged on appeal, and it has been held that the renewal of a specific motion previously made is sufficient to preserve the issues raised in the former motion for purposes of appeal. *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). The problem here, however, is that the above-referenced stipulation is general in nature and reflects neither a renewal nor a motion made on any specific basis at all. In short, the record is silent as to the grounds upon which the motion was made, with the result that any question as to the sufficiency of the evidence has been waived. I also note that appellant filed a motion for a new trial in which he questioned the sufficiency of the evidence on at least one ground urged on appeal. However, a motion for a new trial is no substitute for meeting the requirements of Rule 36.21. *See Easter* v. *State*, 306 Ark. 452, 815 S.W.2d 924 (1991).

Moreover, entirely omitted from the order correcting the record is any mention of a ruling made by the trial court. As observed in the opinion, this, too, prevents us from reviewing the question of the sufficiency of the evidence.

I respectfully concur.

Edward TORREY *v.* CITY of Fort Smith

CA 96-185 934 S.W.2d 237

Court of Appeals of Arkansas
Division I
Opinion delivered December 11, 1996
[Petition for rehearing denied January 15, 1997.]

Walker Law Firm, by: *Eddie H. Walker, Jr.*, and *William J. Kropp, III*, for appellant.

Daily, West, Core, Coffman & Canfield, P.L.L.C., by: *Eldon F. Coffman* and *Douglas M. Carson*, for appellee.

OLLY NEAL, Judge. Edward Torrey appeals from an order of the Arkansas Workers' Compensation Commission denying his entitlement to additional workers' compensation benefits pursuant to Ark Code Ann § 11-9-505 (a)(1)(1996) and his request for a change of physician. For reversal of the Commission's order, appellant contends that he is entitled to additional benefits because appellee refused to return him to work without reasonable cause and that he is entitled to a change of physician.

Appellant was employed by appellee, City of Fort Smith, in its sanitation department, when he sustained an admittedly compensa-

ble injury to his back on October 10, 1993. Appellant was treated at the emergency room by Dr. Mumme. Appellant was diagnosed with a right lateral disc herniation at L4-5 and eventually referred to Dr. Michael Sandefer who prescribed a conservative course of treatment. Appellant was released from Dr. Sandefer's care on March 1, 1994, with a 5% permanent impairment rating to the body as a whole, which was accepted by appellee, and restrictions that included avoiding repetitive bending and lifting over 25 to 30 pounds.

Appellant attempted to return to work for appellee but was advised that there were no positions available that would meet his job restrictions. Appellant applied for dispatcher's positions with the City's sanitation and police departments. Appellant was not hired to fill either position. Appellant then sought additional benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1) (1996).

The Administrative Law Judge found that appellant was entitled to additional benefits because the City refused to return him to work without a reasonable cause for doing so and approved appellant's request for a change of physician. The City appealed to the Workers' Compensation Commission which, upon conducting a de novo review of the matter, reversed the decision of the Administrative Law Judge. Appellant now seeks our reversal of the Commission's order.

■ When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and uphold those findings if they are supported by substantial evidence. *Arkansas Highway & Transp. Dept.* v. *McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992).

In denying appellant's entitlement to additional benefits pursuant to Ark. Code Ann. § 11-9-505, the Commission noted that the Commission had been admonished to not broaden, liberalize, or narrow the workers' compensation statutes. Ark. Code Ann. § 11-9-1001 (Repl. 1996).

■ The case at bar presents an issue of first impression for this court, because what constitutes "reasonable cause" as used in Ark. Code Ann. § 11-9-505(a)(1) has yet to be construed. The

beginning point in interpreting a statute is to construe the words just as they read and to give them their ordinary meaning. *Arkansas Dept. of Health* v. *Westark Christian Action Council*, 322 Ark. 440, 910 S.W.2d 199 (1995). The basic rule of statutory construction is to give effect to the intent of the legislature, making use of common sense. *Office of Child Support Enforcement* v. *Harnage*, 322 Ark. 461, 910 S.W.2d 207 (1995). Statutes relating to the same subject should be read in a harmonious manner, if possible. *Mecco Seed* v. *London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994).

We begin our analysis of this matter by examining the stated purpose of Act 793 of 1993 which is "to pay timely temporary and permanent disability benefits to all legitimately injured workers, ...to pay reasonable and necessary medical expenses resulting thereafter and the return of the worker to the work place. *See* Ark. Code Ann. § 11-9-101 (Repl. 1996).

Pursuant to Ark. Code Ann. § 11-9-505(a)(1)(2):

> any employer who without reasonable cause refuses to return an employee to work, where suitable employment is available within the employee's physical and mental limitations, upon orders of the Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of such refusal, for a period not exceeding one (1) year. In determining the availability of employment, the continuance in business of the employer shall be considered....

Ark. Code Ann. § 11-9-505(4)(d) provides: "The purpose and intent of this section is to place an emphasis on returning the injured worker to work, while still allowing and providing for vocational rehabilitation programs when determined appropriate by the Commission."

In Ark. Code Ann. § 11-9-1001, which is entitled the legislative declaration, the Seventy-Ninth General Assembly reemphasized that, "the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then return the worker to the work force."

In the case at bar, appellant suffered a compensable injury while in the employ of appellee. After appellant's release from the care of his physician he returned to his employer in an attempt to resume his employment. After learning that there were no positions available that would accommodate the restrictions placed on his work activities by his treating physician, appellant was encouraged to apply for other positions within the City of Fort Smith, which employs over 600 persons. Although appellant was afforded the opportunity to interview for dispatcher positions within the police and sanitation departments, he was not hired for either.

In reviewing pertinent sections of the Act, we find that the legislative intent that the injured worker be allowed to reenter the work force permeates the language of sections of the Act. *See*, e.g., Ark. Code Ann. §§ 11-9-101, 11-9-505, 11-9-1001 (Repl. 1996). Keeping in mind that we must make use of our common sense in construing the statutes in question, and that we must construe related statutes in a harmonious manner, we find that the Commission's interpretation of what constitutes reasonable cause for not returning an employee is erroneous.

Before Ark. Code Ann. § 11-9-505(a) applies several requirements must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and, that the employer's refusal to return him to work is without reasonable cause.

In the present case, appellant has proved that he suffered a compensable injury; that there was suitable employment within his restrictions available with his employer, and that the employer refused to return him to work. A more difficult question arises when we question whether appellee's reason for not rehiring appellant was unreasonable. Appellee's stated reason for not hiring appellant to fill either position was that a "more qualified" individual was hired instead. The Commission accepted this explanation and found that the appellee had demonstrated that reasonable cause existed for not rehiring appellant. Further, the Commission noted that once a position is filled there is no longer suitable employment available to be the basis of the employer's refusal to return the employee to work, as provided in this statute.

We believe that the Commission's interpretation is too narrow to allow the true intent of the legislature to be realized. The Commission made a finding that the employer had shown reasonable cause for not returning an injured employee to work, where the employer stated that a "more qualified" person was hired. In accepting the employer's explanation, the Commission, in effect, allows the employer to nullify the stated legislative purpose while exercising minimal effort to return the employee to work. Likewise, the Commission's interpretation allows subjective reasoning to factor into what constitutes reasonable cause, whereas an objective standard is more compatible with the legislative intent and purpose.

At a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary. Further, we do not agree with the Commission's finding that the period of refusal lasts only until a position is filled. We believe that the better rule is that the period of refusal lasts as long as the employer is doing business not to exceed the one-year limit for payment of additional benefits.

Appellee employs over 600 persons, yet the evidence presented fails to demonstrate that any effort was made on the part of appellee to assess appellant's skills or to offer him assistance to enhance his skills so as to better facilitate his re-entry into the work place.

Appellant's final asserted point is that the Commission erred in denying his request for a change of physician from Dr. Sandefer, a neurosurgeon, to Dr. Dodson, a general practitioner. Ark. Code Ann. § 11-9-514(2)(A) (Repl. 1996) provides: If the employer selects a physician, the claimant may petition the Commission one (1) time only for a change of physician, and, if the Commission approves the change, with or without a hearing, the Commission shall determine the second physician and shall not be bound by recommendations of claimant or respondent.

Appellant testified that he requested a change of physician because Dr. Dodson was his family doctor and could make adjustments. The Commission found that the wording of the statute clearly contemplates that the Commission will approve or disapprove any changes of physician. Because the statute contains the

phrase "if the Commission approves the change," we believe that the Commission is vested with discretion to approve or disapprove any change of physician. Upon review of the case at bar, we cannot find that the Commission's decision to not allow a change of physician was in error, especially in light of the fact that appellant offered no compelling reason, other than saying that Dr. Dodson could make adjustments, to support his request for a change of physician.

We therefore reverse and remand for an award of benefits consistent with this opinion.

Reversed and remanded in part; affirmed in part.

STROUD and ROGERS, JJ., agree.

Jerry NOLAND and Anita Delores Shaver, Trustees of the Wesley E. Noland Irrevocable Trust, et al. *v.* Claude NOLAND

CA 95-167 934 S.W.2d 940

Court of Appeals of Arkansas
En Banc
Opinion delivered December 11, 1996
[Petition for rehearing denied January 15, 1997.]

James G. Lingle, for appellants.

Davis & Watson, P.A., by: *Charles E. Davis*, for appellee.

WENDELL L. GRIFFEN, Judge. This case involves a challenge to a chancellor's decision that the appellants procured a trust and related warranty deed from Wesley E. Noland, deceased, and failed to prove beyond a reasonable doubt that Noland possessed the requisite mental capacity and acted without undue influence when he created the Wesley E. Noland Irrevocable Trust and conveyed his one-third interest in a family farm to it. The chancellor also determined that a joint tenancy with right of survivorship could not be destroyed by conveyance. Although we hold that the chancellor erred on the latter issue, his error was harmless because his decision that appellants failed to meet their burden of proof of mental capacity and lack of undue influence concerning conveyances between Wesley Noland and the Wesley E. Noland Irrevocable Trust was not clearly erroneous. Therefore, we affirm.

Wesley Noland and his wife Elsie had four children (daughters Anita Shaver and Helen Hooton, and sons Jerry and Claude Noland). On January 21, 1974, Wesley Noland and Elsie Noland executed a deed that created a joint tenancy with right of survivorship to their eighty-two-and-one-half-acre family farm in themselves and their sons (Jerry and Claude). Apparently, this conveyance was made to keep the husband of one of the daughters from becoming involved in the family estate, and made in the belief that the sons would treat their sisters equitably insofar as the farm was concerned. Wesley Noland is alleged to have later become concerned that Claude Noland would not share the farm with his sisters. Wesley Noland was told by an attorney that the joint tenancy could not be dissolved without the agreement of all the joint tenants, including Claude Noland.

In August 1991 another lawyer concluded that a joint tenant with a right of survivorship could convey his interest to a third entity, thereby converting the joint tenancy with right of survivorship into a tenancy in common. Acting on this advice and the encouragement of Jerry Noland and Anita Shaver (after the death of Elsie Noland), Wesley Noland established the Wesley E. Noland Irrevocable Trust on September 27, 1991. Wesley Noland also executed a warranty deed that transferred his one-third interest in the farm to Jerry Noland and Anita Shaver as Trustees of the Trust (which had as its beneficiaries Jerry Noland, Anita Shaver, and Helen Hooton). Jerry Noland then executed a warranty deed that transferred his one-third interest into the Trust. The Trust also

provided that Claude Noland (who lived with Wesley) would have a life estate in the farm residence and lands, and an undivided one-third interest in the remainder.

Claude Noland did not know about the Trust and related conveyance until he went to pay taxes on the property after Wesley Noland died. He then brought suit to set aside the Trust and related conveyance, arguing that Wesley Noland lacked mental capacity to establish the Trust, and that the Trust and related conveyance resulted from undue influence by Jerry Noland and Anita Shaver. Following a hearing on April 20, 1994, the chancellor held that Jerry Noland had procured the Trust so that he had the burden of proving beyond a reasonable doubt that Wesley Noland had mental capacity and was not under undue influence concerning it and the related conveyance. The chancellor held that Jerry Noland failed to meet that burden, so the conveyance was set aside. He also ruled that even if he held that the defendants had met their burden on the mental capacity and undue influence issues, a joint tenancy with right of survivorship cannot be destroyed by conveyance.

Jerry Noland and Anita Shaver, Trustees of the Wesley E. Noland Irrevocable Trust, and as beneficiaries with Helen Hooton, have appealed the chancellor's decision voiding the Trust and related conveyance. They argue that the chancellor erred by holding that the Trustees had procured the Trust and warranty deed from Wesley Noland, and that the chancellor erred by shifting the burden of proof to them on the issues of lack of mental capacity and undue influence regarding the Trust and related warranty deed by Wesley Noland. Appellants also argue that the chancellor applied the incorrect legal standard for analyzing the mental capacity issue. Appellants finally argue that the chancellor erred in holding that a joint tenant may not convey his interest to a stranger and defeat the survivorship rights of other joint tenants as to the conveyed interest.

Most of the abstract and record deals with the mental capacity and undue influence issues, allegations by appellants that Claude Noland was abusive toward Wesley Noland during his last years, and Claude Noland's counterallegations that appellants were not around Wesley Noland enough to appreciate the extent of his alleged incompetency. The record certainly demonstrates that these siblings appear to be living out hostilities and long-held conflicts dating back many years. Suffice it to say that the chancellor had considerable conflicting proof concerning Wesley Noland's mental state in

1991, the allegations of mistreatment and verbal abuse by Claude Noland (which in some instances clearly appear to have been substantiated by his own conduct and testimony), and proof concerning tactics employed by Jerry Noland and Anita Shaver concerning the creation of the Wesley E. Noland Irrevocable Trust and the conveyance of Wesley Noland's one-third joint interest in the farm into it.

■ However, the threshold issue is whether Jerry Noland procured the Trust and warranty deed from Wesley Noland to the Trust. In an ordinary challenge to the validity of a will, the party contesting its validity must prove by a preponderance of the evidence that the testator lacked mental capacity or was unduly influenced at the time the will was executed. *Baerlocker* v. *Highsmith*, 292 Ark. 373, 730 S.W.2d 237 (1987). This principle also applies to other testamentary instruments. However, where a beneficiary of a testamentary instrument actually drafts or procures it, Arkansas law applies a higher burden of proof and shifts the burden onto the proponent of the instrument. In *Greenwood* v. *Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979), the Arkansas Supreme Court held that a proponent of a will who is a beneficiary and who drafted the will or caused it to be drafted must prove beyond a reasonable doubt that it was not the result of undue influence and that the testator had the mental capacity to make it. In *Smith* v. *Welch*, 268 Ark. 510, 597 S.W.2d 593 (1980), the supreme court again held that where a beneficiary procures the making of a will, it bears the burden of showing beyond a reasonable doubt that the testator had both mental capacity and such freedom of will and actions as are required to render a will legally valid. *See also Looney* v. *Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992).

Under the clearly erroneous standard of review, we are unable to reverse the chancellor's finding of procurement. A de novo review of the record shows that Jerry Noland arranged all of the meetings between his father and counsel regarding creating the Trust. The trust documents were prepared by counsel selected by Jerry and were delivered to Jerry rather than to Wesley Noland. The lawyer who drafted the trust documents explained them to Jerry rather than to Wesley Noland. Jerry, in turn, explained the Trust documents to Wesley Noland and appears to have coached him regarding the documents before covertly arranging with Anita Shaver to take Wesley Noland to the lawyer's office where the

documents were executed.

■■ Because the Court of Appeals reviews equity appeals de novo, we will affirm a chancellor's decision if it is correct for any reason. *Lyons* v. *Lyons*, 13 Ark. App. 63, 679 S.W.2d 811 (1984). In *Park* v. *George*, 282 Ark. 155, 667 S.W.2d 644 (1984), the Supreme Court of Arkansas reversed a decision by a probate judge who admitted a will to probate and held that the probate court erred in placing the burden of proof regarding lack of mental capacity and undue influence on the will contestants rather than its proponents. Hence, the chancellor's ruling that the burden shifted to appellants to prove beyond a reasonable doubt that Wesley Noland was mentally competent and acted with free will when the Trust was created and he executed the warranty deed conveying his joint interest into it should be affirmed.

It is inconsequential that Jerry Noland's interest in the farm was reduced from a one-third joint interest with right of survivorship to a two-ninths interest as a tenant in common by the trust and warranty deed. The crucial factor is that he was a beneficiary of an instrument that he caused to be drafted, whatever his pro rata interest happened to be and for whatever purposes he may have procured its drafting. Although Jerry Noland's pro rata interest in the family farm decreased from one-third to two-ninths under the purported transactions, the two-ninths interest would have been held as a tenant in common. As such, Jerry Noland would have attained an arguably preferable position because his two-ninths interest did not depend upon the right of survivorship. Whether he outlived Wesley and Claude Noland or not, the purported transactions meant that he had two-ninths of the land, and that he and Anita Shavers would have controlling voice in its disposition because of their positions as Trustees of the Wesley E. Noland Irrevocable Trust, which would have owned two-thirds interest in the land as tenant in common with Claude Noland. When one considers that Anita Shavers had no legal interest in the land and no voice in its management under the joint tenancy arrangement that Wesley Noland originally established with Jerry and Claude Noland, it is undeniable that Jerry Noland and Anita Shavers were beneficiaries of the warranty deed and trust instruments, both in the legal and practical senses.

We find no Arkansas authority that restricts the principle that the proponent of a testamentary instrument who is a beneficiary of

that instrument must obtain a larger interest in property than he would otherwise hold before the burden of proof shifts regarding the mental capacity and free will of the testator. Rather, we understand the law to be that if the proponent is a beneficiary, the duty to prove that the instrument was created free of undue influence and by a person competent to do so shifts to the benefiting proponent, and that the quantum of proof rises from preponderance of the evidence to proof beyond a reasonable doubt on those issues.

■ We further hold that the chancellor's finding that appellants did not prove beyond a reasonable doubt that Wesley Noland possessed mental capacity and acted without undue influence regarding the Trust and related conveyance of his joint interest was not clearly against the preponderance of the evidence. There is great disagreement between the parties concerning Wesley Noland's capacity after his wife died in 1991, but it is not our duty to decide this issue de novo. We conduct a de novo review of the record to determine whether the chancellor's ruling on this point is clearly against the preponderance of the evidence. Whatever Wesley Noland's mental state may have been in 1974, or between 1974 and 1991 when the Trust was created and the challenged conveyance took place, the controlling question is whether he possessed mental capacity and acted without undue influence when the Trust was created and he conveyed his joint interest into it in September of 1991. Given the considerable proof that Noland was unable to be trusted with even menial tasks around his house and farm, the chancellor's ruling that appellants failed to prove beyond a reasonable doubt that he acted with the requisite mental capacity and without undue influence is not clearly erroneous.

■ Although the chancellor did err as a matter of law when he held that a joint tenant cannot convey his joint interest to a stranger to the joint tenancy, that error was harmless. Granted, the conveyance of Wesley Noland's undivided one-third joint interest to the Trust would have dissolved the survivorship rights of his joint tenants as to that conveyed interest (assuming that Noland was competent and acting of his own free will when he conveyed his interest to the Trust). Even so, Arkansas law does not prohibit a joint tenant from conveying his interest to a stranger, and we have not been cited to any authority holding that such a conveyance requires the assent of the other joint tenants. Rather, had Noland acted with requisite competency and freedom of will, his one-third

joint interest in the farm would have been conveyed to the Trustees as a tenancy in common pursuant to Ark. Code Ann. § 18-12-603 (Repl. 1987). Given that Jerry Noland conveyed his one-third interest in the farm to the Trust as well, the effect of both transactions would have been that Claude Noland would have held a life interest (pursuant to the other conveyances and the original 1974 deed creating the joint tenancy) in the farm, and his undivided one-third interest in the remainder. That one-third interest would not have been with right of survivorship, however, because the unities of title, time, and interest would not have been present between Claude Noland and the Trust. The practical effect of the purported conveyances in this instance would have been to dissolve the joint tenancy and create a tenancy in common between Claude Noland and the Trust. Given the invalidity of the conveyance by Wesley Noland to the Trust, the chancellor's mistaken view of the law amounts to harmless error.

The chancellor's decision is affirmed.

PITTMAN and ROGERS, JJ., agree.

ROBBINS, MAYFIELD, and STROUD, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. I disagree with the prevailing opinion in two respects. First, I believe that the chancellor erred in shifting the burden of proof from Claude Noland to the defendants. Appellee Claude Noland brought this action seeking to set aside Wesley Noland's trust and warranty deed. The appellants defended the action contending that the trust and warranty deed were legitimate expressions of Wesley Noland's intent. Secondly, I do not believe that the trial court held that a joint tenant cannot convey his joint interest to a third party and by so doing dissolve the joint tenancy.

The chancellor found that Jerry Noland procured the trust agreement and warranty deed. This finding was not clearly erroneous. However, I disagree that the presumption requiring a shifting of the burden of proof was applicable to the facts of this case. The general rule is set forth in 79 Am. Jur. 2d *Wills* § 429, p. 579, and is expressed as follows:

> Most of the authorities support the view that a presumption of undue influence arises upon a showing that one who drew the will, or was otherwise active directly in preparing it or

> procuring its execution, *obtains under the will a substantial benefit, to which he has no natural claim, or a benefit which, in amount, is out of proportion to the amounts received by other persons having an equal claim to participate in the bounty of the testator.* (Emphasis added.)

Arkansas courts have recognized this rule of law since 1858. *McDaniel* v. *Crosby*, 19 Ark. 533 (1858). In every instance, however, where the burden of proof is shifted to the procurer of the document to prove beyond a reasonable doubt that the testator had both mental capacity and freedom of will at the time of execution of the will the procurer gained a greater share of the testator's estate by virtue of the will than the procurer would have otherwise received. *Looney* v. *Estate of Wade*, 310 Ark. 708, 809 S.W.2d 531 (1992) (procurer, unrelated to the testatrix, was owner and administrator of the residential care center where the testatrix lived); *Park* v. *George*, 282 Ark. 155, 667 S.W.2d 644 (1984) (procurers, lawyers who prepared the will, received a $7,000 fee at the time the will was signed and one of them was bequeathed $10,000 under the will); *Oliver* v. *Griffe*, 8 Ark. App. 152, 649 S.W.2d 192 (1983) (although procurer was testator's daughter, testator had disinherited her under an earlier will); *Smith* v. *Welch*, 268 Ark. 510, 597 S.W.2d 593 (1980) (procurer was ex-wife of testator, having divorced testator twenty years before will was procured); *Greenwood* v. *Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979) (procurer, testator's second wife, was devised the testator's entire estate to the exclusion of testator's children); *Short* v. *Stephenson*, 238 Ark. 1048, 386 S.W.2d 501 (1965) (procurer was only a friend of the testator); *Orr* v. *Love*, 225 Ark. 505, 283 S.W.2d 667 (1955) (procurer was testator's daughter-in-law); *McDaniel* v. *Crosby*, *supra* (procurer, an unrelated drinking buddy of testator, was sole devisee to the exclusion of the testator's relatives).

I submit that this factual element is a prerequisite to the rule requiring a shifting of the burden of proof.[1] I further submit that this circumstance is lacking in the case now before us.

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[1] A similar contention was asserted by a testator's daughter in *Oliver* v. *Griffe*, *supra*. However, in that case she contended that the presumption should only arise if the procurer of the will received more benefit under it than she would have received had the testator died intestate. We pointed out that her argument overlooked the fact that the testator had disinherited this daughter under an earlier will. Consequently, she received a significant benefit under the procured will that she would not have otherwise received.

The only significant asset owned by Wesley Noland that is now in dispute is his home, and an approximately 82-acre farm where it sits. Long before execution of the trust agreement and deed involved in this appeal, Wesley Noland and his wife conveyed title to their farm into a joint tenancy with their sons, Claude and Jerry. Consequently, at the time the subject documents were executed, Wesley's farm was owned by three joint tenants, Wesley, Claude and Jerry. If Jerry had not procured the execution of the trust agreement and warranty deed, he likely would have been eventually the sole owner of the home and farm inasmuch as he was the youngest of the joint tenants. However, by virtue of the trust agreement and warranty deed signed by Wesley Noland that Jerry procured, and the warranty deed Jerry also executed conveying his interest in the joint tenancy into the trust, Jerry's interest in Wesley's home and farm was reduced to a two-ninths undivided fractional remainder interest in the house and farm. This fractional interest was subject to Wesley's right to receive support from the trust during his lifetime and Claude's right to reside in the house and use the barn and corral for his lifetime. Rather than gaining or benefiting from this transaction, Jerry actually gave up a very significant share of his father's home and farm that he would have otherwise received. Consequently, the presumption requiring a shifting of the burden of proof to the procurer of the documents was not applicable and the chancellor erred in holding to the contrary.

With regard to the issue of whether a joint tenant may legally convey his interest and thus dissolve a joint tenancy, the chancellor expressed doubt as to whether a joint tenant could do so, however the chancellor clearly stated that "I do not reach that issue." Consequently, I do not think that this issue is properly before us.

I would reverse and remand this case with directions that the chancellor decide the case with the proper burden of proof being on appellee, who sought to set aside the trust agreement and warranty deed.

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

Leah BRECKENRIDGE *v.* Ronald B. ASHLEY

CA 96-487 934 S.W.2d 536

Court of Appeals of Arkansas
En Banc
Opinion delivered December 11, 1996

Boyce R. Davis Associates, by: *Steven S. Zega*, for appellant.

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

PER CURIAM. This appeal from the Carroll County Chancery Court must be dismissed because the appellant did not file a timely notice of appeal.

This case was tried on October 3, 1995. On October 12, 1995, the appellant filed a motion for a new trial under Ark. R. Civ. P. 59, even though the decree had not yet been filed. In fact, the decree was filed on November 2, 1995. The chancellor denied the motion for new trial on November 14, 1995. On December 11, 1995, the appellant, stating that she was appealing from the November 2, 1995, decree and the November 14, 1995, order denying the motion for new trial, filed the notice of appeal. For the reasons expressed below, we hold that, because the appellant's motion for new trial was filed prior to the entry of the decree, it was not timely and was, therefore, ineffective. Further, because the appellant failed to file a timely motion for new trial, the notice of appeal was due on Monday, December 4, 1995. Accordingly, we hold that the notice of appeal that was filed on December 11, 1995, was untimely and of no effect, and therefore, this Court is without jurisdiction to hear this appeal.

Arkansas Rule of Appellate Procedure—Civil 4(a) (formerly Ark. R. App. P. 4(a)) provides that, except as otherwise provided in subsequent sections of this rule, a notice of appeal shall be filed within thirty days from the entry of the judgment, decree, or order appealed from.

Arkansas Rule of Appellate Procedure—Civil 4(b) provides that, upon the "timely filing" in the trial court of a motion for new trial under Ark. R. Civ. P. 59(b), the time for filing the notice of appeal shall be extended as provided in Rule 4. Arkansas Rule of Appellate Procedure—Civil 4 provides:

> If a timely motion listed in section (b) of this rule [such as a motion for new trial under Rule 59(b)] is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any other such motion. Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. A notice of appeal filed before the disposition of any such motion or, if no order is

> entered, prior to the expiration of the 30-day period shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period. No additional fees shall be required for such filing.

■ The failure to file a timely notice of appeal deprives this Court of jurisdiction. *Williams* v. *Hudson*, 320 Ark. 635, 638, 898 S.W.2d 465 (1995); *Rossi* v. *Rossi*, 319 Ark. 373, 374, 892 S.W.2d 246 (1995); *Schaeffer* v. *City of Russellville*, 52 Ark. App. 184, 186, 916 S.W.2d 134 (1996).

■ In this case, we must determine whether the appellant's motion for new trial was "timely" under Ark. R. Civ. P. 59(b) and Ark. R. App. P.—Civil 4. Because it was filed before the decree was entered, we are convinced that it was not timely. Arkansas Rule of Civil Procedure 59(b) provides: "A motion for a new trial shall be filed not later than 10 days after the entry of judgment." In *Hicks* v. *State*, 324 Ark. 450, 452, 921 S.W.2d 604 (1996), and *Webster* v. *State*, 320 Ark. 393, 394, 896 S.W.2d 890 (1995), the Arkansas Supreme Court held that a motion for new trial filed prior to the entry of judgment is not effective and does not extend the time for filing the notice of appeal.

In *Webster* v. *State*, the appellant was convicted of several crimes and was sentenced to six years in prison. He filed a motion for a new trial before the judgment and commitment order was entered. The supreme court held that, under Ark. R. Civ. P. 59 and Ark. R. App. P. 4(b), the motion for new trial was untimely and ineffective. It also held that, because the motion for new trial was ineffective and the appellant's notice of appeal was based on the motion for new trial and filed more than thirty days after the judgment, the notice of appeal also was of no effect. The supreme court stated, however, that the appellant's attorney had assumed responsibility for not verifying that the judgment and commitment order had been filed prior to the filing of the motion for new trial. The court reasoned that it would therefore treat the appellant's motion for rule on the clerk as a motion for a belated appeal. It granted that motion and directed that a copy of its order be filed with the Committee on Professional Conduct.

In *Hicks* v. *State*, the appellant was convicted of several crimes on December 4 and 5, 1995, and was sentenced to ninety-five (95)

years in prison. Before the judgment and commitment order was entered, the appellant's counsel filed a motion for new trial on December 11, 1995. The judgment and commitment order was entered three days later, on December 14. The trial court did not rule on the motion for new trial. On January 19, 1996, the appellant's counsel filed a notice of appeal from the judgment "entered against him on December 5, 1995." 324 Ark. at 451. The supreme court clerk refused to accept the record because the notice of appeal was filed late. The appellant then filed a motion for rule on the clerk.

Citing *Webster* v. *State*, *supra*, the supreme court held that the motion for new trial was untimely and ineffective because it was filed before the judgment and commitment order was entered. 324 Ark. at 451. The court further stated: "Because the motion for new trial was ineffective and because the notice of appeal was filed more than thirty days after the judgment was entered, the notice of appeal was also of no effect. *Webster*, 320 Ark. 393, 896 S.W.2d 890." 324 Ark. at 452. The supreme court denied the appellant's motion for rule on the clerk because his counsel had not admitted responsibility for filing the notice of appeal untimely. The court, however, directed the appellant's attorneys to file, within thirty days, a motion and affidavit accepting full responsibility for not timely filing the notice of appeal and held that, upon such filing, or for other good cause shown, it would grant the motion and send a copy of the opinion to the Committee on Professional Conduct.

Although *Hicks* v. *State* and *Webster* v. *State* are criminal cases, they are not distinguishable in this context. In *Webster* v. *State*, the supreme court specifically relied upon Ark. R. Civ. P. 59 in holding that the notice of appeal was of no effect because it was based upon a motion for new trial filed before the entry of the judgment and commitment order and because it was filed more than thirty days after the judgment. In *Hicks* v. *State*, the supreme court specifically relied upon *Webster* v. *State* in making its decision. Further, both of those decisions cited Ark. R. App. P. 4. Although the Revised Rules of Appellate Procedure became effective on January 1, 1996, the pertinent sections of Rule 4 of the Rules of Appellate Procedure—Civil track former Appellate Rule 4 without change.

■ Additionally, in civil cases, the appellant is not given an opportunity to file a belated appeal as criminal appellants may do when their attorneys admit responsibility for filing an untimely

notice of appeal. In civil cases, we have consistently held that the failure to file a timely notice of appeal deprives this Court of jurisdiction and requires dismissal of the appeal. *See Snowden* v. *Benton*, 49 Ark. App. 75, 76, 896 S.W.2d 451 (1995); *Glover* v. *Langford*, 49 Ark. App. 30, 31, 894 S.W.2d 959 (1995).

The only clear authorities regarding the timeliness of the notice of appeal in the present case are *Hicks* and *Webster, supra*, and these cases require dismissal. Any other course would require us to construe the supreme court's procedural rules, which is outside our jurisdiction, *see* Supreme Court Rule 1-2(a)(3), or alternatively, to overrule *Hicks* and *Webster*. Because we are clearly obliged to follow, and are without authority to overrule, the decisions of the Arkansas Supreme Court, *see Dean* v. *Colonia Underwriters Ins. Co.*, 52 Ark. App. 91, 99, 915 S.W.2d 728 (1996); *Scarbrough* v. *Cherokee Enters.*, 33 Ark. App. 139, 143, 803 S.W.2d 561 (1991), *aff'd*, 306 Ark. 641, 816 S.W.2d 876 (1991), the latter alternative is not a viable option. Therefore, on the strength of *Hicks* and *Webster*, we dismiss this appeal.

Dismissed.

MAYFIELD, J., concurs in part and dissents in part.

MELVIN MAYFIELD, Judge, concurring in part and dissenting in part. I dissent, in part, from the result reached by the majority in the per curiam opinion issued today in this matter. I agree that the notice of appeal in this case was not timely filed insofar as an appeal from the decree filed in this case is concerned. However, I do not agree that the notice of appeal — which states it is also appealing from the denial of the appellant's motion for new trial — is ineffective insofar as the denial of the motion for new trial is concerned.

Here, the appellant did not file a motion for new trial *as described* in Arkansas Rule of Appellate Procedure 4(b) (now designated as Rules of Appellate Procedure—Civil). This is because the motion for new trial referred to in that subsection means a motion *timely* filed under Rule of Civil Procedure 59(b), which requires the motion to be filed not later than "10 days after the entry of judgment." *Compare Fuller* v. *State*, 316 Ark. 341, 344, 872 S.W.2d 54, 55 (1994) (motion for reconsideration not analogous to a motion under Civil Procedure Rules 50(b), 52(b), or 59(b)), and *Enos* v. *State*, 313 Ark. 683, 685, 858 S.W.2d 72, 73 (1993) (motion to set aside judgment not analogous to any of the motions listed in Appel-

late Procedure Rule 4(b)). So, the motion for new trial in the instant case, not being filed within 10 days as required by Civil Procedure Rule 59(b), is not a motion that is referred to in Appellate Procedure Rule 4(b). Therefore, the motion did not extend the time for filing an appeal from the judgment entered November 2, 1995, and this court is correct in holding that the notice of appeal filed December 11, 1995, which was more than 30 days later, was not effective to appeal from the November 2, 1995, judgment.

However, that does not render the notice of appeal ineffective as to the order that denied the appellant's motion for new trial. Appellate Procedure Rule 2(a)(3) provides that an appeal may be taken from an order that "grants or refuses a new trial." *See Mikkelson* v. *Willis*, 38 Ark. App. 33, 826 S.W.2d 830 (1992), where we explained that at one time such an order was not appealable unless the notice of appeal contained an assent by the appellant that if the order of the trial court was affirmed, judgment absolute would be rendered against the appellant. We also pointed out that this condition of appealability was removed by Act 547 of 1963, first compiled as Ark. Stat. Ann. § 27-2101 (Supp. 1965), and preserved by Appellate Procedure Rule 2(a)(3). *See* Reporter's Notes to Rule 2: 1.

So in the instant case, after the decree was entered by the trial court on November 2, 1995, that court denied appellant's motion for new trial by an order entered November 14, 1995, and the appellant filed a notice of appeal from that order on December 11, 1995. This was within 30 days after the entry of the order denying new trial and, under Appellate Procedure Rules 2 and 4, I think the appeal of that order is properly before us and should be decided on its merits.

And in answer to the obvious question of why this would not also allow the decree of November 2 to be reviewed under Appellate Procedure Rule 2(b), which provides that "an appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment," the answer is that the decree of November 2 is not an "intermediate order." This was our conclusion in *Mikkelson* v. *Willis*, *supra*, where the appellant appealed a judgment against him which was obtained after the trial court had granted the appellee a new trial. We said the order granting the new trial had become a final order when it was not appealed; therefore, it was not an intermediate order and could not

be reviewed in the appeal from the judgment entered after the new trial was granted. The same logic should apply in the instant case.

The per curiam opinion issued by the majority of this court cites the cases of *Hicks* v. *State*, 324 Ark. 450, 921 S.W.2d 604 (1996), and *Webster* v. *State*, 320 Ark. 393, 896 S.W.2d 890 (1995), as authority for this court's action in dismissing the appeal from the trial court's failure to grant a new trial and also as authority for dismissing the appeal from the trial court's judgment that decided the merits of the case. From a reading of those per curiam opinions, it seems clear to me that in the *Webster* case no order was entered ruling upon the motion for new trial and that the opinion simply holds that the notice of appeal filed more than 30 days after judgment was entered was too late and was of no effect. And in the *Hicks* case, the opinion specifically states that "the trial court did not rule on the motion for new trial" but that the notice of appeal was filed more than 30 days after the judgment was entered and it was of no effect.

Thus, the *Hicks* and *Webster* cases certainly do not constitute authority for the proposition that when the trial court enters "an order which grants or refuses a new trial" there can be no appeal from that order, and Appellate Procedure Rule 2(a)(3) certainly provides that an appeal may be taken from such an order. It is true that those cases make the statement that the motion for new trial "filed before the judgment and commitment order was entered" was "untimely and ineffective." But those statements simply mean that such motions do not operate to extend the time for filing a notice of appeal from those judgments and commitment orders. But if those motions had met the conditions set out in Appellate Procedure Rule 4(b), (c), and (d), then the notices of appeal would have been operative to allow the appellate court to review the judgments and commitment orders.

This is very clearly explained in the Addition to Reporter's Notes, 1988 Amendment, following Appellate Procedure Rule 4, where it is pointed out that the 1988 amendment "expands from 10 to 30 days the time period in Rule 4(d) for filing the notice of appeal when a posttrial motion has been made." One reason for this, the Reporter's Notes say, is because with the shorter time period contained previously in Rule 4(d), it was possible for an appellant to miss the 10-day deadline and still file a notice of appeal from the order denying the posttrial motion by complying with

the 30-day period provided in Rule 4(a). This would allow the appellant to challenge the trial court's action with respect to the post-trial motion but not the errors underlying the judgment. *Cornett* v. *Prather*, 290 Ark. 262, 718 S.W.2d 433 (1986), is cited as an example of that situation.

But the above explanation does not say that this situation can no longer occur under any circumstances. So, even if for reasons of symmetry or personal preference I wanted to hold that the trial court's order in this case denying the appellant's motion for new trial could not be reviewed on appeal, I would have to say that it was an order which refused to grant a motion for new trial and, under the circumstances involved here, that order is before us in this appeal, and we should not dismiss this appeal without deciding the merits of the issue presented by the denial of that motion.

Therefore, I concur in part and dissent in part from the per curiam opinion of the majority.

Harold M. JEFFCOAT *v.* SECOND INJURY FUND

CA 96-53 935 S.W.2d 309

Court of Appeals of Arkansas
En Banc
Opinion delivered December 18, 1996

Youngdahl, Sadin, & McGowan, by: *Thomas H. McGowan*, for appellant.

David L. Pake, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Harold M. Jeffcoat, appeals from a decision of the Arkansas Workers' Compensation Commission apportioning liability for his compensable injury between his employer, B.C. Keathley Construction, and the Second Injury Fund. He contends that the Commission misinterpreted the law in determining the liability of the Second Injury Fund.[1] We find merit in his argument and reverse and remand.

It is undisputed that, while working for a different employer in 1989, appellant sustained a low back injury for which he received a 10.6 percent impairment rating to the body as a whole. Appellant settled this claim by joint petition. In 1991, while working for Keathley, appellant sustained a compensable injury to his neck and hands for which he received a 19 percent anatomical impairment rating to the body as a whole. The administrative law judge determined that appellant's lumbar and cervical injuries combined to make his cervical and lumbar restrictions more severe. Based on appellant's age, education, experience, and vocational options, the administrative law judge determined that appellant was permanently and totally disabled. The administrative law judge found that the Second Injury Fund was liable because appellant's total disability resulting from the combined effects of the 1989 and 1991 injuries was greater than that which would have resulted had the 1989 injury not occurred. The Second Injury Fund's liability of 70.4 percent was determined by subtracting from 100 percent the 19 percent anatomical impairment rating owed by the present employer for the last injury and the previous disability or impairment of 10.6 percent. The administrative law judge's decision was affirmed by the Commission. The decision was based on an applica-

[1] Appellant also argued in his brief that he was entitled to an attorney's fee for prevailing in the Second Injury Fund's cross-appeal to the Commission. Appellant abandoned this contention during oral argument.

tion of *Weaver* v. *Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990), where we held in a case involving permanent partial disability that the Second Injury Fund was not liable for the claimant's pre-existing disability or impairment. Appellant contends that the Commission erred in applying the formula outlined in *Weaver* to his case of permanent total disability.

Arkansas Code Annotated § 11-9-525(b)(3) and (4) (Repl. 1996), which set out the formula to be applied in determining Second Injury Fund liability in cases of permanent partial disability, state:

> (3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional *permanent partial disability or impairment* so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment. [Emphasis added.]
>
> (4) After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined by an administrative law judge or the Workers' Compensation Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the commission, and the degree or percentage of disability or impairment which existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and compensation for that balance, if any, shall be paid out of the fund provided for in § 11-9-301.

Arkansas Code Annotated § 11-9-525(b)(5) (Repl. 1996), which

sets out the formula to be applied in determining Second Injury Fund liability in cases of permanent total disability, states:

> If the previous disability or impairment, whether from compensable injury or otherwise, and the last injury together result in *permanent total disability*, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself. However, if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in §§ 11-9-501 — 11-9-506 for permanent total disability, then, in addition to the compensation for which the employer is liable and after the completion of payment of compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under §§ 11-9-501 — 11-9-506 out of the fund. [Emphasis added.]

We conclude that *Weaver* is not applicable in cases involving permanent total disability since *Weaver* involved permanent partial disability, which is governed by a separate portion of the statute, § 11-9-525(b)(3) and (4). We conclude that § 11-9-525(b)(5) applies to cases involving permanent total disability and that the Commission erred in applying the formula in *Weaver* to a case involving permanent total disability.[2] We remand for the Commission to determine the Second Injury Fund's liability in light of the applicable section of the statute, Ark. Code Ann. § 11-9-525(b)(5).

Reversed and remanded.

NEAL, GRIFFEN, ROBBINS, ROGERS, and STROUD, JJ., agree.

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[2] Our present § 11-9-525 is a codification of Act 290 of 1981. The act treated the two forms of disability separately as well, with what are now subsections (b)(3) and (b)(4) appearing together in one paragraph and subsection (b)(5) appearing in another paragraph.

Vincent LONIGRO, Jr. *v.* Donna Smith LONIGRO

CA 96-250 935 S.W.2d 284

Court of Appeals of Arkansas
Division II
Opinion delivered December 18, 1996

Pat Hall, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *Cathleen V. Compton*, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant Vincent Lonigro, Jr., appeals from an order of the Union County Chancery Court regarding custody of the parties' minor daughter, Gina, and the award

of child support to appellee.

At the time of their divorce in 1994, appellee obtained custody of the parties' two minor children, a son, Drew, and a daughter, Gina. In July 1995, Gina began living with appellant, who subsequently petitioned the court for custody and for a reduction in child support. The court awarded joint legal custody of Gina to the parties' and physical custody to appellant. Appellant argues that he should have legal custody of Gina because appellee has legal custody of Drew. The court stated it placed Gina in the parties' joint custody because the parties indicated that Gina's living arrangements would be evaluated at Christmas and that Gina might opt to return to live with appellee. The court placed Gina in joint custody so that appellee would not be required to prove a material change in circumstances should Gina desire to return to appellee. Child custody decisions are within the chancellor's broad discretion, and we find no abuse of discretion in the court's ruling. *Milum* v. *Milum*, 49 Ark. App. 3, 894 S.W.2d 611 (1995). The court's assignment of custody is affirmed.

Appellant next argues that the court erred in failing to order appellee to pay child support for Gina. The trial court found that appellant's weekly take-home pay was $700.00 and incorrectly deducted $100.00 as a credit for Gina based on the guidelines of the family support chart. The court then determined appellant's weekly take-home pay to be $600.00 and used this figure to calculate the amount of child support due appellee from appellant for the parties' son, Drew, who remained in appellee's custody. The court failed to make a finding as to child support payable by appellee for Gina.

Arkansas Code Annotated § 9-12-312(a)(2) (Supp. 1995) provides:

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall

the presumption be rebutted.

We hold that the court erred in calculating the amount of child support and remand for the chancellor to apply Ark. Code. Ann. § 9-12-312(a)(2) (Supp. 1995) consistent with this opinion.

On remand, the court should determine whether appellee should pay child support for Gina and, if not, should make specific findings as provided by § 9-12-312(a)(2). Secondly, the amount of child support that appellant owes for Drew should be based on appellant's net weekly income, which the court determined to be $700.00.

Lastly, appellant contends that the court erred by finding that his net weekly pay was $700.00. Appellant's statement of his income excludes overtime earnings which sometimes equaled or exceeded his regular earnings. This court reviews chancery cases *de novo*, and we will not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. *Milum* v. *Milum, supra.* We cannot say that the chancellor's finding as to appellant's income is clearly against the preponderance of the evidence.

Affirmed in part; reversed and remanded in part.

NEAL and STROUD, JJ., agree.

Dena OWENS *v.* DIRECTOR, Arkansas Employment Security Department

E 96-22 935 S.W.2d 285

Court of Appeals of Arkansas
En Banc
Opinion delivered December 18, 1996

Appellant, pro se.

Phyllis Edwards, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant Dena Owens appeals from an order of the Arkansas Board of Review denying her claim for unemployment benefits based on a finding that she left her last employment without good cause connected with the work. Appellant contends that the decision of the Board of Review is not supported by substantial evidence. We disagree and affirm.

Arkansas Code Annotated § 11-10-513(a)(1) (Repl. 1996) provides that an individual shall be disqualified from receiving unemployment benefits if he or she left his or her last work voluntarily without good cause connected to the work. A claimant bears the burden of proving good cause by a preponderance of the evidence. *Perdrix-Wang* v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). Good cause has been defined as a cause that would reasonably impel the average able-bodied, qualified worker to give up his

or her employment. *Id.* What constitutes good cause is ordinarily a question of fact for the Board to determine from the particular circumstances of each case. *Id.* On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (Repl. 1996); *Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Appellant testified that she had worked as a cashier for the Family Dollar Store for approximately one year when an individual was hired by the store to be trained as a manager. The training program was to last approximately three months. Appellant said that the manager trainee falsely accused her of stealing from the store and of permitting others to take merchandise from the store. Appellant also stated that she was harassed by the manager trainee because of appellant's interracial marriage. She stated that she had told her employer that she could not work alone with the manager trainee. She testified that she gave a two-week notice to quit because she could no longer tolerate the manager trainee's harassing and embarrassing her in the presence of customers. Two co-workers testified that they had observed the manager trainee's harassment of appellant and heard the accusations of theft. Appellant testified that shortly after giving notice, she walked out, but returned to work the following day when the manager persuaded her to do so. Appellant said that she worked another week but left because she was scheduled to work alone with the manager trainee.

Appellant said that she spoke with the manager, about two to three weeks before she gave her notice of resignation, about the problems involving the manager trainee and was assured that the problem would be corrected. Appellant said that she had also spoken with the district manager regarding this problem. The Board noted appellant's testimony that she was never reprimanded by her employer concerning the theft accusations, nor was she in danger of losing her job.

The Board found that the training for the manager trainee would have ended in approximately thirty days and that rumors that the trainee might stay at the store beyond that time were unconfirmed. The Board also found that appellant's situation was not such that she could not have requested a leave of absence or waited until the manager trainee left. The Board concluded that appellant's situation would not have impelled the average, able-bodied qualified worker to leave her employment. Upon our review of the record, we cannot conclude that those findings and conclusion are not supported by substantial evidence.

Affirmed.

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

ROBBINS, MAYFIELD, and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the prevailing opinion which affirms the decision by the Arkansas Board of Review that appellant voluntarily left her last work without good cause connected with the work. The only evidence in the record is that appellant left her last work after she was forced to work with a manager trainee who wrongfully accused her of stealing from the store and allowing others to do so. There is undisputed proof that the manager trainee was motivated to make those defamatory accusations out of resentment about appellant's interracial marriage. Equally undisputed is the fact that appellant had informed the district manager of Family Dollar Store concerning the manager trainee's conduct, that there had been no substantiation for the manager trainee's accusations, that the district manager had assured appellant that she would not be required to work alone with the manager trainee, and that appellant quit her job only after the manager of the Family Dollar Store where she was working left her to work with the manager trainee without management protection. Upon this record, I cannot agree that the Board of Review's finding that appellant voluntarily left her last work without good cause connected with the work is supported by substantial evidence.

What constitutes good cause for leaving work is usually a question of fact within the province of the Board of Review. *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978). We have stated that good cause is a cause that would reasonably impel the average able-bodied and qualified worker to give up her employment, and must be determined from the particular circumstances of each case.

Perdrix-Wang v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). The reason purported to constitute good cause for voluntarily leaving employment must not be arbitrary or capricious, and must be connected with the work itself, although personal factors may be considered in determining whether there is good cause. *Wacaster* v. *Daniels*, 270 Ark. 190, 603 S.W.2d 907 (Ark. App. 1980).

We should reverse the Board of Review because the average able-bodied and qualified worker would not voluntarily submit to malicious and unfounded accusations of dishonesty by a management member and agree to work in the same store with her accuser knowing that no other management official was present to protect her. The employer in this case has offered no evidence, either by written statement or through hearing testimony. That leaves appellant's account of her plight uncontradicted. Appellant produced a witness, Becky Parker, who testified that she had worked with appellant and the manager trainee at Family Dollar in Conway, and that she had heard the manager trainee say that appellant was stealing from the employer. Another witness, Carla Rice, also testified that she had worked with appellant and the manager trainee at Family Dollar. Rice testified that she had heard the manager trainee say that appellant was stealing and was allowing others to steal from the store. Appellant testified that she quit her employment with Family Dollar on August 31, 1995, because of conflict with the manager trainee, that she had informed the store manager and the district manager about the problem with the manager trainee, and that the store manager had told the manager trainee to leave her alone to no avail. Appellant testified that the district manager told her not to worry about her problem with the manager trainee, and she also testified that the store manager was supposed to have been with her in the store so that she would not have to work alone with the manager trainee.

There is no proof that appellant could have requested a leave of absence until the manager trainee had been reassigned to a different store. Appellant testified that she did not know whether the employer had a leave policy, and no evidence that one existed — or that it covered this situation if it did exist — is in the record. Rather, the undisputed and independently confirmed proof is that appellant was subjected to harassment by the manager trainee. The undisputed proof is that she informed management about the harassment and actually gave notice of her resignation before being

assured that the problem would be remedied. Appellant was assured by management that she would not be scheduled to work alone with the manager trainee, and quit only after being left to work alone with a person who had told store customers, appellant's landlady, and employees of a nearby store that appellant was stealing. If this undisputed proof does not establish good cause to quit a job, it is hard to understand what additional proof is necessary.

Our court has held that undisputed proof similar to that presented by appellant constitutes good cause for voluntarily quitting a job. In *Barker* v. *Stiles*, 9 Ark. App. 273, 658 S.W.2d 416 (1983), we reversed the Board of Review's decision to deny unemployment benefits on the finding that the appellant quit his job without good cause connected with the work. The appellant in *Barker* was a laborer for Eichleay Corporation who quit work after working for seven months. He and another witness testified that the employer's labor foreman was prejudiced against people of color, and that the labor foreman had assigned appellant more than his share of unpleasant job duties. No evidence was offered on behalf of the employer, either by written statement or through hearing testimony. We reversed the Board of Review's decision denying unemployment benefits, concluded that the appellant reasonably determined that he faced a situation that was impossible to resolve, and that he had attempted to prevent the mistreatment from continuing but had been rebuffed.

The *Barker* decision should be followed in this case because the proof here is equally undisputed that appellant made reasonable efforts to resolve her situation. Her good faith efforts were unsuccessful, and her trust in management to keep its assurance that she would not be left to work alone with the manager trainee was violated. Quitting the job was the only way that she could be assured that the manager trainee would not eventually compromise her reputation as an honest employee, particularly when one considers that she worked as a cashier. Because appellant's proof is both undisputed and corroborated, there can be no substantial evidence supporting the Board of Review's decision that she quit her job without good cause connected with the work.

The policy aspects of this case are unsettling. Unemployment benefits are denied persons who quit their jobs without good cause connected with the work because it is deemed unreasonable to compensate people for leaving work for mere personal reasons. Yet

this case is entirely different. Here, a cashier is accused of stealing from her employer. The accusation was unfounded, and is even traceable to racial bigotry. The cashier was unable to obtain relief from her supervisors, and was required to work under the accusing eye of a manager trainee who slandered her to store customers, other vendors, and other persons. The cashier quit her job to avoid what any reasonable person with normal sensitivity for her character would consider an outright attack on her personal integrity within the context of her employment duties. The Board of Review's decision and our affirmance means that workers facing similar harassment are both helpless to escape it and must be uncompensated unemployment victims because of it. This is wrong policy; therefore, I dissent.

I am authorized to state that ROBBINS and MAYFIELD, JJ., join in this dissent.

Eddie PICKETT *v.* STATE of Arkansas

CA CR 96-45 935 S.W.2d 281

Court of Appeals of Arkansas
En Banc
Opinion delivered December 18, 1996

Katherine S. Street, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Eddie Pickett appeals from his conviction at a jury trial of residential burglary and theft of property, for which he was sentenced to concurrent terms of thirty and ten years in the Arkansas Department of Correction. On appeal, he contends that the trial court erred in denying his motions for directed verdicts of acquittal on grounds that insufficient evidence was presented to corroborate the testimony of an admitted accomplice. We agree, and we reverse and dismiss.

Appellant and Anthony Bluford were charged with the felonies of residential burglary and theft of property in connection with crimes committed against Ms. Jeannie Barnett and her family. Bluford entered negotiated guilty pleas and was placed on probation. At appellant's trial, the State presented evidence establishing that Ms. Barnett's home was burglarized on August 24, 1994, and that several items of personal property were stolen, including a cordless telephone that had been broken and taped back together, a

watch, four Nintendo game cartridges, and a T-shirt. Bluford testified that he and appellant broke into the Barnett home together. Bluford testified that he took some game cartridges and a watch, and that appellant picked up a cordless telephone and some shirts. Bluford testified that he then left appellant inside the house and went alone to a pawn shop to sell what he had taken.

Mr. Jerry Burson, an employee of El Dorado Pawn, testified that he was working on August 24, 1994. He testified that two men came in on that date and sold four Nintendo cartridges. Mr. Burson did not recognize and could not identify the two men, but one of them presented Anthony Bluford's driver's license as identification.

Ms. Barnett testified that she left her house between 12:30 and 1:00 p.m. on the day of the crimes. She testified that, when she left, appellant was standing by himself in the carport of her next-door neighbor's home and spoke to her. She testified that she was gone from an hour to an hour and a half, and returned between 1:30 and 2:00 p.m. to discover the burglary and theft. She further testified that the game cartridges retrieved from the pawn shop were the ones stolen from her home and were the only items ever recovered.

Ms. Barnett testified that she first saw appellant on the evening before the burglary. He had come to her door with some younger neighbors and asked her son for a cigarette.

Officer Jamie Morrow of the El Dorado Police Department testified that he interviewed appellant in connection with the burglary. The officer testified that appellant denied any knowledge of the burglary and offered an alibi. According to the officer, appellant stated that he owned a white cordless telephone with a piece of tape on the back. No such telephone was found in a subsequent search of appellant's home.

Appellant argues that the evidence was insufficient to corroborate the testimony of Bluford, an admitted accomplice, and that his convictions must therefore be reversed and dismissed. We agree.

Arkansas Code Annotated § 16-89-111(e)(1) (1987) provides:

> A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. The corroboration is not sufficient if

> it merely shows that the offense was committed and the circumstances thereof.

The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Gibson* v. *State*, 41 Ark. App. 154, 852 S.W.2d 326 (1993). The test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Gordon* v. *State*, 326 Ark. 90, 931 S.W.2d 91 (1996); *Gibson* v. *State, supra*. The corroborating evidence may be circumstantial so long as it is substantial; evidence that merely raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Gordon* v. *State, supra*; *Gibson* v. *State, supra*.

Here, we agree with the State that the evidence independent of Bluford's testimony was sufficient to establish that the crimes were committed. We further agree that the presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime are relevant facts in determining the connection of an accomplice with the crime. *See Passley* v. *State*, 323 Ark. 301, 915 S.W.2d 248 (1996). However, proof that merely places the defendant near the scene of a crime is not sufficient corroborative evidence of the defendant's connection to it. *Farrar* v. *State*, 241 Ark. 259, 407 S.W.2d 112 (1966). Here, aside from Bluford's testimony, the only evidence produced by the State to connect appellant with the commission of these offenses is that he was present on the victim's next-door neighbor's property some sixty to ninety minutes before the crimes were discovered. That is not sufficient to satisfy the requirement of § 16-89-111(e)(1). *See id.*

Reversed and dismissed.

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

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. The majority opinion correctly points out that the issue here is whether there is sufficient evidence to corroborate the testimony of Bluford, an admitted accomplice. However, the majority opinion concludes that "aside from Bluford's testimony, the only evidence produced by the State

to connect appellant with the commission of these offenses is that he was present on the victim's next-door neighbor's property some sixty to ninety minutes before the crimes were discovered." I do not agree with that conclusion.

The burglary occurred on August 24, 1994. Mrs. Jeanne Barnett testified that the evening before the burglary the appellant came to her door and asked her son for a cigarette. She identified the appellant in the courtroom as the young man who came to her door, and she testified that he came into the living room where the Super Nintendo video game was set up. She said four Super Nintendo cartridges were taken in the burglary, as were some other things. She got the Nintendo cartridges back from a pawn shop managed by Mr. Burson.

A cordless telephone was one of the other things taken in the burglary. Mrs. Barnett said it had been broken and she had taped it together. Officer Jamie Morrow testified that when he interviewed appellant, appellant denied having any knowledge of the burglary, but he admitted to Officer Morrow that he had a white portable telephone with a piece of tape on it.

In addition, Mrs. Barnett testified that when she left her house the day of the burglary, the appellant was standing on her next-door neighbor's carport. He spoke to her and said he was her new neighbor. Moreover, Jerry Burson, who operated a pawn shop, testified that on August 24, 1994, two men came to his shop and sold him four Nintendo cartridges. He could not identify the men, but one had a driver's license issued to Anthony Bluford.

Corroboration of an accomplice's testimony need not be sufficient, in and of itself, to sustain a conviction. It may be slight and not altogether satisfactory and convincing, if substantial. *Olles & Anderson* v. *State*, 260 Ark. 571, 573, 542 S.W.2d 755 (1976); *Klimas* v. *State*, 259 Ark. 301, 534 S.W.2d 202. The acts, conduct, and declarations of the accused before or after the crime, including his testimony at the trial, may furnish the necessary corroboration. *Olles & Anderson, supra*; *Ford* v. *State*, 205 Ark. 706, 170 S.W.2d 671 (1943); *Dickson* v. *State*, 197 Ark. 1161, 127 S.W.2d 126 (1939); *Long* v. *State*, 192 Ark. 1089, 97 S.W.2d 67 (1936); *Stroud* v. *State*, 167 Ark. 502, 268 S.W. 850 (1925); *Russell* v. *State*, 97 Ark. 92, 133 S.W. 188 (1910).

The presence of an accused in the proximity of a crime,

opportunity, and association with a person involved in a crime in a manner suggestive of joint participation, are each relevant factors in determining the connection of an accomplice with the crime. *Ashley* v. *State*, 22 Ark. App. 73, 78, 732 S.W.2d 872, 874 (1987). It is unnecessary that the evidence be sufficient to sustain the conviction, but the evidence must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes* v. *State*, 276 Ark. 203, 210, 634 S.W.2d 107, 111-12 (1982). This court reviews the sufficiency of the evidence by the test of whether the verdict of guilt is supported by substantial evidence, which means whether the jury could have reached its verdict without resort to speculation and conjecture. *Cassell* v. *State*, 273 Ark. 59, 616 S.W.2d 485 (1981). Where circumstantial evidence is used to support accomplice testimony, all facts in evidence can be considered to constitute a chain sufficient to present a question for resolution by the jury as to the adequacy of the corroboration, and the appellate court will not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Johnson* v. *State*, 303 Ark. 12, 17, 792 S.W.2d 863, 865 (1990); *Rhodes*, *supra*; *McDonald* v. *State*, 37 Ark. App. 61, 63, 924 S.W.2d 396, 398 (1992).

While I agree that the evidence corroborating the testimony of the accomplice was slight, still the corroboration was sufficient to justify the court in submitting the question to the jury. The jury found appellant guilty, and I would affirm its verdict; therefore, I dissent.

Charles Gregory SPICER *v.* ESTATE of Charles Nelson SPICER

CA 95-941 935 S.W.2d 576

Court of Appeals of Arkansas
En Banc
Opinion delivered December 18, 1996

Plastiras, Hyden, & Miron, for appellant.

Green, Henry, & Green, by: *J. W. Green, Jr.,* for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal arises from a will contest brought by appellant. The probate court found that appellant did not have standing to contest the will of Charles Nelson Spicer, appellant's grandfather, because he was not an "interested person" as defined in Ark. Code Ann. § 28-1-102 (1987). On appeal, appellant argues that the probate court's decision is clearly erroneous because he has a legal interest in the estate. We agree and reverse and remand.

Charles Nelson Spicer left a holographic will, holographic codicil, and typewritten codicil. Charles Spicer bequeathed to his surviving son, Don Charles Spicer, his personal residence and to his surviving daughter, Donna Sue Spicer Meredith, properties of equal value. The will also created a trust for the benefit of Charles Spicer's grandchildren. Appellant was listed as one of four grandchildren entitled to one-eighth of the distribution of the trust, and three other grandchildren were also listed and entitled to one-sixth of the distribution of the estate. Appellant was to receive $750 per month.

Charles Spicer's first codicil amended his will to create out of his properties a memorial foundation in the memory of his parents. In his second codicil, Charles Spicer added his daughter, Sue Meredith, as a beneficiary of the trust. This change reduced appellant's share in the trust to $600 per month.

The issue before us is whether appellant is an "interested person" as defined at Ark. Code Ann. § 28-1-102(a)(11) (1987), thus having standing to contest Charles Spicer's will. Arkansas Code Annotated § 28-1-102(a)(11) defines "interested persons" as "any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary." An interested person may contest the probate of a will, or any part thereof, by stating in writing the grounds of his objection and filing them in the court. Ark. Code Ann. § 28-40-113(a) (1987). The probate court reasoned that appellant had no standing to contest the will because he would not take as an heir if no will existed. However, the court erroneously overlooked the portion of Ark. Code Ann. § 28-1-102(a)(11) which defines "interested persons" as those having an interest in the estate. The evidence is undisputed that appellant is specifically named in Charles Spicer's will as a beneficiary of a trust which would have distributed $750 per month to appellant. The second codicil affected appellant's interest in the trust by reducing his share to $600 per month. The facts that appellant was a beneficiary of the trust and that the second codicil affected his beneficial interest clearly establish that appellant has an interest in the estate of Charles Spicer. Therefore, we reverse the probate court's decision that appellant does not have standing to contest Charles Spicer's will.

Reversed and remanded.

STROUD and GRIFFEN, JJ., agree.

ROBBINS, J., concurs.

MAYFIELD and NEAL, JJ., dissent.

JOHN B. ROBBINS, Judge, concurring. I agree to reverse and remand because, as noted in the majority opinion, appellant has an interest in the estate and is, therefore, an "interested person" who has standing to contest the decedent's will. I do not, however, believe it is significant that the extent of the appellant's interest in the testamentary trust was reduced by the second codicil. Insofar as

the majority opinion relies on the change made by the second codicil in holding that appellant has standing, I must disagree, but concur in the result.

MELVIN MAYFIELD, Judg, dissenting. I respectfully dissent from the opinion of the majority in this case. The majority has reversed the probate court's finding that the appellant did not have standing to contest the will of his grandfather because he was not an "interested person" as defined in Ark. Code Ann. § 28-1-102(a)(11) (1987). In doing so, the majority, without any citation to authority, has simply held that appellant has an interest in the estate because he is named in the will as a beneficiary of a trust and the second codicil affected his beneficial interest. The probate judge did not think that was sufficient to make appellant an interested party and neither do I.

Arkansas Code Annotated § 28-1-102(a)(11) defines "interested person" as any "heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary."

In the case at bar, the decedent did not leave a surviving spouse, and was survived by his only two children, Don Spicer and Donna Meredith. Therefore, the appellant, who is Don Spicer's son and the decedent's grandson, will take nothing if the will is denied probate. *See* Ark. Code Ann. § 28-9-214(l) (heritable estate passes first to the children of the intestate). Thus, the appellant's claim to the estate arises solely as a result of the will under which the trust is created and depends entirely upon the validity of the will. Without the will, the appellant gets nothing, and has no property right, interest in, or claim against the estate. Neither is he an heir, devisee, spouse, or creditor.

In 3 Bowe & Parker, *Page On The Law of Wills*, § 26.57 at 129 (Revised Treatise 1961), it is said that "one who is not benefitted by having the will set aside, either as heir or next of kin, or by asserting a right to administer in case of intestacy, cannot contest the will." Citation to cases from many states are given to support that statement. One citation is to the Arkansas case of *Hawkins* v. *Hawkins*, 218 Ark. 423, 236 S.W.2d 733 (1951). In that case the Arkansas Supreme Court held that the appellants were not interested parties under the same provision of the 1949 Probate Code that is involved in this case. There, the appellants were the brothers and sisters of the deceased who had made a will leaving one dollar to an adopted

son and the remainder of his property to his wife. His brothers and sisters filed a petition to set aside the probate of the will on the grounds of lack of mental capacity on the part of the deceased and that the will was invalid because of undue influence. The trial court held that the appellants did not establish either lack of mental capacity or undue influence; therefore, it was not necessary to decide the question of whether the appellants were "interested" persons eligible to contest the probate of the will.

On appeal, the Arkansas Supreme Court did decide the question of whether the appellants were interested persons. It found that the adopted son, even though he was later adopted again by other adoptive parents, was still the adopted son of the deceased. The court said that having come to the conclusion that the son was an heir to the estate of the deceased "as if he were a natural son it must naturally follow that appellants, who are the brothers and sisters of the [deceased], cannot be interested persons in the sense that they can maintain a suit to contest the validity of [the deceased's] will." 218 Ark. at 427, 236 S.W.2d at 735.

The above case seems to settle the issue in this case. The grandson who is attempting to contest the will in this case is in the same legal position as were the brothers and sisters of the deceased in the *Hawkins* case.

In the 1996 cumulative supplement to §26.57, *Page On the Law of Wills*, the treatise cites the case of *Hardie* v. *Hardie*, 312 Ark. 189, 848 S.W.2d 417 (1993), for support of the same proposition. In *Hardie* the court said:

> The central issue in this case is whether the remote heirs have the power to attack a court-approved settlement agreement. It should be noted that at the time the settlement agreement was executed, these remote heirs were not "interested persons" entitled to contest a will under Ark. Code Ann. § 28-40-113(a) (1987) because they would not have taken by intestate succession at that time since Mrs. Davis' two daughters were still living. See *Mabry* v. *Mabry*, 259 Ark. 622,535 S.W.2d 824 (1976) (brothers and sisters of testator were not interested persons where testator had adopted son living); *Hawkins* v. *Hawkins*, 218 Ark. 423, 236 S.W.2d 733 (1951) (just any collateral heir is not necessarily an "interested person" with a right to contest the probate of a will

under Ark. Code Ann. § 28-40-113 (1987)).

312 Ark. at 196, 848 S.W.2d at 420.

It is also interesting to note that the very first citation in the 1996 supplement to § 26.57 of *Page On the Law of Wills* is to the Alabama case of *Ames* v. *Parker*, 553 So.2d. 570 (Ala. 1989). The summary describes the holding of the case as follows:

> [W]here grandchild of testatrix had only an expectancy interest under prior will and could have received nothing under that will, but had a vested interest in estate under final will, grandchild had no real, beneficial interest under prior will that could be harmed by establishment of later will, and therefore grandchild had no standing to contest later will as an "interested person".

There is no question in my mind about the issue in the instant case. Under the law, the grandson of the deceased grandfather is not an "interested" person who can contest the will in this case. There also seems to be no logical reason to reach a contrary result. If one is allowed to dispose of property by will, why should someone who has no claim to an interest in that property if the will is set aside be allowed to contest the will? If there is a rational reason to allow this, it escapes me. And if the grandchild does not want what he is given by the will in this case, he certainly does not have to take it.

I would affirm the trial court; therefore, I dissent from the majority opinion.

NEAL, J., joins in this dissent.

Anne WINANS *v.* T. Revillon WINANS

CA 95-1185 934 S.W.2d 546

Court of Appeals of Arkansas
Division III
Opinion delivered December 18, 1996

David H. Williams, for appellant.

Leslie R. Ablondi, for appellee.

JAMES R. COOPER, Judge. The parties in this chancery case appeared in open court on July 13, 1994. At that time, a property settlement agreement was read into the record, and the parties

stated under oath that they agreed to the terms thereof. The agreement was complete with the exception of one item, i.e., the amount of money the appellee was to pay to reimburse the appellant for paying the appellee's personal tax liability. This item was expressly left out of the agreement recited in court; the appellee's attorney was to prepare a precedent incorporating the correct figure. After this was done, the appellant did not agree with the figure provided by the appellee and she so informed her former attorney. However, her former attorney failed to investigate the matter and failed to attend or inform the appellant of a hearing set for adjudication of the correct figure and entry of the decree. The appellee did attend the hearing, and the divorce decree was entered on December 20, 1994. The appellant, after learning that the decree had been entered, filed on January 5, 1995, a motion for a new trial or to set aside the decree. After a hearing on June 10, 1995, an order denying the motion was entered on August 15, 1995. On August 16, 1995, the appellant filed a notice of appeal challenging the correctness of the divorce decree of December 20, 1994, and the granting of attorney's fees to the appellee by an order of July 17, 1995.

The appellee has filed a motion to dismiss the appeal on the grounds that the appellant's notice of appeal was untimely. We grant the motion with respect to the issues regarding the divorce decree of December 20, 1994.

Although Ark. R. App. P.—Civ. 4 allows thirty days for a notice of appeal to be filed after a motion for a new trial is deemed denied, the notice of appeal in the case at bar was not filed within the thirty-day period. The motion in the case at bar was deemed denied on February 6, 1995, and no notice of appeal was filed until August 16, 1995.

The appellant contends that her motion should be regarded as one for setting aside a judgment on the ground of newly-discovered evidence under Ark. R. Civ. P. 60(c)(1), which may be granted more than ninety days after the entry of judgment. We do not agree. The "newly discovered evidence" asserted in the case at bar is merely the fact that the hearing was held: the appellant's former attorney failed to inform the appellant of the hearing date, and the hearing took place in their absence, with the appellee

present.[1] However, this does not constitute newly discovered evidence to authorize a new trial, which has been defined as evidence:

> [R]elevant and material to the issue involved in the original case . . . and due diligence must be shown.

Forsgren v. *Massey*, 185 Ark. 90, 93, 46 S.W.2d 20 (1932). The date of the hearing, while important to the parties, was not an item of evidence; nor was it relevant and material to the amount of tax liability, which was the issue involved in the original case; nor has there been a showing of due diligence.

It has been held that a party cannot invoke Rule 60(c) when the party ignored the action and failed to stay informed. *CMS Jonesboro Rehabilitation, Inc.* v. *Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991). For whatever reason, that is what happened in the case at bar, and we consequently grant the appellee's motion to dismiss with respect to the issues relating to the decree of December 20, 1994.

Because the notice of appeal was filed within thirty days of the July 17, 1995, order awarding attorney's fees to the appellee, the notice of appeal was timely with respect to that order. However, we find no merit in the appellant's contention that the chancellor erred in awarding attorney's fees to the appellee. The award of attorney's fees in a domestic relations case lies within the sound discretion of the chancellor, *Gavin v. Gavin*, 319 Ark. 270, 890 S.W.2d 592 (1995), and we find nothing in the record before us to show that the chancellor's considerable discretion was abused in the case at bar. As the chancellor noted, the hearings and proceedings at issue should not have been necessary in a case where the parties stated their agreement in open court more than one year beforehand. We cannot say that it was an abuse of discretion to award attorney's fees under these circumstances, and we affirm.

Dismissed in part; affirmed in part.

JENNINGS, C.J., and MAYFIELD, J., agree.

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[1] This was not a default judgment, *Dawson* v. *Picken*, 1 Ark. App. 168, 613 S.W.2d 846 (1981), so Rule 55 is not applicable.

COLEMAN'S SERVICE CENTER, INC. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, Southern Inn Management, Inc., and Audubon Federal Savings & Loan Association

CA 95-819 935 S.W.2d 289

Court of Appeals of Arkansas
Division III
Opinion delivered December 18, 1996

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

Ann S. Duross, Ass't Gen. Counsel; *Richard J. Osterman, Jr.*, Sr. Counsel; *E. Whitney Drake*, Special Counsel; and *Eichenbaum, Scott, Miller, Liles & Heister, P.A.*, by: *James H. Penick III*, for appellee Federal Deposit Insurance Corporation.

JOHN B. ROBBINS, Judge. This is the second appeal in this action. In *Coleman's Service Center, Inc.* v. *Southern Inns Management, Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993), we dismissed the first appeal. This appeal follows the Monroe County Circuit Court's entry of judgment for appellee Federal Deposit Insurance Corporation (FDIC) against appellant Coleman's Service Center, Inc., in the amount of $123,135.29 as the result of Coleman's breach of a lease. For the reasons expressed below, we affirm the circuit judge's decision.

Royce Lee, J.M. Denton, Jr., Darrell Larker, and James McGowin decided to build a motel, truck stop, and convenience-store complex near the intersection of U.S. Highway 49 and Interstate 40 in Brinkley, Arkansas. Messrs. Lee, Larker, and McGowin incorporated D'Jer, Inc., for this purpose. D'Jer and Messrs. Lee, Larker, and McGowin borrowed over $4 million from Audubon Federal Savings & Loan Association on May 4, 1984, to finance the project. The note was secured by a deed of trust executed that same date which conveyed to Audubon a lien on two parcels of realty (one contained 15 acres and the other, 1.159 acres) and D'Jer's leasehold interest dated June 24, 1971, in a contiguous one-acre tract. Also, on that date, D'Jer separately assigned to Audubon all of its interest in the one-acre lease. In October 1984, D'Jer leased the entire project to appellant. Separate leases were executed for the motel, the truck center, and the convenience store. On February 21, 1985, D'Jer assigned its interest in the convenience-store sublease to Audubon as additional security. The 1984 assignment of the 1971 lease and the February 1985 assignment of the sublease were recorded in Monroe County.

The project experienced serious financial difficulties, and no payments were made on the 1984 note. In the summer of 1985, Audubon instituted foreclosure proceedings against D'Jer in Monroe County. Later, rather than pursuing foreclosure, Audubon agreed to restructure the financing on the project and entered into a purchase and sale agreement with Messrs. Lee and Denton, Troy Coleman (appellant's principal stockholder), Dr. Glen Wegener, and Dr. Herme Plunk. That agreement, dated December 31, 1985, provided that Audubon would provide enough money to permit completion of the project and that the individuals would assume the project indebtedness. This agreement also provided that the transaction was made subject to the terms, liens, and other encumbrances created by the original deed of trust, the 1984 one-acre lease assignment, and the 1985 assignment of the convenience-store lease. Although Mr. Coleman and Dr. Plunk withdrew from the project, the others completed the plan.

D'Jer transferred all interest it had in the project to Audubon on February 19, 1986. On March 12, 1986, Audubon conveyed the real and personal property involved in the project to Messrs. Lee and Denton and Dr. Wegener. At the same time, Messrs. Lee and Denton and Dr. Wegener delivered a promissory note in the

amount of $5,500,000 to Audubon. This note represented the original principal plus accrued and unpaid interest. Messrs. Lee and Denton and Dr. Wegener, and their spouses, executed to Audubon a mortgage on the 15-acre and 1.159-acre parcels. The next day, these individuals conveyed the property to Hercoleed, Inc., an Arkansas corporation formed by Messrs. Lee and Denton and Dr. Wegener. On June 19, 1986, another promissory note in the amount of $100,000 was executed by Messrs. Lee and Denton and Dr. Wegener to Audubon in consideration for additional funds. On June 20, 1986, the Federal Home Loan Bank Board put Audubon into receivership. The debtors made no payments on the May 4, 1984, or the March 12, 1986, notes. The Federal Savings & Loan Insurance Corporation (FSLIC), Audubon's receiver, filed a foreclosure proceeding in federal district court on November 18, 1987; that case was ultimately settled. The FDIC succeeded the FSLIC as Audubon's receiver in 1989.

On June 1, 1989, Hercoleed, through Mr. Lee, and appellant, through Mr. Coleman, entered into a written amendment to the convenience-store lease, which substantially reduced appellant's obligation for rent. This was apparently done without any approval from, or notice to, Audubon or its receiver, even though all of the rents and profits under the lease had been assigned to Audubon.

In 1989, Marbella & Company of Arkansas, Inc., unsuccessfully tried to purchase the FDIC's interest in the project. However, in December 1989, Marbella did acquire all of the stock of Hercoleed and D'Jer and, in March 1990, acquired the fee simple interest in the one-acre parcel of land.

In 1990, the FDIC sued in federal district court for foreclosure of the deed of trust. On June 11, 1990, the federal court appointed Southern Inns Management, Inc. (SIMI), as receiver for the property. Appellant was included as a defendant in the federal court foreclosure action. In its third amended complaint, the FDIC included the following allegations against appellant:

> 27. As part of D'Jer's original agreement under the construction loan agreement with Audubon on the Quality Inn project, D'Jer was to assign as additional collateral any and all leases which were entered into by D'Jer on the property. On October 3, 1984 D'Jer and defendant Coleman Service Centers, Inc. entered into, *inter alia*, two (2) leases, one

covering the convenience store facility on the subject property, and another conveying the truck repair facility on the subject property. Both leases were filed of record on November 5, 1984, and subsequently assigned to Audubon on February 21, 1985, with said assignments being filed on March 28, 1985 in the real estate records of Monroe County, Arkansas. Copies of said leases, with attached Assignments, are attached hereto as Exhibits "H" and "I", and made a part hereof. A portion of the property conveyed under the lease and assignment attached as Exhibit I, is also conveyed under the June 24, 1971 lease, and therefore is actually a sublease from D'Jer to Coleman Service Center, Inc.

28. During the later part of 1985, the parties to the transaction realized the project was not going to survive under its existing structure, and the parties agreed to restructure the project, with Audubon providing additional funds. First, D'Jer agreed to convey all of its right, title and interest in and to the real property, personal property, and leasehold to Audubon, subject to the June 13, 1984 Deed of Trust and assignments of February 21, 1985 and June 13, 1984, with Audubon agreeing to reconvey the said property to a new ownership group, while maintaining its lien priority on the real property and leasehold, by not terminating or releasing the June 13, 1984 Deed of Trust, and assignment of leasehold, or the February 21, 1985 assignments. Further, the lien created by the Assignment of Leasehold pursuant to Exhibit "G," was also preserved by a subsequent complete Assignment of Lease dated February 19, 1985, and filed of record in the Monroe County real estate records on July 28, 1986, a copy of said assignment is attached hereto as Exhibit "J", and made a part hereof. The clear intention of all parties was to maintain the June 13, 1984 lien priority on the real property, personal property, and leasehold to secure the $5,500,000 and $100,000 notes of March 12, 1986 and June 19, 1986 (referred to in paragraphs 5 and 10 hereinabove).

29. The March 13, 1986 conveyance from D'Jer to Audubon, was by Warranty Deed, with the specific exception that the transfer was made "*subject to*" the Deed of Trust in favor of Audubon which had been filed in Mortgage Record Book 107, Page 278 of the records of Monroe

County, Arkansas. A copy of said deed is attached hereto as Exhibit "K", and made a party hereof.

30. In the alternative, as admitted on several occasions throughout the deposition of Troy Coleman, principal owner of Defendant, Coleman's Service Center, Inc., Plaintiff's decision to restructure the financing on the Quality Inn Project, in lieu of foreclosure, was made in reliance on representations and warranties made by Defendant's Royce Lee and Coleman's Service Center, Inc., through it's [sic] agent Troy Coleman, that the convenience store lease attached hereto as an exhibit to Exhibit "I" to the Complaint, was in full force and affect [sic], and that no modifications or amendments had been made thereto. As provided in the March 12, 1986 mortgage attached hereto as Exhibit "B", Plaintiff retained its lien on the leasehold including rents and profits, and a complete and full assignment of any and all interest of the lessor in and to the unmodified lease. As a result of said pledge of rents and profits, and the full and complete assignment of the leasehold, and the full knowledge of Defendant Coleman's Service Center, Inc. of said pledge and assignment, there is privity of contract between the Plaintiff and the Defendant Lessee, Coleman's Service Center, Inc., and, Plaintiff is a third party beneficiary of the convenience store lease which is the subject of this dispute.

31. Notwithstanding said representations and warranties of the Defendant's Coleman's Service Center, Inc. and Royce Lee, and Coleman's full knowledge of the pledge and assignment, without any notice whatsoever to Plaintiff, some time after Plaintiff's mortgage was filed on March 13, 1986, Defendants Coleman's Service Center, Inc. and Hercoleed, Inc. (successor in interest of D'Jer as Lessor), by and through their duly appointed agents and representatives, Troy Coleman and Royce Lee, unilaterally entered into an agreement attempting to modify and amend the convenience store lease. A copy of said agreement dated June 1, 1989, is attached hereto as Exhibit "L", and made a part hereof (the "Amendment to Lease"). At the time of said unilateral modification, Hercoleed, Inc. was in default under the terms of the restructured financing on the project. Said amendment is void *ab initio*, and without any force or affect [sic]

whatsoever.

32. The Amendment To Lease resulted in a substantial reduction in rent, and therefore collateral, and has no economic basis in fact, and is a mere subterfuge between business associates and personal friends, while Defendant Hercoleed, Inc., nor its individual stockholders and Defendants, Royce Lee, Jack Denton, and Glenn Wegener, ever made even one payment under the restructured financing.

33. Notwithstanding the fact that the Amendment To Lease is obviously dated after Plaintiff's Mortgage of March 12, 1986, and therefore subject to foreclosure under Plaintiff's Mortgage of March 12, 1986, the Amendment To Lease was a material deviation from the original lease; and as a result of Defendant's knowledge of the pledge and assignment, Plaintiff was entitled to notice of any amendments thereto, and therefore the Amendment To Lease is not binding on the Plaintiff and any and all interest of Defendant Coleman's Service Center, Inc. in and to the convience [sic] store lease, and any amendments thereto, is subject to Plaintiff's mortgage attached hereto as Exhibit "B", and should be foreclosed, terminated and forever barred as a claim against the subject property. As a result of Defendant Coleman's failure to properly pay in accordance with the terms of the original lease, Defendant Coleman's Service Center, Inc. is in default under the terms of the original lease, and therefore should be ejected from the premises and the subject lease and any amendments thereto should be foreclosed, terminated and barred forever as a claim against the subject property.

34. In the alternative, if the Court finds that the convenience store lease is not subject to foreclosure and termination, and that Defendant Coleman's Service Center, Inc., is not in default, but that the original lease should control, Defendant Coleman's Service Center, Inc. should be required to account to Plaintiff for any and all rentals not paid as provided under the original convenience store lease, and a judgment in favor of Plaintiff should be entered for said sum.

While the federal action was pending, FDIC and SIMI filed this action for unlawful detainer against appellant in the Monroe County Circuit Court, seeking possession of the property and

treble damages for appellant's breach of the lease. On January 30, 1991, appellant objected to the jurisdiction of the circuit court and to the issuance of a writ of possession. Appellant argued that the filing of this action in circuit court would cause a multiplicity of actions involving the same issues.

On February 8, 1991, Federal Judge Elsijane Roy entered an order granting the FDIC's motion for partial dismissal of paragraphs 33 and 34 of its third amended complaint. Judge Roy stated: "IT IS, HEREBY, ORDERED, DECREED, and ADJUDGED, after due consideration of the matters and Motion before the Court, that Plaintiff's claim as set out in paragraphs 33 and 34 of its Third Amended Complaint concerning the default and breach of the Coleman Service Center, Inc., lease is hereby dismissed without prejudice." On February 11, 1991, in response to appellant's objection, appellees filed a copy of Judge Roy's order with the circuit court and argued that, as a result of the federal court's partial dismissal, the circuit court had jurisdiction of this action.

A hearing was set for 9:00 a.m. on February 12, 1991, in circuit court. Appellant's counsel, however, was mistaken as to the time of the hearing and failed to appear. On February 13, 1991, the circuit judge held that appellees had presented *prima facie* evidence that they were entitled to judgment against appellant in the amount of $143,240.90 and entered a "judgment" directing the clerk of the court to issue appellees a writ of possession.

That same day, appellant filed a motion to set aside the judgment, arguing that its attorney had missed the hearing due to a misunderstanding. It also argued that the order of partial dismissal by the federal district court had been entered ex parte without the knowledge of appellant's counsel. Appellant also filed its answer on February 13, 1991, wherein it stated that the lease had been orally amended in 1986 to provide that, in order to stimulate business, the lessor would bear one-half the cost of certain expenses and that, in 1989, the amendment was memorialized in a written document. Appellant denied that it was in arrears and asserted that it had simply paid rent according to the amended lease.

Appellant also filed a motion for stay of the writ of possession and requested that it be allowed to post a bond pending trial. On February 20, 1991, appellant filed a bond for $150,000.00. On February 22, 1991, the circuit court entered an order finding that

the proposed bond was not filed within the five-day period required by Ark. Code Ann. § 18-60-307(e) and that it did not otherwise comply with that statute. In this order, the circuit judge directed the sheriff of Monroe County to complete appellant's eviction from the premises.

On March 22, 1991, appellant filed a counterclaim against appellees and a third-party complaint against Don Dedman.

On October 28, 1991, the federal judge issued a memorandum opinion determining the rights of the parties in the one-acre tract and the lease agreement with respect to the convenience-store portion of the project. (It was undisputed that the FDIC was entitled to a judgment of foreclosure on the 15-acre and 1.159-acre tracts.) Judge Roy made the following findings in her memorandum opinion:

> The Court's task here is made more difficult by the number of transactions and the lack of precision in the drafting of the accompanying documents. The Court finds that in balancing the equities of this web of transactions the scales tip considerably in favor of plaintiff. From all that has been presented, the Court finds that it was the intent of the parties to these transactions that plaintiff maintain its superior position with respect to its liens on the subject property. Although somewhat dated, and from a case involving different facts, the Court finds the following language of the Arkansas Supreme Court persuasive herein:
>
> > [I]n the absence of an agreement, or a plain manifestation of a contrary intention, the security of the original mortgage follows the note or renewal thereof. In other words, instead of there being a presumption of payment or settlement of the original indebtedness by the execution of the renewal note, and thereby a release of the security, the presumption is that, upon the execution of the new note or bond, the same security is available for its payment.
>
> *Simpson* v. *Little Rock—North Heights Water Dist. No. 18*, 191 Ark. 451, 86 S.W.2d 423, 425 (1935), citing *Oliphint* v. *Eckerley*, 36 Ark. 69 (1880).
>
> The Court finds that plaintiff's rights in the one acre

> tract are prior and paramount to that of Marbella, and that Marbella acquired this property subject to plaintiff's interests. Likewise, plaintiff's rights in the lease on the convenience store are prior and paramount to that of Coleman's. Plaintiff is entitled to Judgment of Foreclosure on its interests in both of these properties.

On January 24, 1992, Judge Roy issued a supplemental opinion to reflect that Marbella's unsuccessful efforts to purchase the interest of the FDIC in the subject properties terminated in March 1990; that Marbella acquired the fee simple interest in the one-acre parcel in a series of transactions between December 20 and 28, 1989; and that Marbella acquired by quitclaim deed the leasehold interest of Messrs. Lee and Denton and Dr. Wegener in the one-acre tract on March 30, 1990.

In the supplemental opinion, Judge Roy stated:

> Finally, in its Motion for Clarification, Marbella asks the Court to clarify its holding concerning the interest and rights of the FDIC in and to the one-acre tract. Upon reflection, the Court should have set out its findings and conclusions with greater precision and specificity. It was not the Court's intention to place plaintiff in a greater position than it otherwise occupied by virtue of its interest in certain leases on this property and any mortgages thereon. However, the Court did intend to put plaintiff in the position it would have occupied had all of its rights been honored. The following shall constitute the supplemental findings and conclusions of the Court and shall have same force and effect as the terms of the original Opinion.
>
> By assignment from D'Jer, Inc., plaintiff acquired an interest in the lease on the one-acre tract between Fred McDonald, special administrator of the Estate of Julian Leland Rutherford, deceased, and Baldwin Petroleum Company, Inc. dated June 24, 1971, which ran until July 6, 1991. As assignor, plaintiff had the right pursuant to paragraph 11 to renew or extend the lease for a period of five years. In addition, paragraph 18 provides that "[i]n the event the grantor desires to sell the above described real property during the initial and extended term of this agreement the grantee shall have the first option to purchase said property

> for the highest bona fide purchase price offer ...." Rather than offer the property to plaintiff, the owners sold it to Marbella in December of 1989, clearly within the initial term of the lease.
>
> Upon consideration of all the pleadings and evidence presented, the Court finds that plaintiff was wrongfully denied its first option to purchase the property under the lease. After plaintiff has tendered the 1989 sale amount, plus interest at ten percent per annum, to Marbella, within three business days thereafter Marbella shall convey its interest in the one-acre tract to plaintiff.

On March 25, 1992, Judge Roy issued a judgment of foreclosure and held that all interest claimed by appellant, whether pursuant to the lease, amendment to lease, or otherwise, is subject and subordinate to the interest of the FDIC and thereby subject to foreclosure. Judge Roy specifically adopted her findings in the October 28, 1991, memorandum opinion and stated: "[T]he June 1, 1989, Amendment To Lease was procured and entered into without any approval from, or notice to, Audubon or its receiver, the FDIC, formerly the FSLIC, in spite of the assignment and pledge to Audubon of all rents and profits under the Lease." In this judgment, Judge Roy decreed that its filing in the real estate records of Monroe County would constitute a complete and absolute conveyance to the FDIC of all of Marbella's interest in the one-acre parcel. She also directed Marbella to execute and deliver a special warranty deed to the FDIC and to negotiate a check in the amount of $89,306.85 which was tendered pursuant to court order. She held that all of the FDIC's rights in the one-acre parcel were thereby vested absolute and paramount to Marbella.

Appellant appealed Judge Roy's decision to the Eighth Circuit Court of Appeals and argued three points:

> (1) Audubon had notice of and gave approval to the amendment of the lease agreement entered into by Coleman and Lee, (2) the court did not possess jurisdiction to decide the issue of whether Coleman breached the lease agreement because the court has previously dismissed that issue, (3) the district court erred in determining that the sublease was subordinate and subject to foreclosure by the FDIC because Audubon's rights under the 1984 deed were destroyed when

it restructured the loan in 1986.

Federal Deposit Insurance Corporation v. *Lee*, 988 F.2d 838, 841 (8th Cir. 1993). Apparently, appellant did not argue that Judge Roy had erred in dismissing paragraphs 33 and 34 of the third amended complaint. Appellant did argue that, by dismissing paragraphs 33 and 34, the district court could not make any findings as to whether the lease was breached. The Eighth Circuit Court of Appeals disagreed:

> Coleman argues, however, that the district court's finding on the issue of notice and approval is also legally erroneous. Coleman contends that the ruling is legally erroneous because the court, on February 8, 1991, dismissed portions of paragraphs 33 and 34 of plaintiff's third amended complaint that dealt with the default and breach of the lease.[1] This dismissal, Coleman asserts, precluded any findings the court could make at the foreclosure proceedings with regard to whether the lease was breached. Therefore, Coleman contends, because the issue of notice and approval relates to the issue of whether the lease was breached, the trial court lacked jurisdiction to decide the issue.
>
> We acknowledge that the trial court dismissed certain portions of the complaint which addressed whether there was default and breach under the lease. However, we also note that portions of the complaint that the trial court did not dismiss presents the issue of whether the lease was amended without notice to or the approval of Audubon or its receiver. Specifically, paragraph 31 states that "without any notice whatsoever to Plaintiff" the defendants Coleman and Hercoleed "unilaterally entered into an agreement attempting to modify and amend the convenience store lease." That paragraph further alleges that at the time of this attempted modification, Hercoleed was in default "under the terms of the restructured financing on the project." Plaintiff then alleges that the amendment is void *ab initio*. As this paragraph was not dismissed, the issue of notice and approval

[1] The trial court dismissed those portions of the paragraphs because the issues of default and breach related to an Unlawful Detainer suit that was pending in state court in Monroe County, Arkansas.

> was properly before the court. Accordingly, the trial court had jurisdiction to decide the issues.

988 F.2d at 842.

On January 23, 1992, the circuit court dismissed appellant's counterclaim and third-party complaint based upon lack of subject-matter jurisdiction under Ark. R. Civ. P. 12(b)(1). The circuit court entered an order under Rule 54(b) of the Rules of Civil Procedure on February 7, 1992, and held that it would be highly prejudicial for appellees to proceed to trial and obtain judgment against appellant without appellant first having a final adjudication of its right to assert its counterclaim and third-party complaint.

Appellant then filed a notice of appeal, reciting that it appealed from "all orders and judgments entered herein." On appeal to this Court, however, appellant failed to challenge the dismissal of its counterclaim and third-party complaint. Instead, it argued the following four points: (1) this court had no jurisdiction of the subject matter because the dismissal of the issues relating to the D'Jer-Coleman lease from the federal case did not permit refiling of these issues in a state court; (2) the trial court erred in refusing to set aside the "judgment" rendered in favor of appellees against appellant at the hearing; (3) the restructuring of the original indebtedness to FDIC by Audubon was a novation; and (4) the order of the court finding that the supersedeas bond proffered by appellant was not timely filed and did not otherwise comply with the statute was clearly erroneous.

In our opinion, we noted that appellant had argued issues that were totally unrelated to the interlocutory order from which it had been given permission to appeal:

> The issues Coleman's raises, however, are totally unrelated to the interlocutory order that it has been permitted to appeal. All of the issues raised relate to the primary cause of action, the suit for unlawful detainer, which is still pending in the circuit court. In the language of Rule 54(b) no "final judgment as to" this "claim" has been entered by the trial judge. Our view is that when the trial court permits an interlocutory appeal under Rule 54(b) the issues raised must be reasonably related to the order or orders appealed from. A Rule 54(b) order may not be used as a vehicle to bring up for review matters which are still pending before the trial court.

> Because there is no contention that the trial court erred in dismissing the appellant's counterclaim and third-party complaint, the decision of the trial court is affirmed.

44 Ark. App. at 49.

The Arkansas Supreme Court granted appellant's petition for review in part and stated: "The result of the case is corrected and modified to the extent that it is dismissed rather than affirmed." *Coleman's Serv. Center, Inc.* v. *Southern Inns Management, Inc.*, 93-1285, slip. op. (Ark. January 10, 1994).

Upon remand, the circuit court granted the FDIC's motion in limine to prevent appellant from introducing evidence respecting the purported amended lease as a defense to the FDIC's claims because Judge Roy had found that the amendment to the lease was done without any approval from, or notice to, FDIC or its receiver. The FDIC's claim for damages resulting from appellant's failure to pay rent according to the original sublease was tried to the circuit court on October 28, 1994. On January 11, 1995, the circuit judge held that the FDIC was entitled to damages against appellant in the amount of $123,135.29. He denied the FDIC's request for treble damages.

On appeal, appellant raises four points: (1) the circuit court erred in holding that it had subject-matter jurisdiction because the dismissal of the issues relating to the D'Jer-Coleman lease from the federal case did not permit refiling in state court; (2) the circuit court erred in refusing to set aside the "judgment" rendered against appellant pursuant to the 1991 hearing; (3) the circuit court erred in finding that the supersedeas bond proffered by appellant did not comply with the applicable statute; and (4) the circuit court erred in refusing to admit evidence of appellant's unjust-enrichment defense.

In its first point on appeal, appellant contends that appellees should have brought all of their claims for relief in one action against appellant. It argues that the FDIC improperly split its cause of action by pursuing the unlawful-detainer action in addition to the original federal foreclosure action. However, we conclude that this case falls within an exception to the general rule against splitting a cause of action: because Judge Roy specifically stated that she dismissed paragraphs 33 and 34 of the FDIC's third amended complaint "without prejudice," the FDIC could file this unlawful-detainer action and obtain a judgment for rent arrearages in circuit

court.

Under the claim-preclusion aspect of the doctrine of *res judicata*, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. *Magness* v. *Commerce Bank*, 42 Ark. App. 72, 78, 853 S.W.2d 890 (1993). *Res judicata* bars not only the relitigation of claims which were actually litigated in the first suit but also those which could have been litigated. *Id.* Where a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Magness* v. *Commerce Bank*, 42 Ark. App. at 78; *Swofford* v. *Stafford*, 295 Ark. 433, 435, 748 S.W.2d 660 (1988). The cases dealing with this issue do not draw a distinct line beyond which the principle of *res judicata* invariably applies and where it does not; the very nature of litigation makes that impossible. *Golden Host Westchase, Inc.* v. *First Serv. Corp.*, 29 Ark. App. 107, 119, 778 S.W.2d 633 (1989). The doctrine of *res judicata* applies only when the party against whom the earlier decision is being asserted had a fair and full opportunity to litigate the issue in question. *Cater* v. *Cater*, 311 Ark. 627, 632, 846 S.W.2d 173 (1993).

The doctrine of collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by parties in the first suit. *John Cheeseman Trucking, Inc.* v. *Pinson*, 313 Ark. 632, 635-36, 855 S.W.2d 941 (1993); *Arkansas Dep't of Human Servs.* v. *Dearman*, 40 Ark. App. 63, 66, 842 S.W.2d 449 (1992). When an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *John Cheeseman Trucking, Inc.* v. *Pinson*, 313 Ark. at 636. Collateral estoppel is based upon the policy of limiting litigation to one fair trial on an issue and is applicable only when the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Arkansas Dep't of Human Servs.* v. *Dearman*, 40 Ark. App. at 66. For collateral estoppel to apply, the following elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the

determination must have been essential to the judgment. *Crockett & Brown, P.A.* v. *Wilson*, 314 Ark. 578, 581, 864 S.W.2d 244 (1993). In *Finch* v. *Neal*, 316 Ark. 530, 538, 873 S.W.2d 519 (1994), the supreme court stated that the test in determining whether *res judicata* applies is whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein.

In *Carter* v. *Owens-Illinois, Inc.*, 261 Ark. 728, 729, 551 S.W.2d 209 (1977), the supreme court stated that identical cases between the same parties can be pending in a federal district court and a state court at the same time. In such a situation, the first forum to dispose of the case by trial enters a judgment that is binding on the parties. *Id.* at 729-30. *See also Country Pride Foods, Ltd.* v. *Medina & Medina*, 279 Ark. 75, 78, 648 S.W.2d 485 (1983).

It should be noted that an unlawful-detainer action is quite limited in scope. Arkansas Code Annotated § 18-60-308 (1987) provides: "In trials under the provisions of this subchapter, the title to the premises in question shall not be adjudicated upon or given in evidence, except to show the right to the possession and the extent thereof." *See also Cortiania* v. *Franco*, 212 Ark. 930, 934, 208 S.W.2d 436 (1948); *Williams* v. *Prioleau*, 123 Ark. 156, 161, 184 S.W. 847 (1916). Additionally, Ark. Code Ann. § 18-60-312(a) (1987) provides: "Neither the judgment to be rendered by the court in matters brought pursuant to the provisions of this subchapter nor anything in this subchapter shall bar or preclude the party injured from bringing any cause of action for trespass or ejectment, or any other action, against the offending party." A final judgment was first rendered, however, in the federal court action. Our focus, therefore, must be upon the *res judicata* effect of that judgment on this action.

A person having only a single cause of action is usually not permitted to split up the cause of action and maintain more than one suit for different parts of the action; if this rule is violated, it is held that the adjudication reached on the first action is, under the doctrine of *res judicata*, a bar to the maintenance of the second suit. 1 Am. Jur. 2d *Actions* § 110 (1994). In *Eiermann* v. *Beck*, 221 Ark. 138, 252 S.W.2d 388 (1952), it was held that a plaintiff-buyer who had obtained rescission of a contract to purchase a restaurant plus consequential damages could not later sue for other damages resulting from the defendant-seller's fraud. The court stated:

> Our cases do not draw a distinct line beyond which *res judicata* invariably applies and within which it does not. The very nature of litigation makes that impossible. The rule, however, seems to be that if the forum selected by the plaintiff has jurisdiction of the person and the subject-matter, and the parties in each instance are the same, and if claims that were made or could have been made grew out of the same transaction, then it is the duty of the aggrieved party or parties to include in one action all rights subject to judicial determination at the time suit was brought, thus preventing multiple litigation.

221 Ark. at 141.

In *Lisenbey* v. *Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, 245 Ark. 144, 431 S.W.2d 484 (1968), the supreme court held that claims resulting from the loss of personalty and realty in one fire covered by one insurance policy constituted one cause of action:

> Needless to say, the rule against the splitting of a single cause of action is intended to keep defendants from being harassed by a multiplicity of suits and to lighten the already overcrowded dockets of the trial courts. In finding the existence of a single cause of action we have placed some emphasis upon the fact that the several claims arise from a single transaction. *Eiermann* v. *Beck*, 221 Ark. 138, 252 S.W.2d 388 (1952). In the case at bar we are firmly of the view that the fire created only one cause of action and that the plaintiffs ought not to be permitted to subdivide that cause of action, thereby burdening the defendant and the courts with the waste of time and expense that attends a needless jury trial.

245 Ark. at 146.

In his treatise, *Arkansas Civil Practice and Procedure* (1993), Justice David Newbern states:

> [A] claimant may not split a claim or cause of action by attempting to bring a portion of it in one action and a portion in another. According to the rule of *res judicata*, the second attempt will be considered merged in the first or barred by it.
>
> The purposes underlying this rule are to protect those against whom split causes of action would be levied from

> having to defend twice and to protect court dockets from unnecessary burdens.

Id. at § 3-7.

It has been said that, in order to determine whether a second action is for the same cause of action as the first, one should consider the identity of facts essential to their maintenance, and whether the same evidence would sustain both. *See Chiotte* v. *Chiotte*, 225 Ark. 101, 102, 279 S.W.2d 296 (1955); *Lee* v. *Westbrook*, 208 Ark. 914, 917, 188 S.W.2d 141 (1945). "Whether a factual grouping constitutes a 'transaction' for purposes of *res judicata* is to be determined pragmatically, by considering whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit and whether treatment of the facts as a unit conforms to the parties' expectations for business understanding or usage." 46 Am. Jur. 2d *Judgments* § 533 (1994). "In the context of *res judicata*, a contract is typically considered to be a 'transaction' so that all claims arising from the breach of the contract must be brought in the original action, as well as all defenses." *Id.* at § 529.

The Restatement (2d) of Judgments has adopted a "transactional" approach in determining whether a claim is barred by *res judicata*:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (2d) of Judgments § 24 (1982).

In Section 25, the Restatement (2d) of Judgments provides exemplifications of the general rule concerning splitting:

> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.
>
> This section is explained in comment e:
>
> *State and federal theories or grounds.* A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

The doctrine of *res judicata*, however, does not bar a subsequent action where, in an earlier action, a court has made an express reservation of right as to future litigation or where a party was actually prohibited from asserting a claim. *Cater* v. *Cater*, 311 Ark. at 632. *See also Thornbrough v. Barnhart*, 232 Ark. 862, 866, 340 S.W.2d 569 (1960). It has been held that an express reservation of rights as to litigation on a certain item preserves that subject for future adjudication. *Miles* v. *Teague*, 251 Ark. 1059, 1061, 476 S.W.2d 245 (1972). *See also Kulbeth* v. *Purdom*, 305 Ark. 19, 22, 805 S.W.2d 622 (1991); 50 C.J.S. *Judgments* § 641 (1947).

Section 26(1)(b) of the Restatement (2d) of Judgments sets forth an exception to the general rule concerning splitting that controls our disposition of this appeal. It provides:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a

second action by the plaintiff against the defendant:

....

(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action....

This subsection is explained in comment b as follows:

> *Express reservation by the court (Subsection (1)(b)).* It may appear in the course of an action that the plaintiff is splitting a claim, but that there are special reasons that justify his doing so, and accordingly that the judgment in the action ought not to have the usual consequences of extinguishing the entire claim; rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the first action. A determination by the court that its judgment is "without prejudice" (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action.

Under Section 24 of the Restatement (2d) of Judgments, this unlawful-detainer action would normally be barred under the rule against splitting a cause of action. However, because Judge Roy dismissed paragraphs 33 and 34 of the FDIC's third amended complaint in federal court against appellant "without prejudice," we conclude, pursuant to Section 26(1)(b) of the Restatement (2d) of Judgments, that appellees could entertain this action for unlawful detainer in circuit court. We therefore reject appellant's first point on appeal.

In appellant's second point on appeal, it argues that the "judgment" that followed the hearing on February 12, 1991, addressed all issues in the case and awarded a monetary judgment to the FDIC. This is not correct. As we noted in the first appeal, an action for unlawful detainer under Ark. Code Ann. § 18-60-307 (Supp. 1991) is a two-step process. *Coleman's Serv. Center, Inc.* v. *Southern Inns Management*, 44 Ark. App. at 48. The statute contemplates that the right to possession will be preliminarily determined and, if appropriate, a writ of possession will be issued; however, the question of damages will be left for a subsequent hearing. *Id.* at 48-

49. The statute expressly provides that an order directing the issuance of a writ of possession shall not be a "final adjudication of the parties' rights in the action." *Id.* at 49. *See* Ark. Code Ann. § 18-60-307(d)(1). We stated: "In the case at bar, the parties are in the middle of the primary lawsuit. While the circuit court has directed the issuance of a writ of possession, its orders clearly contemplate a further hearing on the question of damages. A money judgment has not yet been entered." 44 Ark. App. at 49. In fact, the February 13, 1991, "judgment" specifically stated that appellees had presented "prima facie evidence" that they were entitled to judgment against appellant.

In any event, we need not address the second and third points on appeal because they are moot. A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Stair* v. *Phillips*, 315 Ark. 429, 435, 867 S.W.2d 453 (1993). *See also Martin Farm Enters., Inc.* v. *Hayes*, 320 Ark. 205, 210, 895 S.W.2d 535 (1995). With few exceptions, the appellate court will not address moot issues. *Leonards* v. *E.A. Martin Machinery Co.*, 321 Ark. 239, 246, 900 S.W.2d 546 (1995); *Wright* v. *Keffer*, 319 Ark. 201, 203, 890 S.W.2d 271 (1995); *Kinkead* v. *Union Nat'l Bank*, 51 Ark. App. 4, 19, 907 S.W.2d 154 (1995). An exception is made to the mootness doctrine for cases that are capable of repetition yet evading review because the justiciable controversy will necessarily expire or terminate prior to adjudication. *Wright* v. *Keffer*, 319 Ark. at 203. This is not one of those cases. Even if we were to hold that the circuit judge erred in refusing to set aside the February 12, 1991, decision or to accept the supersedeas bond, no meaningful relief could be granted. Because of the decisions of the federal district court and the Eighth Circuit Court of Appeals, appellant can not be put back into possession of the property covered by the sublease.

In its fourth point on appeal, appellant argues that the circuit court erred in refusing to admit evidence of appellant's unjust-enrichment defense. Appellant asserts that it should have been allowed to introduce evidence of its performance pursuant to the amended lease in order to establish its "negative defense" to appellees' claim for back rent. Appellant does not argue that the amended lease is controlling; instead, it argues that evidence of its performance under the amended lease was admissible to prove that the FDIC would be unjustly enriched by receiving judgment for the

entire amount of damages due under the original sublease. Appellant, in anticipation of a response by the FDIC that it failed to properly plead the unjust-enrichment defense, argues that this defense did not have to be affirmatively pled. Appellant states that it is not making a claim for affirmative relief, but is merely setting forth its performance under the amended lease as a "negative defense."

We disagree. Here, appellant has attempted to utilize its unjust-enrichment defense as a set-off against the FDIC's award for back rent due under the original sublease. Under Ark. R. Civ. P. 8, set-off is an affirmative defense, which must be pled. The abstract contains no indication that appellant pled this set-off.

Appellant also argues that, even if it was required to affirmatively plead unjust enrichment as a defense, the parties impliedly treated it as having been pled. Appellant also asserts that it asked the circuit court to amend the pleadings to conform to the proof. Appellant states in its brief that, at the final hearing, it conceded that the amended lease was void but asked the circuit court to admit evidence of its performance under the amended lease to support its unjust-enrichment defense and cites pages 684-705 of Transcript Volume II. These pages of the transcript, however, are not abstracted by appellant.

Because appellant failed to abstract this part of the transcript, we need not address appellant's fourth point. Supreme Court Rule 4-2(a)(6) provides that the appellant's abstract of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the court for decision. Rule 4-2(b)(2) provides that, if this court finds the abstract to be flagrantly deficient, the judgment or decree may be affirmed for noncompliance with the rule. *See D. Hawkins, Inc.* v. *Schumacher*, 322 Ark. 437, 438, 909 S.W.2d 640 (1995); *Chrysler Credit Corp.* v. *Scanlon*, 319 Ark. 758, 761, 894 S.W.2d 885 (1995); *Stroud Crop, Inc.* v. *Hagler*, 317 Ark. 139, 142, 875 S.W.2d 851 (1994). In *Hunter* v. *Williams*, 308 Ark. 276, 277, 823 S.W.2d 894 (1992), the supreme court stated that it had pointed out repeatedly, "for a hundred years ... that there being only one transcript it is impractical for all members of the court to examine it...."

Even if we were to address this argument, however, we

would affirm. To find unjust enrichment, a party must have received something of value, to which he was not entitled and which he must restore. *Dews* v. *Halliburton Indus., Inc.*, 288 Ark. 532, 536, 708 S.W.2d 67 (1986). The basis for recovery under this theory is the benefit that the party has received, and it is restitutionary in nature. *Id.* at 536-37. The doctrine of unjust enrichment had its origins in the action for money had and received, which was based upon the theory that there was an implied promise to pay. *Frigillana* v. *Frigillana*, 266 Ark. 296, 307, 584 S.W.2d 30 (1979).

One who is free from fault cannot be held to be unjustly enriched, however, merely because one has chosen to exercise a legal or contractual right. *Guaranty Nat'l Ins. Co.* v. *Denver Roller, Inc.*, 313 Ark. 128, 138, 854 S.W.2d 312 (1993). One is not unjustly enriched by receipt of that to which he is legally entitled. *Smith* v. *Whitener*, 42 Ark. App. 225, 228, 856 S.W.2d 328 (1993). It is generally held that, where there is an express contract, the law will not imply a quasi- or constructive contract. *Lowell Perkins Agency, Inc.* v. *Jacobs*, 250 Ark. 952, 959, 469 S.W.2d 89 (1971); *Friends of Children, Inc.* v. *Marcus*, 46 Ark. App. 57, 61, 876 S.W.2d 603 (1994). It has been held that the quasi-contractual principle of unjust enrichment does not apply to an agreement deliberately entered into by the parties. *Lowell Perkins Agency, Inc.* v. *Jacobs*, 250 Ark. at 959. "[T]he law never accommodates a party with an implied contract when he has made a specific one on the same subject matter." *Id.* In *Moeller* v. *Theis Realty, Inc.*, 13 Ark. App. 266, 268-69, 683 S.W.2d 239 (1985), we stated that the concept of unjust enrichment has no application when an express written contract exists.

Affirmed.

ROGERS and GRIFFEN, JJ., agree.

FEDERAL COMPRESS & WAREHOUSE CO. *v.* Johnny RISPER

CA 96-78 935 S.W.2d 279

Court of Appeals of Arkansas
Division III
Opinion delivered December 18, 1996

Walter A. Murray, for appellant.

Paul J. Teufal, for appellee.

JOHN B. ROBBINS, Judge. Appellant Federal Compress & Warehouse Company appeals from a decision of the Workers' Compensation Commission which held that appellee Johnny Risper was entitled to a ten percent permanent impairment rating to his right eye and twenty percent wage-loss disability benefits to the body as a

whole. Appellant contends on appeal that the Commission's opinion is not supported by substantial evidence, specifically arguing that the Commission erred as a matter of law in considering wage-loss disability as it related to appellee's scheduled eye injury.

The evidence indicated that on November 26, 1990, appellee sustained an admittedly compensable injury when he was hit from behind by a cotton bale and became trapped between two bales. Appellee sustained fractures in his neck and suffered an orbital blowout to his right eye. He underwent two surgical procedures to repair his right eye and the surrounding bone. Several eye specialists who treated appellee opined that he had tenderness to the orbital rim; depressed vision fields; enophthalmus (the eye sits back in the socket); diplopia (double vision); esotropia (eye turns inward); and ptosis (drooping of the upper eyelid).

Appellee's eye injury and the resulting impairment falls under the scheduled permanent injury category as set forth in Ark. Code Ann. § 11-9-521 (Repl. 1996). That section provides in part:

> (a) An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule[.]
>
> . . . .
>
> (14) Eye enucleated, in which there was useful vision, one hundred five (105) weeks;
>
> . . . .
>
> (f) Compensation for permanent partial loss or loss of use of a member shall be for the proportionate loss or loss of use of the member.

The test of whether or not an injury falls within the scheduled injury category is primarily a question of law. *See Taylor v. Pfeiffer PLBG & HTG Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983). We have held that partial permanent impairments to the eyes come within the scheduled injury category as set out above in

Ark. Code Ann. § 11-9-521(f), and that claimants are limited to the scheduled benefits. E.g., *Hampton & Crain* v. *Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991); *Emerson Elec. Co.* v. *Powers*, 268 Ark. 920, 597 S.W.2d 111 (Ark. App. 1980). Our prior cases have been very clear in holding that a claimant who sustains a scheduled injury is limited to the applicable allowances set forth in Ark. Code Ann. § 11-9-521, and such benefits cannot be increased by considering wage-loss factors absent a finding of permanent total disability. *Anchor Const. Co.* v. *Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972); *Taylor* v. *Pfeiffer PLBG & HTG Co.*, *supra*; *Haygood* v. *Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982).

The Commission in this case held that the appellee was entitled to benefits for a permanent anatomical impairment of ten percent to the right eye and awarded him wage-loss disability benefits of twenty percent to the body as a whole. When discussing wage-loss the Commission stated:

> [w]e find that claimant has proven by a preponderance of the evidence that he is entitled to benefits for wage loss disability.
>
> At the time of the most recent hearing, claimant was 50 years old. He has a third grade education and his job duties included operating equipment such as forklift or simply pulling levers for a cotton compress; painting; stacking lumber; loading and unloading trucks and boxcars; and general maintenance and other housekeeping chores. Claimant sustained compensable injuries, which caused the above noted impairments to his right eye, as well as to the cervical and thoracic spine. He experiences difficulty raising his arms; problems sleeping; and physical discomfort, which requires prescription pain medication and muscle relaxants. His daily activities are very limited as a result of the continued difficulties with his right eye and cervical and thoracic spine.
>
> . . . .
>
> Based on the above evidence, we find that claimant has proven by a preponderance of the evidence that he is entitled to benefits for wage loss disability in an amount equal to 20% to the body as a whole.

It appears from the Commission's opinion that it may have considered the appellee's eye injury when determining the amount

of wage-loss benefits to which appellee was entitled. As pointed out above, because the appellee's eye injury is scheduled, that injury could not and should not have been considered when determining appellee's wage-loss benefits. *See Clark* v. *Shiloh Tank and Erection Company and Hartford Insurance Company*, 259 Ark. 521, 534 S.W.2d 240 (1976).

We vacate the Commission's opinion and remand for the Commission to determine the extent of wage-loss benefits to which appellee may be entitled without giving consideration to his scheduled eye injury or his noncompensable lumbar injury, which may also have been considered to some extent.

Reversed and remanded.

ROGERS and GRIFFEN, JJ., agree.

MID-CENTURY INSURANCE CO. *v.* Anthony D. MILLER

CA 96-74 935 S.W.2d 302

Court of Appeals of Arkansas
Division III
Opinion delivered December 18, 1996
[Petition for rehearing denied January 15, 1997.]

Compton, Prewett, Thomas & Hickey, P.A., by: *William I. Prewett*, for appellant.

James B. Bennett, for appellee.

JUDITH ROGERS, Judge. This is an appeal from a declaratory judgment in which the trial court held that an insurance policy issued by appellant to appellee was in full force and effect at the time of appellee's loss, even though the policy had been canceled due to the nonpayment of the premium. Appellant raises two issues for reversal. It contends that the trial court erred in finding that the policy had been reinstated and in failing to find that appellee had perpetrated a fraud. We find merit in the first point raised and reverse.

On April 19, 1991, appellee purchased automobile liability insurance from appellant through its agent Lewis Allen Edrington on a 1983, four-door Cadillac Sedan DeVille. For a premium of $150, the policy extended coverage for a six-month period ending on October 19, 1991. Appellee remitted $80 at once, leaving a balance on the premium of $70. On June 4, 1991, appellant mailed a reminder notice to appellee advising him that payment of the remaining balance was due on June 18. Appellee failed to pay the balance due and a notice of cancellation was mailed on July 8 informing him that the policy would be canceled as of July 21, 1991, if payment were not received. Payment was not made, and a final notice of cancellation was mailed to appellee stating that the policy was canceled on July 21. This notice further advised that, if reinstatement were desired, appellee was to send the full amount due "now" and that he would be informed "whether [the] policy has been reinstated, and if so, the exact date and time of reinstatement."

On October 5, 1991, appellant was involved in an automobile accident in the Cadillac. Two days later, on October 7, appellee

went to Edrington's office and remitted $70. In July of 1993, suit was filed against appellee for damages arising out of the October 5 collision. Appellee then filed this suit for declaratory judgment seeking a determination of whether coverage existed under the policy for the accident. In the complaint, appellee alleged that he had not received any notices of cancellation and that appellant had accepted payment on the premium both before and after the accident. After a hearing, the trial court ruled that appellant had presented sufficient proof of the mailing of the cancellation notices to satisfy the requirements of Ark. Code Ann. § 23-89-306 (1987), but found, however, that appellee's payment of $70 on October 7, 1991, was for the balance of the term ending on October 19, 1991, and thus effected the reinstatement of the policy. Consequently, the court ruled that the policy was in full force and effect at the time of the accident and that it was, therefore, a covered event.

■ We do not set aside the findings of fact by a circuit judge sitting as a jury unless they are clearly erroneous. Ark. R. Civ. P. 52(a); *American States Ins. Co.* v. *Tri Tech, Inc.*, 35 Ark. App. 134, 812 S.W.2d 490 (1991). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Henry, Walden & Davis* v. *Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987). Appellant contends that the trial court erroneously found that the policy was reinstated to its original term when payment of the premium was made after cancellation. We agree.

■ There is no question but that the policy was canceled effective July 21, 1991. The receipt evidencing the payment made on October 7 by appellee clearly recites that the policy was "renewed," not reinstated. As was said by Mr. Edrington, the policy was carried forward from that day to January 2, 1992, when it again lapsed because the payment was not sufficient to provide coverage after that date. Despite this evidence, the trial court reasoned that the payment reinstated, not renewed, the policy because no application was required, the policy number had not changed and no second policy was issued. However, with all due respect to the trial court, we are not persuaded by its reasoning because those circumstances are equally consistent with the renewal of a policy. Moreover, there is no indication that the procedure for reinstatement as outlined in the cancellation notice was ever accomplished. Based on

the evidence, we are convinced that the trial court's decision was clearly in error, and we reverse on this issue. Consequently, it is not necessary for us to reach appellant's second argument that appellee perpetrated a fraud by failing to inform its agent of the accident when the October 7th payment was made.

Reversed.

ROBBINS and GRIFFEN, JJ., agree.

John CHRISTIAN *v.* ARKANSAS CRANE & CRAWLER

CA 96-275 935 S.W.2d 1

Court of Appeals of Arkansas
Division I
Opinion delivered December 18, 1996
[Petition for rehearing denied January 22, 1997.]

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

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

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley*, for appellee Garrett Excavating.

OLLY NEAL, Judge. John Christian appeals from an order of the Arkansas Workers' Compensation Commission finding that he was not an employee covered under Arkansas Workers' Compensation Law at the time of his injury, thereby precluding an award of workers' compensation disability benefits. For reversal, appellant contends that the Commission erred as a matter of law in ruling that appellant was not an employee of Arkansas Crane & Crawler and that the Commission's decision was not supported by substantial evidence. We find merit in appellant's argument and reverse and remand.

Appellant sustained an injury on June 2, 1994, when he fell twenty feet from a ladder while working at the residence of Gilbert Garrett. Garrett is an officer in several corporations including Arkansas Crane & Crawler, Garrett Excavating, and Garrett Enterprises. Arkansas Crane & Crawler primarily engages in the purchase and sale of equipment; Garrett Excavating contracts excavation type work, and Garrett Enterprises purchases property for investment purposes. Mr. Garrett pays for work performed on his home through Garrett Enterprises. After the injury appellant received a week's pay from Arkansas Crane & Crawler and an advance of $200 written on the bank account of Garrett Enterprises.

There was some dispute as to the nature of the relationship between the parties. When appellant filed a claim for workers' compensation disability benefits he stated that he was employed by either Arkansas Crane & Crawler, Garrett Excavating, or Garrett Enterprises. At the hearing before the administrative law judge Mr. Garrett acknowledged that he considered appellant to be an employee of Arkansas Crane & Crawler. Appellant testified that at one time he had worked as an independent contractor hired to paint the interior of Mr. Garrett's pool house, which was located adjacent to

his personal residence. After completing the interior of the pool house, appellant went to Mr. Garrett to seek work with one of his companies. Appellant testified that he was seeking stable employment because of his wife's medical condition. Mr. Garrett testified that he could not recall making a definite offer of employment, but did recall offering to allow appellant to work for him at Arkansas Crane & Crawler. Mr. Garrett also testified that he neither promised appellant full time employment, nor did he tell appellant he would not be employed full-time. Mr. Garrett testified that he intended to keep appellant around to work if his capabilities were such that he could perform additional tasks. Under examination by the administrative law judge, Mr. Garrett testified that he considered appellant to be an employee of Arkansas Crane & Crawler.

The administrative law judge dismissed Garrett Enterprises and Garrett Excavating as parties to the action upon finding that Garrett Enterprises and Garrett Excavating had no liability in the matter. The administrative law judge found that appellant was an employee of Arkansas Crane & Crawler, that he had sustained a compensable injury and awarded benefits for an assessed 20% permanent impairment rating to the body as a whole.

Arkansas Crane & Crawler appealed to the Commission, which after conducting a de novo review of the record, reversed the administrative law judge's finding that appellant had sustained a compensable injury and denied appellant's entitlement to any benefits. In reversing the administrative law judge, the Commission specifically found that appellant was not an employee covered under Arkansas Workers' Compensation law of either company. The Commission concluded that appellant continued to be an independent contractor from the time he originally contracted to paint the interior of the pool house until the time he was injured. The Commission also pointed out that the medical report generated by Dr. Robert Johnson immediately after the injury indicated that Dr. Johnson was advised by appellant's wife that appellant was working as an independent contractor. Although appellant and Mr. Garrett both testified that appellant was an employee of Arkansas Crane & Crawler, the Commission found that the testimony was not dispositive of the issue, but instead constituted evidence to be considered in reaching its decision of whether appellant was an employee.

■ In reviewing cases on appeal from the Commission, we affirm the Commission's decision if supported by substantial evi-

dence. Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Harper* v. *Hi-Way Express*, 51 Ark. App. 183, 912 S.W.2d 21 (1995). A decision of the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Id.*

Pursuant to Ark. Code Ann. § 11-9-102(10)(A), "Employee means any person, ... employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied; but excluding one whose employment is casual and not in the course of the trade, business, profession or occupation of his employer...."

In the case at bar, the Commission had before it a statement from the president of Arkansas Crane & Crawler that appellant was considered an employee of that entity, even though he did not know how long appellant would be employed. Appellant received a W-2 form from Arkansas Crane & Crawler and was paid on an hourly basis. Also there is evidence that when appellant worked as an independent contractor he received two checks as payment for his services, rather than being paid $15 per hour as he was when he painted the exterior of the pool house. The evidence clearly indicates that appellant was an employee of Arkansas Crane & Crawler and that the work he performed was in the course of the business of his employer.

Pursuant to Ark. Code Ann. § 11-9-102(12)(A)(ii), employment means:

> (a) Every employment in the state in which three (3) or more employees are regularly employed by the same employer in the course of business except:
>
> (ii) An employee employed to do gardening, maintenance, repair, remodeling, or similar work in or about the private home of the person employing the employee.

The Commission found that even if it determined appellant to be an employee of Arkansas Crane & Crawler he would not satisfy the definition of "employment" because he was employed to work at Garrett's residence.

The testimony of Mr. Garrett, appellant and appellant's brother

supported the contention that appellant was employed by Arkansas Crane & Crawler. Mr. Garrett testified that as an employee of Arkansas Crane & Crawler appellant was employed to perform work which included painting the building which housed Arkansas Crane & Crawler and some of the machinery that was in need of repainting. When appellant reported to work at Arkansas Crane & Crawler to paint the inside of the building he could not because there were trucks inside of the building that were being repaired and could not be moved. Mr. Garrett testified that once appellant reported to the job site, he did not want to send him home because he had had a difficult time getting someone to work there. Once appellant was at the job site, according to Mr. Garrett, he was sent to Garrett's personal residence to paint the exterior of his pool house. Mr. Garrett's personal residence is located only a few hundred yards from Arkansas Crane & Crawler.

The Commission suggests that since appellant was injured while painting at Garrett's personal residence his employment is not covered under our workers' compensation law. If, in fact, appellant's primary purpose for being at the Arkansas Crane & Crawler site was to paint the exterior of the pool house we would be inclined to agree. However, as in the instant case, where an employee reports to his designated place of employment and is then sent to his employer's personal residence to make repairs, we cannot find that work done in such a manner is the worker's employment.

■ We believe that the evidence supports a finding that appellant was at all relevant times an employee of Arkansas Crane & Crawler. It would appear that the only reason that appellant was at Mr. Garrett's residence was because he had been instructed to go there because he could not work at his place of employment, Arkansas Crane & Crawler. We believe that based upon the evidence, it is clear that fair-minded persons could not have reached the same conclusion as the Commission. We accordingly reverse and remand for an award of benefits consistent with this opinion.

Reversed and remanded.

STROUD and PITTMAN, JJ., agree.

SPARKS REGIONAL MEDICAL CENTER and Holt-Krock Clinic *v.* Robert S. BLATT

CA 95-1361 935 S.W.2d 304

Court of Appeals of Arkansas
Division II
Opinion delivered December 18, 1996
[Petition for rehearing denied January 15, 1997.]

Warner, Smith & Harris, PLC, by *G. Alan Wooten* and *Kathryn Stocks Campbell*, for appellants.

Mark E. Ford, for appellee.

WENDELL L. GRIFFEN, Judge. Appellee, an attorney, filed suit to recover an attorney's fee based on the theories of quasi-contract and unjust enrichment. On cross-motions for summary judgment, the circuit court judge granted the appellee's motion and awarded the fee. We conclude that the grant of summary judgment was in error; therefore, we reverse and remand.

Joe H. Bell underwent major surgery at Sparks Regional Medical Center, one of the appellants herein. Bell was a beneficiary on his wife's health-insurance plan, which was self-funded by her employer, Crawford Memorial Hospital, and administered by Health Management Associates ("HMA"). One of the cost-saving features of the health plan called for all surgeries to be performed at Crawford Memorial. HMA refused to pre-certify Bell for admission to

Sparks. For reasons unclear in the record, he was admitted anyway and incurred medical expenses totaling $53,983.54. Bell also incurred an additional $2,847.27 in medical expenses at the Holt-Krock Clinic, the other appellant herein. HMA denied payment for both the Sparks and Holt-Krock bills totaling $56,830.81.

Soon after his discharge from the hospital, Bell retained the appellee to represent him in a suit against HMA for the denial of his medical claim. Bell and the appellee eventually signed a one-third contingency-fee agreement. On October 17, 1991, within five weeks of Bell's discharge from the hospital, the appellee filed a complaint in Bell's behalf against HMA in federal district court. Over the next few months, Bell's wife made at least two contacts with Sparks, offering assurances that the bill would be paid by HMA. On March 27, 1992, Bell's wife informed Sparks that HMA would not pay the outstanding amount, and she suggested that Sparks file a claim with Medicare. On March 30, 1992, Sparks filed a claim with Medicare and received partial payment in the amount of $11,155.00. By accepting this Medicare payment, Sparks evidently waived any action it might otherwise have had against Bell for the balance of the bill.

Just before the trial in federal court, Bell and HMA settled the case for $56,830.81 — the precise amount owing to Sparks and Holt-Krock. When a dispute arose over who should be included as payees on the settlement checks, HMA filed an interpleader action. The district court held that the money in question was properly characterized as "insurance proceeds" and, because Bell had executed viable assignments of any insurance proceeds received to Sparks and Holt-Krock, the entire amount of the settlement should go to them. This characterization of the settlement money as insurance proceeds was also confirmed in a related bankruptcy action[1], and both the district court and the bankruptcy court were affirmed by the Eighth Circuit Court of Appeals. In an unpublished per curiam opinion, the Eighth Circuit had this to say about attorney's fees:

In the District Court, counsel took the position that the fee

[1] In September, 1992, Bell filed a voluntary bankruptcy action. He was represented by the appellee in the bankruptcy proceeding and there contended that the interpled monies belonged to the bankruptcy estate rather than Sparks or Holt-Krock.

> matter was not properly an issue in these cases, and we agree. Our action in these appeals is without prejudice to whatever rights the parties may have with respect to the fee matter. Unless the parties can come to an agreement, these rights will have to be determined in some other appropriate proceeding.

In re Joe Hughes v. *Sparks Regional Medical Ctr., et. al.*, Nos. 93-4051WA, 93-4055WA, slip op. at 3 (8th Cir. June 28, 1994).

The appellee then filed the action that is the subject of this appeal in the circuit court of Sebastian County. In his complaint, the appellee contended that he was entitled to a reasonable attorney's fee "for securing payment" of his client's indebtedness to Sparks and Holt-Krock. In its summary judgment decision, the trial court reasoned that the appellants were subject to a quasi-contract because they failed to pursue their own claims against HMA and knowingly accepted the benefits of the appellee's legal services, which were solely responsible for producing the recovery. Sparks and Holt-Krock were, therefore, held to have been unjustly enriched and were ordered to pay their pro rata amounts of a $15,225.27 fee to appellee.

The standard of review of a summary judgment is whether the evidentiary items presented by the moving party in support of the motion left a question of material fact unanswered and, if not, whether the moving party is entitled to judgment as a matter of law. *Nat'l Bank of Commerce* v. *Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996). The appellate court views all proof in the light most favorable to the party opposing the motion, resolving all doubts and inferences against the moving party. *Id.* Here, none of the material facts are in dispute; however, we cannot say that the appellee was entitled to judgment as a matter of law. Resolving all doubts in favor of the appellants, we are convinced that, to the extent they were enriched by the appellee's legal services, the enrichment was not unjust.

In the case of consensual contracts, the agreement defines the duty, while in the case of *quasi*-contracts the duty defines the contract. *Road Improvement Dist. No. 7* v. *St. Louis-San Francisco Ry. Co.*, 172 Ark. 368, 288 S.W. 884 (1926) (emphasis in original). The duty which thus forms the foundation of a *quasi*-contractual obligation is frequently based on the doctrine of unjust enrichment.

Id. (emphasis in original).

A quasi-contract is not a contract; it is an equitable remedy. We have defined quasi-contracts this way:

> Quasi or constructive contracts (commonly referred to as contracts implied in law) are obligations which are imposed or created by law without regard to the assent of the party bound, 'on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contractu. They rest solely on a legal fiction and are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy, and the obligation arises not from consent, as in the case of true contracts, but from the law or natural equity. Such contracts rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do.'

Jackson County Grain Coop. v. *Newport Wholesale Elec. Inc.*, 9 Ark. App. 41, 652 S.W.2d 638 (1983) (citing *Dunn* v. *Phoenix Village, Inc.*, 213 F. Supp 936 (W.D. Ark. 1963). The doctrine of "unjust enrichment," that a person shall not be allowed to profit or enrich himself inequitably at another's expense, is not contractual, but is equitable in nature. *Klein* v. *Jones*, 980 F.2d 521 (8th Cir. 1992). The appellee reminds us in his brief that unjust enrichment and quasi-contract are equitable remedies founded upon an implied agreement to give reasonable value for services performed, and upon the principle that it would be unjust to allow the party receiving the benefit of such services to accept them without paying for them. *See Purser* v. *Kerr*, 21 Ark. App. 233, 730 S.W.2d 917 (1987).[2]

Unjust enrichment is

> a general principle underlying various legal doctrines and

[2] We note here that although the appellee sought what is essentially equitable relief in a court of law, neither party raised a jurisdictional challenge in the circuit court or on appeal. Nor do we choose to raise it now even though it is within our prerogative to do so. *See Coran* v. *Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988); *Estate of Puddy* v. *Gillam*, 30 Ark. App. 238, 788 S.W.2d 957 (1990) (Jennings, J., dissenting).

> remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.

66 Am. Jur. 2d, *Restitution and Implied Contracts*, § 3 (1973).

The phrase "unjust enrichment" does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so. *Id.* (1996 Supp. citing *Lauriedale Assoc., Ltd.* v. *Wilson*, 7 Cal. App. 4th 1439, 9 Cal. Rptr. 2d 774 (1992). To find unjust enrichment, a party must have received something of value to which he was not entitled and which he should restore. *Duckworth* v. *Poland*, 30 Ark. App. 281, 785 S.W.2d 472 (1990). However, there must be some operative act, intent, or situation to make the enrichment unjust and compensable. *Id.* The courts will imply a promise to pay for services only where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary. *Id.* One who is free from fault cannot be held to be unjustly enriched merely because he has chosen to exercise a legal or contract right. *Whitley* v. *Irwin*, 250 Ark. 543, 465 S.W.2d 906 (1971).

The facts show that the appellee and his client executed a contingency-fee agreement covering "all amounts recovered." The agreement also provided that "[a]ll medical expenses and charges of any nature made by doctors in conjunction with the above-mentioned claim are not 'litigation costs' and will be paid by client out of his recovery." The appellee, presumably with his client's approval, settled the federal lawsuit against HMA for the exact amount of his medical expenses: $56,830.81. This settlement made no allowance for attorney fees. When this amount was subsequently interpled, the federal judge made no allowance for attorney fees. The U.S. Court of Appeals for the Eighth Circuit mentioned attorney's fees, but failed to reach the merits of that issue. All told, three federal courts (the bankruptcy court, the district court, and the Eighth Circuit Court of Appeals) agreed that the appellants were simply creditors who deserved to receive full payment of their debt, given the fact that a settlement was reached for the full amount and that

assignments had been executed in the appellants' favor.

■ In the instant action, the trial court agreed with the appellee's unjust-enrichment theory and granted summary judgment, relying, in part, on the appellants' failure to become involved in the federal litigation. We disagree because several undisputed facts are sufficient to raise the evidentiary posture of this case out of the realm of summary judgment for the appellee. First, the appellants' failure to become actively involved in the litigation initiated by appellee is understandable. They were told more than once by Bell's wife that the unpaid bill would be soon resolved. More importantly, their position as a creditor was protected, at least to some extent, by the assignments executed by Bell. In addition, the appellee conceded in his pleadings below that the federal lawsuit was initiated not to benefit the appellants, but to relieve his client of a substantial financial burden.[3] In that sense, the appellee won his case: he succeeded in enabling his client to avoid a large debt. As the subsequent bankruptcy proceeding revealed, the appellee's client was evidently in no position to pay a $56,000 medical bill out-of-pocket. For purposes of the fee agreement between the attorney and his client, there was no amount "recovered" by the client. As a result of the interpleader action, the settlement money flowed straight to the appellants.

■ Courts should be hesitant to employ a quasi-contractual theory of recovery where an underlying express contract already exists and fairly distributes the risks among the parties involved. *See Moeller* v. *Theis Realty, Inc.*, 13 Ark. App. 266, 683 S.W.2d 239 (1985). As with all litigation, there also existed the risk of no recovery at all. Therefore, the appellee here obtained a good result — indeed, the best result — for his client. Because the case was

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[3] In another case with very similar facts, two attorneys filed suit seeking to recover a fee based on a quantum meruit theory. They represented two police officers who were acquitted of wrongdoing in separate jury trials. The attorneys then sued the city and various city officials claiming that the officers' acquittals also benefitted the city. An Ohio appellate court rejected their claim, holding that the two police officers were the real beneficiaries of the legal services performed by the attorneys; any benefit flowing to the city was "incidental." *Norton v. City of Galion*, 573 N.E.2d 1208 (1989).

While the benefit received by the appellants here may be more than "incidental," the point of the *Norton* holding is that, for quantum meruit purposes, the primary beneficiary of an attorney's work is the client, not some third party who also happens to gain from the outcome. The attorney still must look primarily to his client for his fee.

settled, it cannot be said the attorney, who must have been somewhat skilled in negotiations of this kind, was somehow unfairly denied a fee. He simply failed to protect his own interest in obtaining a fee while he was also protecting his client's interest.

The summary judgment must also fail because any enrichment enjoyed by the appellants was not unjust. As creditors, the appellants were entitled to their recovery and they were not, in some equitable sense or otherwise, bound to restore it. There was no operative act, intent, or situation on the part of the appellants to make the enrichment unjust, and, as just discussed, their *failure* to act is an unsatisfactory basis for this theory of recovery. *Duckworth, supra.* The contingency-fee arrangement was executed with Bell, not the appellants; thus, the appellee had no reasonable expectation of payment from the appellants. *Id.* The appellants cannot be considered at fault for not intervening in the federal lawsuit prior to the interpleader action; in fact, they were well within their legal rights to stand aside while the appellee and his client initiated the suit, even though the appellants stood to gain from it as well. *Whitely, supra.*

The appellee cites several cases purporting to uphold the application of unjust enrichment and quasi-contract in cases involving subrogation and the common-fund doctrine. Most of these cases are inapposite because they do not rest on the principles of unjust enrichment or quasi-contract at all. The attorney's fee issues in the subrogation cases turn on the application of an attorney's lien, which is specifically provided for by statute. *See e.g., Hatten* v. *Little Rock Dodge,* 47 Ark. App. 147, 886 S.W.2d 891 (1994); *Continental Cas. Co.* v. *Sharp,* 312 Ark. 286, 849 S.W.2d 481 (1993); *Daves* v. *Hartford Accident & Indem. Co.,* 302 Ark. 242, 788 S.W.2d 733 (1990); *Northwestern Nat'l Ins.* v. *American States Ins.,* 266 Ark. 432, 585 S.W.2d 925 (1979). As for the common-fund cases, one case never mentions quasi-contract, unjust enrichment, quantum meruit or any other similar theory upon which the attorney's fees were awarded. *Pledger* v. *Bosnick,* 306 Ark. 45, 811 S.W.2d 286 (1991). In a second cited common-fund case, although a quantum meruit theory was upheld by the Arkansas Supreme Court to support an award of attorney's fees, it is clear that the court relied on the unusual nature of common-fund cases to justify the result. *Powell* v. *Henry,* 267 Ark. 484, 592 S.W.2d 107 (1980). Perhaps most importantly, *Powell* centered on the question of the proper amount of

attorney's fees, not whether a fee should be paid in the first instance. The court in *Powell* noted that that case was a class action involving thousands of electric ratepayers and a substantial amount of money, and further that a reduction in the fee could discourage attorneys from accepting these unusual but important cases. 267 Ark. at 488, 592 S.W.2d at 109. The dynamics of the instant case are quite different. We believe the application of rules from common-fund cases stretches the analogy too far.

The Arkansas case most on point to the situation before us is *Ford Motor Credit Co.* v. *Exchange Bank*, 251 Ark. 881, 476 S.W.2d 208 (1972). There, the supreme court reversed the application of unjust enrichment to a creditor because the creditor had a legal right to the proceeds of the sale of collateral. Although the appellants here were not secured creditors, the general principle of *Ford Motor Credit* is no less applicable. Sparks and Holt-Krock had an undeniable legal right to the insurance proceeds in the amount specifically negotiated to pay the debt in full. Apparently, this is why the proceeds were assigned to them.

Finally, our conclusion in this case is in accord with the well-settled American rule that attorney's fees are not allowed except when expressly provided for by statute. *Continental Cas. Co.* v. *Sharp, supra.* The appellee has directed us to no statutory authority to support his fee award and, based on our discussion above, the facts of this case cannot support an award based on a quasi-contractual theory, especially under our standard of review for summary judgment. We need not address the appellants' other points. We reverse and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

PITTMAN and ROBBINS, JJ., agree.

Paul CALCAGNO *v.* SHELTER MUTUAL INSURANCE COMPANY and Bill Bledsoe

CA 95-1047 934 S.W.2d 548

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996
[Petition for rehearing denied January 22, 1997.]

Q. Byrum Hurst, Jr., for appellant.

Matthews, Sanders, & Sayes, by: *Margaret M. Newton* and *Roy Gene Sanders*, for appellees.

JOHN MAUZY PITTMAN, Judge. Paul Calcagno appeals from an order of the Garland County Circuit Court dismissing his complaint.[1] We find no error and affirm.

Summary judgment under Rule 56 of the Arkansas

[1] Appellees' motion to dismiss was treated as one for summary judgment. Ark. R. Civ. P. 12(b)(6).

Rules of Civil Procedure is proper when there is no genuine issue as to a material fact and the moving party is entitled to summary judgment as a matter of law. *Skaggs* v. *Johnson*, 323 Ark. 320, 915 S.W.2d 253 (1996). All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.* Where the operative facts of the case are undisputed, as here, we simply determine 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, 914 S.W.2d 303 (1996).

The facts are undisputed. Prior to January 1990, appellant applied for automobile insurance with appellee, Shelter Mutual Insurance Company, through its agent Bill Bledsoe. Appellant stated that he told Bledsoe that he wanted "full" coverage and that Bledsoe mentioned underinsured motorist coverage to him. Appellant was involved in a motor-vehicle accident on January 11, 1990, and first learned that he did not have underinsured motorist coverage when he sought to collect benefits. Appellant filed suit against Shelter Insurance on February 22, 1993, and later amended his complaint to include Bledsoe, asserting that Bledsoe was negligent and that as a matter of law he had an implied contract for underinsured motorist coverage pursuant to Ark. Code Ann. § 23-89-209(a) (Supp. 1987).[2] Appellees filed a motion to dismiss stating, in part, that the action was barred by the statute of limitations.

Because we find that the cause of action is barred by the three-year statute of limitations for actions based on an implied contract, we do not reach appellant's argument that it is the insurance agent's responsibility to apprise a policyholder of underinsured motorist coverage. Ark. Code Ann. § 16-56-105(3) (1987).

In *Flemens* v. *Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996), the court stated that the statute of limitations for an insurance agent's negligence commences at the time the negligent act occurs, in keeping with the traditional rule in professional malpractice cases. Thus, appellant's claim is barred by the three-year statute of limitations because the statute commenced when Bledsoe took

[2] By virtue of Act 209 of 1991, this statute was amended to require that the policyholder reject in writing underinsured motorist coverage. Appellant purchased his policy prior to this requirement taking effect.

appellant's application for insurance prior to the January 11, 1990, accident. Appellant filed his suit in February 1993, which was after the statute had run. We find that the court was correct in dismissing the complaint.

JENNINGS, C.J., and STROUD, J., agree.

MAYFIELD, ROGERS, and NEAL, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I respectfully dissent from the opinion of the majority in this case affirming the circuit court's dismissal of appellant's complaint. The majority holds that appellant's cause of action is barred by the three-year statute of limitations for actions based on an implied contract. In doing so, the majority relies upon *Flemens* v. *Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996), which held that the statute of limitations for an insurance agent's negligence begins at the time the negligent act occurs, and the majority reasons that appellant's claim in the instant case is barred because the statute of limitations began when the agent took appellant's application for insurance. I do not agree because I do not think that negligence is the only cause of action in this case. I think the other cause of action involved in this case is based upon an implied contract, and limitations did not start on that cause of action until it was determined that the tortfeasor in this case was uninsured.

It is undisputed that the appellant purchased automobile insurance from the appellee insurance company but there is a dispute as to whether he was informed about the availability of underinsured motorist coverage as required by Ark. Code Ann. § 23-89-209. In any event, the policy was issued without underinsured motorist coverage. On January 11, 1990, appellant was involved in an automobile accident with Pamela Dehart, and on January 24, 1992, Ms. Dehart's insurance company settled with appellant for the policy limits of $25,000. Appellant's damages were in excess of that amount and he tried to collect under his underinsured motorist coverage. The appellee insurance company denied the claim and appellant filed suit on February 22, 1993.

After filing an answer, the appellee filed a motion to dismiss, which was treated as a motion for summary judgment, and the motion was granted. The majority recognizes that summary judgment should not be granted if there is a genuine issue as to a material fact; however, the majority hold that the operative facts are

undisputed, and the question is one of law. Not so, says the appellant.

The first issue in this case is whether appellant had underinsured motorist coverage. At that time Section 1, of Act 335 of 1987, codified as Ark. Code Ann. § 23-89-209(a) (1987), provided:

> SECTION 1. Every insurer writing automobile liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicles in this State, shall make available to the named insured underinsured motorist coverage which enables the insured or the insured's legal representative to recover from the insurer the amount of damages for bodily injury or death to which the insured is legally entitled from the owner or operator of another motor vehicle, with coverage limits equal to the limits of liability provided by such underinsured motorist coverage to the extent such coverage exceeds the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle.

This statute was amended by Act 209 of 1991 to provide that underinsured motorist coverage shall be provided to the named insured *unless rejected in writing* by the insured. The appellee argued and the majority agrees that appellant purchased his policy prior to this requirement taking effect.

However, in *Shelter Mutual Insurance Co.* v. *Irvin*, 309 Ark. 331, 831 S.W.2d 135 (1992), the Arkansas Supreme Court said: "This case requires our interpreting Act 335 of 1987, codified as Ark. Code Ann. 23-89-209 (1987), which provides that every insurer writing liability insurance in Arkansas on any motor vehicles in the state shall make available underinsured motorist coverage to their named insureds." In that case, the appellee's automobile was struck by a vehicle whose driver was insured by Farmers Insurance Group with a policy bearing liability limits of $25,000 per person. The opinion states: "Appellee's total damages were $42,500, and upon receiving policy limits of $25,000 from Farmer's, appellee became underinsured in the amount of $17,500." Appellee was insured by Shelter, and the accident occurred after Act 335 became effective, but his policy contained no underinsured motorist coverage. After Shelter denied payment, the appellee brought suit alleging that underinsured coverage in the amount of $17,500 should be implied

by operation of law. The trial court agreed and Shelter appealed.

Our supreme court agreed with the trial court's implying underinsured coverage by operation of law, and affirmed the trial court. In doing so, the supreme court discussed Act 335 of 1987 and its subsequent amendments by Acts 209 and 1123 of 1991, and said:

> [T]he General Assembly attempted to ensure no misinterpretation would result so as to exclude insureds from receiving these new and important benefits provided by underinsured coverage.

309 Ark. at 335, 831 S.W.2d at 137-38.

Likewise, in the instant case Act 335 did not contain the "unless rejected" requirement to decline underinsured coverage at the time appellant purchased his policy, but as our supreme court said in *Shelter Insurance*, "the General Assembly clearly set out in the preamble of the Act [335] that it intended the enactment to require insurers to *offer* underinsured motorist coverage to insureds purchasing automobile liability policies." 309 Ark. at 334, 831 S.W.2d at 137. Although the majority opinion does not reach the point of whether there was a genuine issue of fact about the insurance agent having complied with the statute by making underinsured motorist coverage *available* to the appellant at the time he purchased the policy in this case, the trial court held that underinsured coverage was made available to the appellant because he knew the company had such coverage. However, the appellant alleged, in response to appellee's motion to dismiss, that he also told the agent he wanted the maximum coverage. *Shelter Insurance, supra,* held that the trial court should have *implied* underinsured coverage under the circumstances there. It is my position that there was a genuine issue of fact to be decided on this point in the instant case, and summary judgment should not have been granted.

The second issue in this case relates to the statute of limitations. Ark. Code Ann. § 16-56-105(3) (1987) provides that actions on implied contracts must be brought within three years after the cause of action accrues, and a cause of action accrues the moment the right to commence an action comes into existence. *Courtney* v. *First National Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989). However, underinsurance does not apply until it is determined whether the tortfeasor is in fact underinsured. *See State Farm Mutual Automo-*

bile Ins. Co. v. *Beavers*, 321 Ark. 292, 901 S.W.2d 13 (1995), where the court said:

> Stated another way, "it is practical and pure common sense that underinsurance should not [apply] until it is determined whether the insured is in fact underinsured."

321 Ark. at 296-97, 901 S.W.2d at 16. The case of *State Farm Mut. Auto Ins. Co.* v. *Thomas*, 316 Ark. 345, 871 S.W.2d 571 (1994), is cited in support of that statement.

Here, appellant settled with the tortfeasor on January 24, 1992, and at that time it was determined the appellant was underinsured and appellant's cause of action accrued. Appellant filed suit on February 22, 1993, well within the three-year statute of limitations, and the majority is wrong in holding that appellant's cause of action is barred, as a matter of law, by limitations.

I think the majority's real error comes from its insistence that the appellant's cause of action is founded on negligence by the insurance company and/or its agent. It is true that such an allegation is made in appellant's complaint. But the complaint also alleges that the appellee insurance company "has breached its contract with the plaintiff and has failed to provide him with the insurance requested and to which they are obligated to provide him under Arkansas law." This, I think, is sufficient to state a cause of action on an implied contract.

Appellant's abstract of this complaint is a little less clear on this point, but the abstract does say: "Shelter is obligated under Arkansas Law to provide underinsured motorist coverage unless rejected in writing by Appellant. There was no written objection [sic]. Shelter refused to pay for the damages in excess of the settlement with the tortfeasor and breached the contract."

Moreover, the motion to dismiss, which was treated as a motion for summary judgment, is abstracted by the appellant as stating, in part, "Appellant's cause of action is based upon an implied contract and the Statute of Limitations is three years." And in response to the motion, the appellant, as abstracted, asserted that "Shelter's motion to dismiss is without merit and should be denied." Also, in the brief in support of the response, the appellant, as abstracted, stated in part, as follows:

> Under A.C.A. 23-89-209 notice of underinsured mo-

> torist coverage must be provided. Absent such notice, the coverage has been implied by the Courts. Appellant's deposition indicates that he requested full coverage. Bledsoe states in his deposition that he did not inform Appellant about the underinsured coverage. Since the coverage was never offered, the coverage is implied by law.
>
> The Statute of Limitations is three years but the date the Statute of Limitations begins to run is from the date of the settlement with the tortfeasor. The settlement with the tortfeasor was January 24, 1992. The original complaint was filed on February 22, 1993 which was well within the Statute of Limitations.

It is clear that the appellee insurance company was aware that the appellant claimed liability under an implied contract and that he contended this cause of action arose at the time of the settlement with the tortfeasor.

I would reverse and remand because there is a genuine issue of fact as to whether the insurance company made underinsured motorist "available" to the appellant; therefore, summary judgment was not proper.

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

Cynthia DUKE *v.* REGIS HAIRSTYLISTS

CA 95-1337 935 S.W.2d 600

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996

The Whetstone Law Firm P.A., by: *Gary Davis*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant, Cynthia Duke, filed a claim for benefits alleging that she developed carpal tunnel syndrome early in 1994 as a result of her job with the appellee, Regis Hairstylists. On *de novo* review, the Commission denied and dismissed the claim, finding that appellant failed to establish her injury with medical evidence supported by objective findings. On appeal, appellant contends that there were objective findings sufficient to establish a compensable injury. We disagree, and we affirm.

Arkansas Code Annotated § 11-9-102(5)(D) (Repl. 1996) provides that a compensable injury must be established by medical evidence, supported by "objective findings" as defined in § 11-9-102(16). That subsection defines "objective findings" as follows:

> (16)(A)(i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.

> (ii) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.
>
> (B) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty[.]

The facts are not in serious dispute. Appellant was employed as a hairstylist by appellee and, during her employment, developed difficulties with her hands for which she sought medical treatment. The central question in the case at bar is whether her physician's diagnosis of carpal tunnel syndrome is supported by "objective findings" as defined by Ark. Code Ann. § 11-9-102(16).

Dr. Earl Peeples, an orthopedic surgeon specializing in hand surgery, testified concerning the manner in which he arrived at his diagnosis. As abstracted, he stated:

> I conducted a physical examination on April 4 and the conclusions are recorded in the third paragraph of my letter: "On examination the patient is in no acute distress. The examination of the hands reveal strongly positive left and mildly positive right Tinel's sign. She has a positive compression test on the left. Hyperextension and hyperflexion tests also tend to cause discomfort and numbness of the median nerve distribution. This patient has classic findings of carpal tunnel syndrome."
>
> The first test conducted was a Tinel's test. . . . The Tinel's test is an indicator of irritated or damaged nerve fibers. When you tap on the area, the patient generally describes a tingling or electrical sensation out to where the nerve goes. . . . You tap along the nerve path and wait for the patient to respond. I also tap in some areas that are not in the nerve pathway so that if the patient is not being totally straightforward with me, I give them an opportunity to report areas that would be misleading. So I don't tell the patient what to expect. I tap in a variety of areas and ask them if they feel any particular sensation. If that correlates

with the path of the median nerve, then that's considered a positive Tinel's test.

I also did a positive compression test. The compression test is done by placing two fingers over the median nerve just above or at the edge of the ligament and holding additional pressure. In a normal nerve, no numbness will be caused. In a nerve that is under pressure and has carpal tunnel syndrome, usually within twenty seconds it will become positive and there will be tingling in the median nerve distribution. In her case the test was positive. I also did hyperextension and hyperflexion tests. These tests are done for specific sensations and usually describing the light tingling.

I did not need to perform EMG or nerve conduction studies on Ms. Duke to confirm the diagnosis of carpal tunnel syndrome. I was able to make the diagnosis based on her physical exam. I did not feel the tests were needed.

Based on our review of the evidence, we hold that the Commission correctly found that the appellant failed to establish her injury with medical evidence supported by objective findings. The results of each of the tests performed by Dr. Peeples were based on the patient's description of the sensations produced by various stimuli. Such descriptions are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. Ark. Code Ann. § 11-9-102(16)(A)(i) (Repl. 1996).

We are not unmindful of appellant's argument that the findings obtained by Dr. Peeples' testing were objective findings because the tests contained various safeguards to detect malingering and ensure reliability. Dr. Peeples testified:

Q. You were aware of the fact, probably, that in 1993 the Arkansas Legislature passed a new Workers' Compensation Act, were you not?

A. Yes, sir.

Q. Doctor, let me ask you one area that the Legislature has indicated in the Act that we are required to prove with respect to compensability of workers' compensation claims. The Legislature says, according to Act 796 of 1993, that a compensable injury must be established by medical evidence

supported by objective findings. Objective findings are then described as those findings which cannot come under the voluntary control of the patient.

Now, with that in mind, Doctor, is it your opinion that your diagnosis of carpal tunnel syndrome for Ms. Duke is supported by objective findings?

A. Yes, sir.

Q. Can you tell us that those objective findings are?

A. The positive Tinel's test, the positive compression test, the positive hyperflexion and hyperextension test.

Q. Those are tests that are, in your opinion, reflecting findings that are out of the voluntary control of the patient; is that correct?

A. Well, I think it's important to understand that the system can only work if you reasonably assume that people are telling you how their body feels. And to check a nerve or to check many things, you have to ask someone, "Is this tender?"

Now, that is different from the subjective description of, "I have pains that shoot out my ears," or, "I have pains that run down my spine." That is a subjective description.

But if I tap a particular location or if I place a joint in a particular position and say, "Does this hurt as opposed to this position?" then I'm asking for the patient to use their nervous system to tell me what makes them comfortable or uncomfortable. And that is objective. The patient must communicate that to me. Obviously, I cannot perform these tests on a comatose patient.

But those are not subjective in the sense that — subjective findings, such as, "Please bend over and touch the floor," and the patient subjectively won't bend forward. And then you can't assume from that that the back has no motion. That is a different thing than the patient cooperating with the [physician] to produce objective medical data.

The examination of the abdomen, you put pressure on the abdomen and you say, "Well, does it hurt here?" And

then if it hurts, "Does it hurt more when I press in or does it hurt more when I let go?" The classic finding of rebound, which is necessary for the diagnosis of appendicitis, depends on the patient being able to tell you whether it hurts more when you let go or whether it hurts more when you apply direct pressure.

So this is just another similar type examination that the patient and physician, as a team, produce data, and you do some things during the exam to see if the patient is faking. You deliberately exam[ine] some areas that aren't tender, that don't cause symptoms. And if every place you tap on the arm, they say, "Oh, that makes it tingle," then that's not a positive Tinel's test. That's hysteria.

Q. The purpose of conducting the tests that may demonstrate a finding which is inconsistent with what the patient is telling — the purpose of conducting not only the test directly on the nerve that you are particularly concerned about but in other areas on the arm and so forth is to take that finding out of the voluntary control of the patient?

A. Well, it's to weed out malingerers.

The foregoing testimony is typical of the extensive evidence adduced at the hearing to show that the tests performed by Dr. Peeples were reliable and accurate. Nevertheless, we are constrained to reject appellant's argument. In passing Act 796 of 1993, which made far-reaching changes in Arkansas's workers' compensation law, the legislature made it plain that the provisions of that law were to be strictly and literally construed by the Commission and the courts. *See* Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). The General Assembly further declared:

When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physi-

> cal condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

Ark. Code Ann. § 11-9-1001 (Repl. 1996).

Construing the Act strictly, as we must, it is apparent that the tests performed by Dr. Peeples did not produce objective findings within the meaning of § 11-9-102(16)(A)(i). That subsection excludes from the definition of "objective" all findings save those that "*cannot* come under the voluntary control of the patient." (Emphasis added). Despite the evidence tending to show the accuracy and reliability of the tests performed on appellant, it is nevertheless clear that they depended on voluntary responses and that the findings obtained from them could be controlled by a knowledgeable patient. We are consequently obliged to hold that they did not constitute objective findings as defined in Ark. Code Ann. § 11-9-102(16).

Affirmed.

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

MAYFIELD and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority opinion affirming the decision of the Worker's Compensation Commission which held that the appellant had failed to establish her injury with "medical evidence supported by objective findings." Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996) provides that "A compensable injury must be established by medical evidence, supported by 'objective findings,' " defined in § 11-9-102(16)(A)(i) (Repl. 1996) as, "those findings which cannot come under the voluntary control of the patient."

First, it is important to note that all that is involved in this case, at this point, is whether the appellant sustained a compensable injury. That is what the full Commission's opinion states in its first and concluding paragraphs — that the appellant did not establish a compensable injury.

Thus, we are *not* concerned with Ark. Code Ann. § 11-9-102(16)(A)(ii) (Repl. 1996) which says that "when determining physical or anatomical impairment" pain may not be considered, etc.

In the second place, Dr. Earl Peeples, appellant's physician, testified that the Tinel's test, compression test, hyperextension test, and hyperflexion test are objective tests because they have built-in safeguards to disclose dishonest responses from the patient. He illustrated by describing the Tinel's test, in which the doctor taps along the nerve root. If the patient describes a tingling or electrical sensation it is a positive indicator of irritated or damaged nerve fibers. Dr. Peeples said that, without telling the patient what response he expects, he also taps in some areas that are outside the nerve pathway to give the patient the opportunity to report sensations that would be misleading. Dr. Peeples testified:

> I think it's important to understand that the system can only work if you reasonably assume that people are telling you how their body feels. And to check a nerve or to check many things, you have to ask someone, "Is this tender?"
>
> Now, that is different from the subjective description of, "I have pains that shoot out my ears," or, "I have pains that run down my spine." That is a subjective description.
>
> But if I tap a particular location or if I place a joint in a particular position and say, "Does this hurt as opposed to this position?" then I'm asking for the patient to use their nervous system to tell me what makes them comfortable or uncomfortable. And that is objective. The patient must communicate that to me. Obviously, I cannot perform these tests on a comatose patient.

Nevertheless, the majority holds that because these diagnostic tests rely on the patient's verbal descriptions of physical sensations produced by various stimuli, they are under the "voluntary control" of the patient, and are not, therefore, "objective findings." The majority concludes, "Despite the evidence tending to show the accuracy and reliability of the tests performed on appellant, it is nevertheless clear that they depended on voluntary responses and that the findings obtained from them could be controlled by a *knowledgeable* patient." (Emphasis added.)

To the contrary, I think it would take a highly trained, medically sophisticated patient to know the exact nerve path associated with carpal tunnel syndrome.

Although a patient with carpal tunnel syndrome might voluntarily control her responses to pain, assuming she knew the path of the nerve root, she cannot control the pain itself. And, according to Dr. Peeples, it is not even pain that the carpal tunnel patient is expected to report; it is a tingling or electrical sensation. Dr. Peeples said that he considers the tests involved in diagnosing carpal tunnel syndrome objective tests because of the safeguards which are incorporated into them to insure reliability, and that he relies upon these tests to diagnose and treat carpal tunnel syndrome, even though verbal responses from the patient are essential to the diagnosis. I do not see how then we can say these tests are not objective just because the patient must vocalize her responses to stimuli and the words used are in her voluntary control. And I do not think the Arkansas legislature intended that the medical profession should have to do away with reliable and dependable tests in order to diagnose and treat an employee who has sustained an accidental injury on the job.

Therefore, I dissent.

I am authorized to report that ROGERS, J., joins in this dissent.

Lynn Nelson TEAGUE *v.* C & J CHEMICAL COMPANY

CA 95-1114 935 S.W.2d 605

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996
[Petition for rehearing denied January 22, 1997.]

James E. "Jeb" Blount and *H. Oscar Hirby*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Lynn Nelson Teague appeals from an order of the Arkansas Workers' Compensation Commission denying him additional benefits, except spousal nursing care. Appellant contends that the Commission's decision is not supported by substantial evidence and that appellee is estopped from denying benefits. We find no error and affirm.

Appellant sustained a compensable injury in an automobile accident on June 8, 1985. He contends that he is entitled to additional benefits for total loss of vision, dental problems and aggravation of his preexisting diabetes. Appellant also argues that he is entitled to treatment to his eyes and his feet and for a second cervical surgery. He also contends that he is entitled to benefits for spousal nursing care and reimbursement for home modifications.

Appellant was diagnosed with diabetes in 1971 and has been noncompliant with his treatment plan. Dr. Lawson Glover, an endocrinologist, examined appellant in May 1985 and noted complications attributable to his diabetes, such as vision changes and leg numbness. The Commission found that these complications preexisted the June 1985 accident. Dr. Glover opined that as of August 20, 1986, appellant was no longer suffering from diabetic residual effects from the accident, except for his ophthalmological problems. Dr. Thomas Ward agreed with Dr. Glover's opinion. The Commission found that except for diabetic retinopathies, the medical records did not support the contention that the accident affected appellant's diabetes or caused diabetic complications after August 1986.

Dr. J.J. Magie, an ophthalmologist, testified that in February 1985, appellant had diabetic retinopathies in both eyes, and that he saw appellant in February 1984 for iritis, an inflammation of the iris typically seen in advanced cases of diabetes. Dr. Magie testified that trauma can cause a progression of retinopathy if the trauma creates extra pressure on the eye. The Commission found that there was insufficient evidence of increased eye pressure from the accident. Finally, Dr. Magie testified that failure to comply with recommended treatment of the diabetes would also aggravate the retinopathy. The Commission found that appellant did not follow his treatment plan for diabetes before the accident. The Commission

concluded that there was no causal connection between appellant's retinopathies and vision loss and the accident.

Appellant also contends that his foot problems and ulcerations are due to an aggravation of his diabetes precipitated by the accident. The Commission found that appellant began to experience a loss of sensation in his feet due to peripheral neuropathy prior to the accident and that the earliest indication of foot ulcerations was in September 1988. Dr. Glover stated that residual complications to appellant's diabetes caused by the accident did not continue beyond August 1986. Appellant also attributed the amputation of his right toe, caused by stepping on a nail in December 1990, to his vision loss which he contended was the result of an aggravation of diabetes precipitated by the accident. The Commission found that no causal connection existed and that a contrary finding would be based on speculation. The Commission cited appellant's poor control of his diabetes and neglect of foot care prior to the accident.

Appellant underwent cervical surgery in February 1986 which was attributable to his compensable injury. In 1992, appellant had a subsequent cervical surgery, and Dr. Tom Ward said the surgery was not related to appellant's compensable injuries. The Commission declined to award benefits for the second surgery, finding that there was no causal connection to the compensable injury. The Commission noted that appellant testified that his three-wheeler had rolled over him at least twenty times. Appellant said that in October 1992 he first developed numbness and tingling in his arms.

Appellant also attributes his dental problems to his compensable injuries. Prior to the accident, appellant had undergone dental procedures for dental extractions. Dr. James Flanagin testified that the trauma from the accident "may" have caused appellant's dental problems occurring after the accident. The Commission found that appellant failed to prove that his dental problems were caused by or aggravated by the accident.

As to appellant's hearing loss, Dr. Ward stated that appellant had a preexisting peripheral nerve injury which resulted from appellant's poor control of his diabetes.

Appellant further sought benefits for modifications to his house and benefits for a four-wheeler, a walker, a page magnifier and a hot tub. The Commission declined to award benefits stating that none of the items were recommended by a physician except for

the hot tub and that that recommendation was made after the hot tub was purchased.

The administrative law judge awarded compensation to appellant for his wife's nursing services at the rate of $6.00 per hour. The Commission reversed and held that the services be paid at minimum wage. The abstract is devoid of any evidence concerning the current rate of pay for nursing services, and we decline to speculate as to the rate of pay. Administrative agencies such as the Workers' Compensation Commission are better equipped by specialization, insight and experience to analyze and determine such issues. *P.A.M. Transportation* v. *Miller*, 24 Ark. App. 163, 750 S.W.2d 417 (1988); *Allen Canning Co.* v. *McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982). Also, in determining a claim, we expect the Commission to utilize expertise, and we do not interfere with the Commission's actions unless we find that it has acted without or in excess of its authority or that its decision is not supported by substantial evidence. *Allen Canning Co., supra.* Although appellant requested that the spousal services be reimbursed at $6.00 an hour, the Commission has the right to believe or disbelieve the testimony of the claimant or any other witness, and may accept and translate into findings of fact only that portion of the testimony that it deems worthy of belief. *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). Thus, we find no error in the Commission's decision to award compensation for nursing services at the minimum-wage rate.

Lastly, appellant argues that appellee should have been estopped from denying benefits because it did not provide him with notice using form A-29. Additionally, appellant asserts, without any supporting authority, that appellee had a duty to advise him of all benefits available to him under the workers' compensation laws. Appellant raises these arguments for the first time on appeal; thus, we decline to address them. *Couch* v. *First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995). Nevertheless, we note that the administrative law judge found that appellant was provided with the A-29 notice.

When reviewing decisions from the Workers' Compensation Commission, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision. *Couch* v. *First State Bank, supra.* Substantial evidence is such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. If reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.* We also recognize that it is the Commission's duty to weigh the medical evidence as it does any other evidence, and the resolution of conflicting evidence is a fact question for the Commission. *Nix* v. *Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

From our review of the record, we cannot conclude that the Commission's findings and conclusions are not supported by substantial evidence.

Affirmed.

JENNINGS, C.J., and STROUD, J., agree.

ROBBINS, MAYFIELD, and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. Although I have seen many workers' compensation appeals in which the Commission's decision was supported by much stronger substantial evidence, I agree to affirm this case with one exception. Therefore, I must dissent on that point.

The law judge allowed spousal nursing benefits from September 13, 1985, through December 6, 1985, but the Commission reversed this on the basis that the claim had been withdrawn and the law judge made an award for those benefits anyway. However, the Commission did allow spousal nursing benefits from July 3, 1985, to September 12, 1985, but reduced the hours allowed by the law judge to three hours per day and reduced the $6.00 per hour allowed by the law judge to the "minimum wage." I simply cannot agree to this parsimonious reduction of the hourly rate.

The Commission's only explanation for this rate was, "Although the care rendered by her required specialized knowledge, it was not overly complicated." The majority opinion in this case affirms for three reasons: (1) the abstract is devoid of any evidence concerning the current rate of pay for nursing services; (2) administrative agencies are better equipped to analyze and determine issues that come before it than we are; and (3) we do not interfere with the Commission's exercise of its expertise unless it exceeded its authority or its decision is not supported by substantial evidence.

In *Plante* v. *Tyson Foods*, 319 Ark. 126, 127-28, 860 S.W.2d 253, 253-54 (1994), the Arkansas Supreme Court said, "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." And in *Morgan* v. *Desha County Tax Assessor's Office*, 45 Ark. App. 95, 96, 871 S.W.2d 429, 429 (1994), the Court of Appeals said:

> However, this standard must not totally insulate the Commission from judicial review and render this Court's function in these cases meaningless. We will reverse a decision of the Commission when we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. (Citations omitted.)

Introduced into evidence in this case was a letter from Dr. John G. Slater, one of the several doctors who attended the appellant. This letter, addressed "To Whom It May Concern," stated:

> Nelson Teague was involved in a motor vehicle accident in June of 1985. He was on the job at the time. He sustained multiple injuries. After his discharge from the hospital, he required nursing care and this was provided by Mrs. Teague who is a licensed dietician but also is very capable of performing many nursing duties.
>
> For his orthopaedic problems, she provided pin site care for the Hoffman device, administration of medications, cast care including windowing of the cast on one occasion, range of motion physical therapy in a hot tub, and ambulation training after cast removal, and bowel management including removal of fecal impactions and administration of enemas as needed. On one occasion, she took a videotape of Mr. Teague's progress and sent this to me so I could be aware of his progress. She also performed a number of functions in the management of Mr. Teague's diabetes mellitus.
>
> As these functions would have had to be performed by a visiting nurse and I expect that the cost of this would have been covered under his workmans' compensation injury, please give consideration to reimbursing Mrs. Teague for the care that she provided for Mr. Nelson Teague.

In addition, appellant's wife testified as to the nursing care she gave the appellant. She said she had a bachelor's degree from the University of Central Arkansas and was presently employed by the Conway Human Development Center. She had worked in Children's Hospital in Little Rock in the field of nutrition and had helped train children to swallow food. As to the care she administered to appellant, which she described in some detail, it included keeping the pin site dry as Dr. Slater had demonstrated for her to do; managing appellant's bowel program, which she said was more than just helping him on and off the toilet, but involved intermittent catheterization of his bladder as well as irrigation of the rectum; managing his nutrition because he was a diabetic and she was a dietitian; plus keeping his bed comfortable; helping the appellant to use a hot tub, at the doctor's instruction, for relief from pain; and helping appellant to use a wheelchair and to take exercise for motion therapy.

While it is true that the appellant did not introduce any evidence as to the "going rate" for nursing services, and neither did the appellee, the appellant's wife submitted a very detailed claim for her services and asked for $6.00 per hour. Nobody testified that this was excessive, or what would be the more appropriate rate. The Commission simply selected the "minimum wage" without saying what it was, or for that matter, without showing that it even knew what that wage was.

Even though appellant's wife is surely an interested party, this court has said that even the testimony of a party "cannot be arbitrarily disregarded, there must be some basis for it." *See Timms* v. *Everett, Director*, 6 Ark. App. 163, 639 S.W.2d 368 (1982). Neither can the Commission arbitrarily disregard a physician's opinion. *Foxx* v. *American Transportation*, 54 Ark. App. 115, 924 S.W.2d 815 (1996).

I cannot explain the reduction of the hourly rate made by the Commission from $6.00 per hour to "minimum wage" — whatever that is. The Commission's explanation for the reduction is almost contradictory within itself — and since the Commission stated that the care rendered by appellant's wife "required specialized knowledge," it would seem to me that the Commission would use the expertise attributed to it by the majority opinion to allow at least the $6.00 per hour claim.

I do not think that fair-minded persons, based on the evidence in this case, could have reached the decision the Commission reached with regard to $6.00 hourly claim for spousal nursing benefits.

Therefore, I dissent and would modify the Commission's award to allow the $6.00 per hour rate.

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

OLSTEN KIMBERLY QUALITY CARE *v.* Cheri PETTEY

CA 96-77 934 S.W.2d 956

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996
[Petition for rehearing denied January 15, 1997.]

Laser, Wilson, Bufford & Watts, P.A., by: *Frank B. Newell*, for appellant

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

JAMES R. COOPER, Judge. The appellee in this workers' compensation case was employed by the appellant as a nurse's assistant. Her duties required her to care for patients in their homes. She was compensated according to the time she actually spent in each patient's home. She used her own vehicle to travel to the homes but she received no wages for the time spent travelling and was not reimbursed for travel expenses. On April 21, 1994, the appellee was injured in an automobile accident while en route from the appellant's offices to the home of her first patient of the day. The appellee filed a claim for workers' compensation benefits and, on stipulated facts, the Commission held that the appellee's accident constituted a compensable injury under the Arkansas workers' compensation law as amended by Act 796 of 1993. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in concluding that the appellee was injured at a time when employment services were being performed.

Act 796 of 1993 made sweeping changes to the Arkansas workers' compensation law. Among those changes was the redefinition of "compensable injury" so as to exclude injury which was inflicted on the employee at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(5)(B)(iii) (Repl. 1996). In the case at bar, the Commission reasoned that because the appellee's duties necessarily involved travel exceeding travel to and from a regular place of employment, the appellee was performing employment services at the time of her accident.

This is a case of first impression concerning the meaning of "performing employment services" under § 11-9-102(5)(B)(iii). Arkansas Code Annotated § 11-9-1001 (Repl. 1996) provides that:

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. Unfortunately, many of the

> changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

The legislature also changed the law so as to require the Commission and the courts to construe the Act "strictly," Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996), rather than "liberally in accordance with the chapter's remedial purposes" as was the law prior to the 1993 amendment.

■ The Workers' Compensation Commission is an administrative agency, *Ward School Bus Mfg., Inc.* v. *Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977), and, as a general rule, reviewing courts recognize that administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than are courts to determine and analyze legal issues affecting their agencies. *Arkansas Dept. of Human Services* v. *Kistler*, 320 Ark.

501, 898 S.W.2d 32 (1995); *see Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). Therefore, while not conclusive, the interpretation of a statute by an administrative agency is highly persuasive. *Technical Services of Arkansas, Inc.*, v. *Pledger*, 320 Ark. 333, 896 S.W.2d 433 (1995). We are persuaded by the Commission's reasoning in the case at bar.

In reaching its conclusion, the Commission reasoned that, because traveling was an inherent and necessary incident of the appellee's required employment activity, the appellee was performing employment services while en route from her employer's office to the patient's home. We agree. Although we recognize that the appellee was not directly compensated for driving to patients' homes, the payment of compensation is not conclusive to the question of whether employment services are being performed. For example, many workers, such as salesmen, are paid on the basis of commissions, but it is abundantly clear that a salesman who is attempting to make a sale is performing an employment service without regard to whether his attempt is successful.

It is likewise clear that delivering nursing services to patients at their homes is the *raison d'être* of the appellant's business, and that traveling to patients' homes is an essential component of that service. Whatever "performing employment services" may mean in the context of Ark. Code Ann. § 11-9-102(5)(B)(iii), it must include the performance of those functions which are essential to the success of the enterprise in which the employer is engaged. Consequently, we hold that the Commission did not err in concluding that the appellee was performing employment services while en route from the employer's office to the patient's home.

Affirmed.

MAYFIELD, ROGERS, and NEAL, JJ., agree.

JENNINGS, C.J., and STROUD, J., dissent.

JOHN E. JENNINGS, Chief Judge, dissenting. The issue in this case is one of law because the facts were stipulated and are undisputed. Although we have always deferred to the Commission when it decides a question of fact, neither this court, nor the supreme court, has deferred to the Commission when the issue was the interpretation of a substantive workers' compensation statute.

It has long been the law in this state, as well as in most every

other state, that an injury is compensable if it was one "arising out of and in the course of employment." *See, e.g., Barrentine* v. *Dierks Lumber & Coal Co.*, 207 Ark. 527, 181 S.W.2d 485 (1944); *American Red Cross* v. *Wilson*, 257 Ark. 647, 519 S.W.2d 60 (1975). An enormous body of case law has developed interpreting this phrase and in most every instance the interpretation has been guided by the familiar rule that workers' compensation laws are remedial and to be liberally construed.

Act 796 of 1993 made, as the majority says, "sweeping changes to the Arkansas Workers' Compensation Law," among them a requirement that the act be "strictly construed." Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). A strict construction requires that the language of the statute be narrowly construed. *Arkansas Conference Assoc. of Seventh Day Adventist, Inc.* v. *Benton Cty. Bd. of Equalization*, 304 Ark. 95, 800 S.W.2d 426 (1990). Strict construction requires that nothing is taken as intended which is not clearly expressed. *Thomas* v. *State*, 315 Ark. 79, 864 S.W.2d 835 (1993). Strict construction is construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications. *Arkansas State Highway Comm'n* v. *Southwestern Bell Telephone Co.*, 206 Ark. 1099, 178 S.W.2d 1002 (1944), (McFadden, J., dissenting, quoting *Black's Law Dictionary*, 3rd ed. p. 413).

Moreover, the basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Graham* v. *Forrest City Housing Authority*, 304 Ark. 632, 803 S.W.2d 923 (1991). In my view the language of the act leaves no doubt that the General Assembly intended the statute in issue to be narrowly construed. Under a strict construction of the statute the claimant here was injured "at a time when employment services were not being performed." Under the stipulated facts she was using her own vehicle to travel and would not begin earning wages until her arrival at the home of her first patient.

While the Commission's decision is, in the abstract, a reasonable and sensible one and would be entirely supportable under prior law, I do not believe that this injury is "compensable" under current law. The legislature has made its intention clear and I would give effect to that intention. It is, after all, the body charged with the responsibility for making law.

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

Ronald G. SMITH *v.* ARKANSAS EMPLOYMENT SECURITY DEPARTMENT and Land O Frost, Inc.

E 95-132 934 S.W.2d 952

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996

Appellant, pro se.

Allan Pruitt, for appellee.

JOHN B. ROBBINS, Judge. Appellant Ronald G. Smith appeals from the May 31, 1995, decision by the Board of Review which found that appellant was discharged from his last work for misconduct connected with the work, resulting in his disqualification for unemployment benefits for a period of eight weeks pursuant to Ark. Code Ann. § 11-10-514(a)(3) (Repl. 1996). Appellant contends on appeal that the Board's decision disqualifying him from benefits is not supported by substantial evidence. We disagree and affirm.

In January 1995, appellant was employed as a truck driver for Land O Frost, Inc. He requested to be off work for two weeks beginning January 22, 1995, so that he could be with his son and

daughter-in-law for the birth of their baby in February 1995. That request was denied by his employer, but appellant was given permission to take one week off after January 27, 1995. Appellant went to California to be with his daughter-in-law anyway, arriving there on January 25. On February 1, 1995, appellant telephoned his employer and informed the manager that he did not believe that he could be back to Arkansas by February 5, the last day of the two-week period. He returned to work on February 10, 1995, but his employer deemed him to have resigned when he did not appear for work the week of January 22, 1995. The Arkansas Employment Security Department denied appellant benefits pursuant to Ark. Code Ann. § 11-10-513 (Repl. 1996), finding that he voluntarily left his last work without good cause connected with the work. Appellant appealed that decision to the Board of Review, resulting in the modification already mentioned whereby appellant was held to have been discharged on account of misconduct connected with the work.

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. *Pendrix-Wang* v. *Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Greenberg* v. *Director*, 53 Ark. App. 295, S.W.2d (1996). Our review is limited to determine whether the Board could reasonably reach its results upon the evidence before it, and we will not replace our 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).

Arkansas Code Annotated section 11-10-514(a)(1) (Repl. 1996), provides that an individual shall be disqualified from benefits if he is discharged for misconduct in connection with the work. "Misconduct," for the 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). The element of intent must also be determined when assessing whether or not misconduct has occurred. In *Nibco, Inc.* v. *Metcalf & Daniels*, 1 Ark. App. 114, 613 S.W.2d 612 (1981), this

court stated:

> To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

1 Ark. App. at 118, 613 S.W.2d at 614. The issue of misconduct is a question of fact for the Board to determine. *Greenberg* v. *Director, supra.*

In our opinion, the decision of the Board of Review finding that appellant was discharged from his last work for misconduct in connection with the work is supported by substantial evidence.

■ There was proof in the record before the Board that appellant had requested to be off work for two weeks to be with his daughter-in-law, who was having a baby. There was also evidence that appellant's request was denied as to the first week he wanted off, but that he would likely be permitted to take the second week. Notwithstanding the employer's response, appellant took off both weeks. The Board could find that this conduct constituted an intentional or deliberate disregard of appellant's duties and obligations to his employer. *See George's Inc.* v. *Director, supra*; *Perry* v. *Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995); and *Nibco, Inc. v. Metcalf & Daniels, supra.*

Appellant was required by Ark. Code Ann. § 11-10-529(a)(2)(A) to state the ground upon which he sought our review of the Board of Review's decision. In his petition for review appellant acknowledged that he had not quit, but had been discharged from his last job. His complaint is that the Board of Review erred in not receiving the additional evidence of the family emergency that he requested to introduce.

■ Assuming, arguendo, that the Board of Review erred in denying appellant's request to introduce into evidence the two letters that he proffered, such error was harmless. One of these letters was from appellant's son and basically stated the same family

information that appellant testified to before the Appeal Tribunal. The other letter was from Dr. Richard L. Alexander, the obstetrician who attended appellant's daughter-in-law. Dr. Alexander stated that appellant's daughter-in-law had "a slightly elevated blood pressure." This could hardly constitute a family medical emergency which would justify an employee to defy an employer's refusal to give the employee time off to be with the expectant daughter-in-law. Consequently, even if the Board of Review should have received these letters into evidence, it did not constitute prejudicial error.

Because the Board's decision is supported by substantial evidence, we affirm.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

MAYFIELD, STROUD and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. The Board of Review found that appellant was discharged from his last work for misconduct connected with the work, resulting in his disqualification for unemployment benefits for a period of eight weeks pursuant to Ark. Code Ann. §11-10-514(a)(3) (Repl. 1996). This finding was made despite the admission by appellant's supervisor that the employer considered appellant to have voluntarily quit his job when he failed to report for work the week of January 22-28, 1995, because he had gone to California to be with his pregnant daughter-in-law. Because I am convinced that substantial evidence was not presented to support the finding of misconduct, I would reverse and remand.

The findings of fact made by the Board of Review are conclusive upon judicial review if supported by substantial evidence. *Edwards* v. *Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988); *Reddick* v. *Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950). Whether the findings of the Board of Review are supported by substantial evidence is a question of law, and the Court of Appeals may reverse a finding of the Board of Review which is not supported by substantial evidence. *Edwards* v. *Stiles*, *supra*. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Perdrix-Wang* v. *Director, Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

The issue of misconduct is a question of fact for the Board of

Review, and, on appeal, the Board's findings are conclusive if supported by substantial evidence. *A. Tenenbaum Co.* v. *Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990). Yet, it is well-settled in Arkansas that there is an element of intent associated with a determination of misconduct. 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 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).

I would hold that the Board of Review's finding that appellant was discharged because of misconduct in connection with his last work is not supported by substantial evidence. Although the record contains conflicting testimony from appellant and the employer concerning what was said during telephone conversations about his request for time off to be with his son and daughter-in-law, his supervisor testified that appellant phoned him on January 22, 1995, and announced that he was going to California for the birth of his grandchild. The manager testified that he told appellant that his position on the request was unchanged (that appellant was not authorized to be off work), but that if appellant went to California, the decision on his request would be reserved if appellant could document a family emergency. According to the manager, appellant agreed to call back in a week. Appellant phoned on February 1, 1995, ten days afterwards, and stated that the baby had not yet been born. The manager testified that the employer deemed appellant to have quit his job. Indeed, appellant's claim was initially denied on the finding that he voluntarily left his last work without good cause connected with the work.[1]

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[1] Appellant appealed that determination by the Arkansas Employment Security Department to the Appeal Tribunal which found that appellant was deemed by the employer to have resigned when he did not return to work the week of January 22, 1995, and that the evidence was insufficient to show a personal emergency despite appellant's assertion that his daughter-in-law needed a relative with her in the closing days of her pregnancy. Although appellant's appeal to the Board of Review challenged the determination that he voluntarily left his last work, the Board of Review modified the determination of disqualification by holding that appellant was discharged due to misconduct.

I find nothing in the record that shows where appellant was notified that the basis for his disqualification was being considered as misconduct before the Board of Review issued its decision, nor does the record show that the employer alleged misconduct as the basis for discharge so that appellant would have known or had reasonable notice that evidence on that issue was warranted. There is a material difference in a finding of disqualification because one has voluntarily left the last work without good cause connected to the employment and disqualification due to misconduct related to the work. A worker deemed disqualified due to having voluntarily left work shall continue disqualified until he has been *employed* for at least thirty days covered by an unemployment compensation law of Arkansas, another state, or the United States. Ark. Code Ann. § 11-10-513(a)(2). Disqualification due to misconduct is for eight weeks of *unemployment.* Ark. Code Ann. § 11-10-514(a)(3). Because it does not appear that appellant had an opportunity to present evidence on the misconduct issue, or that he even knew that misconduct was a potential ground on which his claim was being considered for denial, I believe that the Board of Review erred by denying his claim on that basis.

Moreover, the record does not support the finding of misconduct. As previously mentioned, appellant's manager testified that the employer deemed the appellant to have resigned. There is no proof that the employer deemed appellant's absence from work as a manifestation of culpability, wrongful intent, evil design, or an intentional or substantial disregard of the employer's interests or the employee's duties and obligations. Rather, Ernie Ritta (appellant's supervisor) testified that when appellant failed to report for work the week of January 22 through 28, 1995, the employer considered him to have voluntarily quit, conditioned on reconsidering its position if appellant was able to document that his presence in California was necessary due to a family emergency. There was no proof that anything fitting the meaning of misconduct occurred. Therefore, I would reverse the Board of Review and remand this case to it for a ruling not inconsistent with this opinion.

I am authorized to state that Mayfield and Stroud, JJ., join in this opinion.

Patsy TRENT and W.W. Trent *v.* KMS, INC., et al.

CA 95-1259 935 S.W.2d 6

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996
[Petition for rehearing denied January 22, 1997.]

Keith Blackman, for appellants.

Womack, Landis, Phelps, McNeill & McDaniel, by: *Mark Alan Mayfield*, for appellee Dale Walker.

Snellgrove, Laser, Langley , Lovett, & Culpepper, by: *Todd Williams*, for appellee KMS, Inc.

JOHN B. ROBBINS, Judge. Appellant Patsy Trent brought a tort action against KMS, Inc. (the owner of a Bonanza Steakhouse in Jonesboro), and Dale Walker, the individual who had recently applied a sealant to the surface of the asphalt parking lot at this Bonanza restaurant. Mrs. Trent alleged that she slipped and fell on the slick asphalt and sustained injuries. She further alleged that her injuries were caused by improper sealing by appellee Dale Walker and the negligence of appellee KMS for allowing her to walk on asphalt that it knew or should have known was slick and dangerous. The appellees moved for summary judgment, which was granted against Mrs. Trent. She now appeals, arguing that the trial court erred in granting summary judgment.[1] We agree and reverse.

In *Renfro* v. *Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996), our supreme court summarized the standards for summary judgment review as follows:

> In these cases, 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 the motion left a material question of fact unanswered. *Nixon* v. *H & C Elec. Co.*, 307 Ark. 154, 818 S.W.2d 251 (1991). The burden for sustaining a motion for summary judgment is always the responsibility of the moving party. *Cordes* v. *Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Lovell* v. *St. Paul Fire & Marine Ins. Co.*, 310 Ark. 791, 839 S.W.2d 222 (1992); *Harvison* v. *Charles E. Davis & Assoc.*, 310 Ark. 104, 835 S.W.2d 284 (1992); *Reagan* v. *City of Piggot*, 305 Ark. 77, 805 S.W.2d 636 (1991). Our rule states, and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law. Ark. R. Civ. P. 56(c); *Short* v. *Little Rock Dodge, Inc.*, 297 Ark. 104, 759 S.W.2d 553 (1988); *see also Celotex Corp.* v.

[1] We attempted to certify this case to the Supreme Court as one presenting a question about the law of torts pursuant to Rule of Supreme Court 1-2(a)(16). However, certification was denied.

Catrett, 477 U.S. 317 (1986).

In Mrs. Trent's complaint against the appellees, she alleged that she and her husband were dining at this Bonanza on December 2, 1989. While walking in the parking lot after dinner, she slipped and fell, suffering injuries. Since the fall, Mrs. Trent has incurred medical expenses and has missed work, and asserted in her complaint that she is now permanently and totally disabled. She alleged that her injures were the result of negligence on the part of KMS and Dale Walker. Specifically, she claimed that KMS was negligent in allowing customers to use a parking lot with a slick surface as a means of ingress and egress to and from the restaurant. Mrs. Trent further claimed that Mr. Walker was negligent because he failed to use sand or a similar agent in the sealant and this failure was a proximate cause of her injuries.

In their answers, both KMS and Mr. Walker admitted that Mrs. Trent had fallen and injured herself on the asphalt. However, both appellees denied any negligence or liability. In addition, both appellees pleaded contributory negligence on account of Mrs. Trent's failure to give proper lookout and exercise ordinary care.

The motion for summary judgment filed by the appellees asserted that Mrs. Trent had submitted no evidence of negligence which would create a question of fact or support a verdict in her favor. The trial court agreed and granted the appellees' motion for summary judgment.

In Mrs. Trent's deposition, she indicated that on the evening that she fell, the parking lot was not well lit and she was walking down an incline. Although it was not raining and the asphalt was not wet, she found it to be very slippery. The deposition of Mr. Walker was also very informative. He stated that he has been in the sealing business for a number of years and that until about 1987 he mixed sand into his sealing compounds. However, he discontinued this practice and when he sealed the Bonanza parking lot in August 1989 he did not use sand. The evidence suggested that it is customary for sealers to use sand for this purpose. Mr. Walker produced an invoice which read, "Caution, sand or slag recommended in all sealer applications." Despite this warning, he failed to use sand when he sealed the Bonanza parking lot. Mr. Walker remembered that the manufacturer said that it may be necessary to mix sand in

the sealant on inclined areas.

Kelly Hale, manager of the Jonesboro Bonanza, also gave a deposition. He stated that between August 1989 and December 1989, when Mrs. Trent fell, at least three other ladies had slipped and fallen in the same area of the parking lot. Before Mr. Walker sealed the lot there had not been a problem with people slipping in this area, and prior to Mrs. Trent's accident KMS had taken no action to remedy the problem.

We find that the undisputed facts of this case did not justify a summary judgment ruling in favor of either KMS or Mr. Walker. Mr. Walker knew that it was customary to combine sand with the sealing agent, yet failed to do so. KMS was apparently aware of prior accidents on the inclined area of the parking lot, yet failed to warn customers of potential danger or attempt to cure the problem. A property owner has a general duty to exercise ordinary care to maintain its premises in a reasonably safe condition for the benefit of invitees. *Dye* v. *Wal-Mart Stores, Inc.*, 300 Ark. 197, 777 S.W.2d 861 (1989). The answers to interrogatories and depositions before the court presented genuine issues as to whether Mr. Walker's actions and KMS's inaction constituted negligence. This should have been a jury determination. Therefore, we reverse the trial court's summary-judgment rulings.

Reversed and remanded.

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

PITTMAN and GRIFFEN, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent from the majority opinion reversing the entry of summary judgment in favor of appellee, KMS, Inc..

It is undisputed that Gem Seal, the manufacturer of the coal tar sealant used by Walker, recommended that sand be added to the mixture to give more traction on an incline, that the area in which appellant fell was on an incline, and that Walker failed to use sand in surfacing the parking lot. However, there was no testimony from the President of Gem Seal, George Mariani, that the absence of sand was the proximate cause of appellant's fall. He said that the absence of sand in the mixture was only one consideration of several that could have caused appellant's fall. He had *no* opinion on that issue and could not say that appellant's fall would have been pre-

vented if sand had been added. Mariani also testified that an engineering study would be required to determine whether sand should have been used on the Bonanza parking lot.

It is established that the mere fact that someone slips and falls does not give rise to an inference of negligence. *Morehart* v. *Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995); *Arkansas Kraft* v. *Cottrell*, 313 Ark. 465, 855 S.W.2d 333 (1993). The plaintiff's description of the surface as slick or slippery alone is insufficient to support a case of negligence. *Black* v. *Wal-Mart Stores, Inc.*, 316 Ark. 418, 872 S.W.2d 56 (1994). Causation is established if reasonable men conclude that it is more probable than not that the event was caused by the defendant. *Hill* v. *Maxwell*, 247 Ark. 811, 814, 448 S.W.2d 9 (1969). However, proximate cause need not be proven with certainty, *Parker* v. *Seaboard Coastline R.R.*, 573 F.2d 1004 (8th Cir. 1978). But, proximate cause cannot be based on a choice of possibilities that require the jury to speculate as to causation. *Morehart, supra*; *Ark. Kraft, supra*. In other words, evidence showing possible causes of a fall, as opposed to probable causes of a fall, does not constitute substantial evidence of negligence. *Safeway Stores, Inc.* v. *Willmon*, 289 Ark. 14, 708 S.W.2d 623 (1986).

There was evidence that Walker subsequent to appellant's fall resurfaced the lot using sand in his sealing compound. Subsequent remedial measures are inadmissible to prove negligence. Ark. R. Evid. 407. Thus, the court erred in considering this inadmissible evidence in deciding the motion for summary judgment. *Dixie Ins. Co.* v. *Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989). In the absence of any objection, it would not be error for the court to disregard inadmissible evidence on motion for summary judgment. *Douglas* v. *Citizens Bank*, 244 Ark. 168, 424 S.W.2d 532 (1968), concurring opinion.

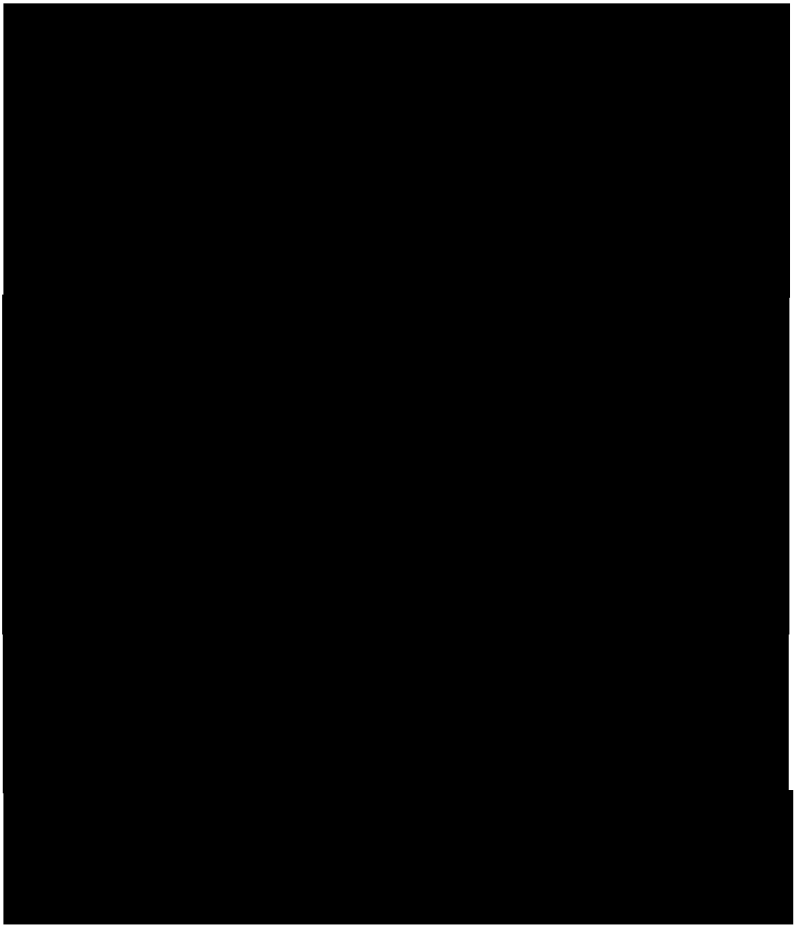
Based on my review of the evidence, I believe entry of summary judgment was proper because the evidence presented by appellant as to causation would have required the jury to speculate as to the cause of her fall.

GRIFFEN, J., joins in this dissent.

AMERICAN INVESTORS LIFE INSURANCE COMPANY
v. Patricia Kathleen HUDSON

CA 95-970 935 S.W.2d 594

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996
[Petition for rehearing denied January 29, 1997.*]



* Pittman, J., would grant.

Skokos, Bequette & Smith, P.A., by: *Jay Bequette*, for appellant.

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

MELVIN MAYFIELD, Judge. This is the third appeal of this case in this court. It involves the continuing attempt of the appellee, Patricia Kathleen Hudson as Executrix of the Estate of Pat K. Savelle, to collect medical and life insurance benefits under a group insurance plan covering Pat Savelle who died on April 28, 1986.

In 1985, Pat Savelle filed a complaint seeking a declaratory judgment holding that her medical coverage benefits under a group policy issued by the Arkansas Nursing Home Employee Benefit Trust was valid and should be continued until she was no longer totally disabled. Summary judgment was entered June 12, 1986, in her favor. However, this judgment was later vacated because Ms. Savelle died prior to its entry.

On September 17, 1987, the present appellee was substituted as party plaintiff. Appellee then filed an amended complaint realleging and adopting the allegations of the original complaint and seeking, in addition, death benefits as provided by the plan. On July 28, 1989, summary judgment was granted for appellee against "Maury Barnes, Kenneth K. Yarbrough, Ann Wiggins, Melvin Nussbaum, Perry Wilson, and any successors in interest thereto, as Trustees of the Arkansas Nursing Home Association Employee Benefit Trust." (American Investors Life Insurance Company was not then a party.) The trial court granted the appellee's complaint for declaratory judgment on the basis that Pat Savelle continued to be entitled to all health insurance coverage, including death benefit coverage, beyond the termination of her employment through the

date of her death, April 28, 1986. On August 24, 1989, "Maury Barnes, et al" filed a notice of appeal, and in an unpublished opinion handed down June 27, 1990, this court affirmed the judgment in every respect except for an award of statutory penalty.

Subsequently, the appellee filed a motion asking the trial court for a money judgment, consistent with her declaratory judgment, for unpaid medical bills and life insurance benefits, plus interest, costs, and attorney's fees. The defendants opposed the claim for some medical bills alleging entitlement to certain offsets. A hearing was held in July 1991, on the actual amount due appellee and in an order entered April 8, 1992, the trial court found the appellee was entitled to the amount of the claim presented and granted appellee judgment in a specific amount, including attorney's fees. The trial court's finding was based in part upon the testimony of Robert Alexander, an attorney for American Investors Life Insurance Company, who appeared on behalf of the defendants. The trial court entered judgment not only against the trust as an entity, but also against the individual trustees, for all amounts. And the court also found that American Investors was the successor in interest to the trust and was also responsible for the judgment, and the court specifically reserved jurisdiction for the sole purpose of joining American Investors as an additional party for further proceedings against it which might be necessary in the event appellee was unable to collect the judgment awarded.

Thereafter, on May 7, 1992, a notice of appeal was filed which stated that "Maury Barnes, Kenneth K. Yarbrough, Ann Wiggins, Melvin Nussbaum, Perry Wilson, and any Successors in Interest Thereto, as Trustees of the Arkansas Nursing Home Association Employee Benefit Trust, Defendants" appeal the order entered April 8, 1992. In an unpublished opinion handed down June 30, 1993, this court affirmed the judgments against the trust and the individual trustees, but modified the amount of judgment by reducing it by an amount that had been written off by Cooper Clinic, and by eliminating post-judgment interest prior to April 8, 1992.

On September 9, 1993, the judgment not having been satisfied, appellee filed an amended complaint in which she asked that the appellant American Investors be added as an additional party, and for judgment against that appellant also as a successor in interest. American Investors was made a party and answered denying most of the allegations of the complaint stating, "Since American

Investors was not previously a party to the litigation, American Investors is without sufficient information to admit or deny the material allegations," and on March 14, 1994, it filed a motion for summary judgment on the basis that the order of April 8, 1992, was ineffective against it because it was not served with legal process or notice, and it was not a successor in interest to the trust or responsible for the trust's liabilities.

After a hearing held March 25, 1994, the trial court entered a well-reasoned and comprehensive opinion holding that appellant was fully liable for all sums due the appellee. The trial court awarded judgment in favor of the appellee in the amount of $61,253.75, plus attorney's fees and accrued costs. Because of its completeness, we quote extensively from the trial court's decree and judgment. We also point out that the appeal from this judgment is only by American Investors Life Insurance Company (American Investors) and hereafter our reference to appellant without other designation will be to that appellant. The trial court's decree states in part, as follows:

III.

> Plaintiff obtained Judgment in this Court on August 2, 1989, as against all Defendants except American Investors Life Insurance Company, which was not then a party. The Judgment held in favor of the Plaintiff, granting her Complaint for declaratory judgment. The basis of the Court's holding was that Plaintiff's Decedent, Pat Savelle, continued to be entitled to all health insurance coverage, including death benefit coverage, beyond termination of her employment date through the date of her death, which was on April 28, 1986.
>
> . . . .

IX.

> Defendant, American Investors insists that it is not responsible for any sums due and owing to the Plaintiff under the previously awarded judgments by the Court. On the Contrary, the Court concludes that Defendant American Investors is fully liable for all sums due and owing to the Plaintiff, previously affirmed by the Arkansas Court of Appeals. In so concluding, the Court has considered the testimony of the Plaintiff's representative, James Hudson, and the

Defendants' representative, Robert Alexander, who had also previously testified for and on behalf of the other Defendants who are trustees of the Arkansas Nursing Home Association Employee Benefit Trust. The Court is persuaded, consistent with Mr. Alexander's previous testimony in this matter, that American Investors assumed the claims that were outstanding as of January 1, 1989. Those claims necessarily included the claim of the Plaintiff's decedent, Pat Savelle, which claim has been held valid by this Court in a previous proceeding, and which was affirmed by the Arkansas Court of Appeals. Thus the Defendant American Investors' position that the claim is not valid because Ms. Savelle terminated her employment prior to the termination of the Trust, is wholly without merit, that issue having been conclusively determined by this Court, and the Arkansas Court of Appeals, in previous proceedings. Defendant, American Investors cannot collaterally attack those previous findings of the Court. That is particularly true here, since at all times, all Defendants have been represented by the same able attorneys, and have been represented at hearings by the same representative, namely, Robert Alexander.

X.

The Court is persuaded that American Investors, or persons acting on its behalf, knew at all relevant phases of this litigation, as did Fewell & Associates, as did Robert Alexander and his predecessor . . . that the claim of the Plaintiff's decedent, and later the Plaintiff, was in existence, was being aggressively defended and litigated by the Nursing Home Trust, and that neither the nursing home Trust nor any of the Trustees had raised the claim that the Trust had been terminated on April 1, 1984. . . . It would be unfair and inequitable for this Court to allow the Defendant to profit from a situation in which a Trust was terminated, over one year prior to the time that this lawsuit was filed, where the Plaintiff was never so informed. Defendant American Investors would be allowed to profit from that, if this Court were to find in its favor. Under these circumstances, the Defendant American Investors had a duty to speak, because at all times it had knowledge of the termination of the Trust, but failed to disclose it until after the decision by the Court

of Appeals in the initial appeal.

XI.

It was clear at both the July, 1991 and March, 1994 hearings that Robert Alexander was at all times aware of the salient facts, and that personnel at American Investors knew the facts since the date of the initial Trust termination in April, 1984. The initial Trust Agreement for the Arkansas Nursing Home Association Employee Benefit Trust states that upon termination, trustees must pay all obligations of the Trust, and must use the fund to continue insurance on employees insured under the policies and the families of employees, and must act to protect the employees that were insured at the time of the termination of the policies. Further, the Trust instrument recites that the trustees shall pay all obligations of the Trust. Robert Alexander testified previously in this matter that the Trust accomplished this by providing for the assumption of certain liabilities upon termination.

XII.

. . . Under the circumstances presented by this case, Plaintiff's claim is a liability which should have been assumed in the various assumptions entered into by certain entities after the April 1, 1984 termination of the Trust.

XIII.

Pursuant to the equitable doctrines of estoppel and waiver, American Investors is estopped to claim that it is not responsible for full satisfaction of the Judgment in favor of Plaintiff in this matter. At all times, Defendant, American Investors had knowledge of these transactions, and unquestionably had a duty to speak. Robert Alexander testified that he supervised this litigation matter from the time he became an employee. At any time during the course of the proceeding, he could have notified the Plaintiff, her Counsel, or his own attorneys, with respect to the termination of the Trust, but did not do so until September, 1990, after the first appeal to the Arkansas Court of Appeals. Robert Alexander admitted that his attorney in this matter has been reporting either to him or his predecessor at American Investors, throughout

> this matter. He further testified that Fewell & Associates, third-party administrator, is a sister company of American Investors.

In its appeal from the above decree and judgment, the appellant argues the chancellor's order is clearly erroneous "because the record is barren of any facts that prove it was the successor in interest to the Trust and/or . . . assumed liabilities of the Trust for the claims made by Appellee." Appellant argues that the trial court's finding that it was the successor in interest to the Trust and the responsible party is clearly against the preponderance of the evidence.

The problem with appellant's argument is that the trial court held appellant estopped to claim that it is not responsible for full satisfaction of the judgment.

In *Robinson* v. *Buie*, 307 Ark. 112, 817 S.W.2d 431 (1991), our supreme court stated:

> Under the doctrine of res judicata or claim preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. Privity of parties within the meaning of res judicata means "a person so identified in interest with another that he represents the same legal right." Res judicata bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could have been litigated. Collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by the parties in the first suit.

307 Ark. at 114, 817 S.W.2d at 432-33 (citations omitted).

And in *Arkansas Department of Human Services* v. *Dearman*, 40 Ark. App. 63, 842 S.W.2d 449 (1992), we discussed the doctrine of collateral estoppel. We stated:

> The question of who may be bound by a judgment is considered in Freidenthal, Kane, and Miller, *Civil Procedure* § 14.9 (1985). In discussing the general issue underlying collateral estoppel, the authors state:
>
> When an issue has been litigated fully between the par-

> ties, spending additional time and money repeating this process would be extremely wasteful. This is particularly important in an era when the courts are overcrowded and the judicial system no longer can afford the luxury — if it ever could — of allowing people to relitigate matters already decided.

Id. at 658. The authors also state that this doctrine applies only to persons who were parties or who are in privity with persons who were parties in the first action and that persons in a privity relationship are deemed to have interests so closely intertwined that a decision involving one necessarily should control the other. *Id.* § 14.13 at 682-83.

It has been suggested that privity is merely a word used to say that the relationship between one who is a party and another person is close enough that a judgement [sic] that binds the one who is a party should also bind the other person. This is the view taken in 18 Wright, Miller, and Cooper, *Federal Practice and Procedure* § 4448 (1981) where it is stated:

> As to privity, current decisions look directly to the reasons for holding a person bound by a judgment. This method should be adopted generally so that a privity label is either discarded entirely or retained as no more than a convenient means of expressing conclusions that are supported by independent analysis.

The Arkansas Supreme Court has said that privity within the meaning of res judicata means a person so identified in interest with another that he represents the same legal right. In *Restatement (Second) of Judgments* § 39 (1982) it is stated that "a person who is not a party to an action but who controls or substantially participates in the control of the present action on behalf of a party is bound by the determination of issues decided as though he were a party." It has also been held that the identity of parties or their privies for res judicata purposes is a factual determination of substance, not mere form.

40 Ark. App. at 67-68, 842 S.W.2d at 451-52 (citations omitted).

Under the law as cited above, we do not think the trial

court erred in holding that the appellant is estopped from claiming it is not responsible for full satisfaction of the judgment in favor of the appellee.

At this point, we want to note that the appellant filed a motion for summary judgment in this case; that the trial court advised the parties, by letter to their attorneys, that there were material facts at issue; but that no order was filed to that effect until after the evidentiary hearing had been held. Then, in the decree and judgment from which we have quoted above, the court stated that "it specifically finds that the Motion for Summary Judgment filed by the Defendant, American Investors should be denied."

In response to American Investors' motion for summary judgment, the appellee summarized the background of this litigation and stated that the court should hold the appellant estopped to deny liability in this matter.

Now, in light of that pleading, we want to also note that this case has had a long and tortuous history. A section of appellant's brief entitled "ABSTRACT OF PRIOR TESTIMONY" abstracts the testimony of Robert Alexander given at the July 1991 hearing on behalf of the Trustees long before American Investors was named as a party. At that time, Alexander testified that he had been an attorney for American Investors since September 1988. He testified that Fewell & Associates is a third-party administrator that administered the Nursing Home Association Trust, the Multiple Employer Trust that the nursing home people went into, the fully insured program for Paramount Life, and then Mr. Fewell purchased American Investors and Fewell & Associates administered the business of the new insurance company. Alexander testified that he also served as staff counsel for Fewell & Associates and went to work for them in September 1988.

Alexander again testified at the hearing held March 25, 1995, again as representative for the defendants, this time including American Investors. He testified that Pat Savelle was one of the beneficiaries of the Nursing Home Trust; that the "Employer Benefit Group" took over claims that occurred prior to April 1, 1984; and that another entity called Paramount Life Insurance Company came next. Alexander testified that Fewell & Associates was the third-party administrator for the Nursing Home Trust and that it is owned by Bob Fewell who is also the president of American Inves-

tors. He said that in July 1991, the party defendants were the trustees of the Nursing Home Trust; that he was employed then as now by American Investors; and that he came as a witness to "shed any light I could on the information that I had collected." He said he came to the July 1991 hearing for Fewell & Associates and had been involved in the case at least from February 1991. He said he did not come for American Investors, but American Investors and Fewell & Associates are sister companies; that he had gathered information in preparation for the hearing; and came to give the information he had. Alexander went to great lengths to explain why Ms. Savelle claim was not covered. He testified her claim fell into the category of claims which were ineligible because they were incurred after April 1, 1984. He said the Employer Benefit Group (MET) assumed only claims incurred prior to April 1, 1984, that had not been paid, or so called "run-off" claims; that Ms. Savelle's claim was not a run-off claim; that it assumed no claims incurred after April 1, 1984, unless the people continued to participate; that Ms. Savelle was disabled and not able to be employed; and that her claims were incurred after April 1, 1984, and their liability was not assumed. He testified further that American Investors had no connection with the Nursing Home Trust or the Employer Benefit Group, and it only assumed claims incurred under the Paramount Life Group Policy.

However, we think the appellant was involved in this litigation from its inception. Alexander, an employee of American Investors, was also employed by Fewell & Associates during this suit. He testified as a representative on behalf of the defendants even before American Investors became a party. He was at all times aware of the facts and testified that he was "the attorney responsible for this claim at American Investors since 1988."

Under the law regarding collateral estoppel, as set out in the cases of *Robinson* v. *Buie* and *Arkansas Department of Human Services* v. *Dearman*, *supra*, and applying the requirements of Ark. R. Civ. P. 52(a) that we not set aside the findings of fact made by a judge in a trial without a jury unless they are clearly erroneous or against the preponderance of the evidence, we think that the trial judge's decision in this case should be affirmed.

Affirmed.

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

PITTMAN, J., dissents.

JOHN MAUZY PITTMAN, Judge, dissenting. As stated by the majority, Pat Savelle was an employee of Oak Lodge Nursing Home and had medical insurance through her employer with the Arkansas Nursing Home Association Employee Benefit Trust (hereinafter "Trust"). The personal representative of Savelle's estate, the appellee herein, brought suit against the trustees of the Trust seeking to enforce insurance coverage and to recover medical benefits. The lower court held that Savelle continued to have coverage and that the Trust was liable and found that American Investors Life Insurance Company was a subsequent successor to the Trust and liable for appellee's claims. American Investors now appeals from that decision.

I must respectfully dissent from the majority opinion affirming the decision holding American Investors liable because I believe that the lower court erred by precluding American Investors from presenting evidence as to the liability it assumed.

Savelle became totally disabled with cancer and terminated her employment in December 1983. The Trust terminated on April 1, 1984, and the Employer Benefit Group (hereinafter "Group") insured employees of the Oak Lodge Nursing Home who elected to continue coverage and assumed runoff claims, *i.e.*, claims incurred in the previous year but not yet submitted. The Group terminated on January 1, 1986, and a Multiple Employer Trust underwritten by Paramount Life assumed the same runoff claims. Coverage through Paramount Life terminated on December 31, 1988, and American Investors provided coverage for continuing employees of the nursing home and assumed *only* runoff claims.

This is the third appeal of this case. The first appeal involved the trial court's order holding that despite Savelle's termination of employment and because she was totally disabled, she was entitled to continued coverage. The trial court further found that the Trust was liable for Savelle's claims until her death on April 28, 1986. We affirmed. Savelle's estate then filed a motion in the lower court seeking to enforce the judgment against the trustees in their individual capacities. The court granted the motion in its April 8, 1992, order holding that the trustees were liable in their individual and representative capacities. The court further held that American Investors was a successor in interest to the Trust and, based on the

testimony of Robert Alexander that American Investors assumed claims outstanding as of January 1, 1989, that American Investors was liable for the judgment. The court reserved jurisdiction to name American Investors as a defendant. That decision was affirmed on appeal. American Investors was subsequently joined as a defendant. On May 31, 1995, the court held that American Investors was liable for the original judgment and *precluded* American Investors from presenting *any* evidence of the liability it assumed because the court had previously found that American Investors was the responsible party as the successor in interest. The court further found that American Investors could not collaterally attack the court's earlier finding, that Savelle had continuing coverage despite termination of her employment, because the finding was affirmed on appeal.

American Investors now appeals the May 31, 1995, order arguing that it was not a party to the case when liability was decided by the court, that it did not have an opportunity to defend its interest, and that appellee failed to prove that it was the successor in interest to the Trust.

I believe that the court erred in refusing to consider evidence concerning the liability American Investors assumed. American Investors argues that it assumed *only* runoff claims and that appellee has *never* shown or even asserted that Savelle's claim was a runoff claim. Before American Investors can be held liable for Savelle's claim, its assumed liability must be determined.

Appellee argues that American Investors is precluded from asserting a defense because it is bound by the court's earlier decision holding American Investors liable as successor, which was affirmed on appeal. Thus, she argues that the doctrines of "law of the case," *res judicata*, and collateral estoppel apply. Generally, the law of the case applies only against those who were parties to the case when the prior decision was rendered. *See Hodges* v. *Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995); *McDonald's Corp.* v. *Hawkins*, 319 Ark. 2-A, 894 S.W.2d 136, supp'l op. (1995); *Willis* v. *Estate of Adams*, 304 Ark. 35, 799 S.W.2d 800 (1990); *Potter* v. *Easley*, 288 Ark. 133, 703 S.W.2d 442 (1986). The same is true for *res judicata* and collateral estoppel to apply. *Carmical* v. *City of Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994); *Arkansas Dep't of Human Services* v. *Dearman*, 40 Ark. App. 63, 842 S.W.2d 449 (1992). Here, the court considered the doctrines of *res judicata*, law of the case and collateral estoppel as

a basis of establishing American Investors' liability. These doctrines have no application to this fact situation because American Investors was not a party to the case when its liability was determined.

Lastly, I do not believe the "privity" doctrine has any application to the case under consideration. A person is considered to be in privity with a party when that person controls or substantially participates in the control of the present action on behalf of a party. *Arkansas Dep't of Human Services* v. *Dearman, supra.* Robert Alexander testified that he did not appear on behalf of American Investors at the hearing at which the court determined American Investors' liability. The majority opinion places emphasis on the fact that Robert Alexander is associated with Fewell and Associates and American Investors, both of which are owned by Bob Fewell. Because of Fewell and Associates' participation, the majority reasons that American Investors is now estopped from defending its interest. Privity requires that the entities have similar, non-adverse interests. *Id.* Fewell and Associates was a third-party administrator and, unlike American Investors, was not responsible for a judgment against the Trust. It appeared only to produce its records pertaining to its previous administration of the Trust, the Employee Benefit Group, and Paramount Life.

Because the court ruled that it had previously determined that American Investors was liable and refused to give it an opportunity to present evidence regarding the liability it assumed, the case should be remanded.

I would reverse and remand for the court to decide American Investors' liability consistent with this opinion.

Jesse R. WINCHEL, et al. *v.* Robert CRAIG

CA 95-998 934 S.W.2d 946

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996

Davis & Watson, P.A., by: *Jeff H. Watson*, for appellants.

Everett, Shemin, Mars & Stills, by: *David D. Stills*, for appellee.

MELVIN MAYFIELD, Judge. Appellants Jesse and Verda Winchel appeal from a judgment entered against them and Winchel Enterprises, Inc., jointly and severally, in the amount of $19,250, plus costs. The damages were assessed for an injury sustained by the appellee caused, in part, by Winchel Enterprises, Inc. The appellants were found liable under the doctrine of "piercing the corporate veil." On appeal the appellants argue only two points: (1) the trial court lacked subject-matter jurisdiction to decide the issue of piercing the corporate veil; and (2) the trial court erred in denying

their motion for judgment notwithstanding the verdict as there was no substantial evidence to support the jury's decision to pierce the corporate veil.

Robert Craig, who was employed by Mike Traylor to operate an apparatus, used to spread fertilizer, which was manufactured by Winchel Enterprises, Inc., was injured on April 16, 1992, when he stuck his hand into the sprocket and chain area of the spreader motor while it was operating. On December 17, 1992, Craig filed a complaint in circuit court against Traylor and Winchel Enterprises alleging strict liability, negligence, and breach of an implied warranty of merchantability.

In June 1993, the appellants resigned as officers of Winchel Enterprises and the corporation was officially dissolved by filing a certificate of dissolution in the office of the Secretary of State on December 7, 1993. Thereafter, on May 16, 1994, Craig filed a "Second Amended and Substituted Complaint" adding the appellants as defendants and asking for judgment jointly and severally against Traylor, Winchel Enterprises, and the appellants. The complaint alleged, among other things, that because the corporation was a sham corporation, because it was inadequately capitalized, and because of the way its business was transacted and its records were kept its corporate veil should be pierced.

After a trial held April 25 and 26, 1995, a jury returned a verdict on interrogatories. The jury found against Winchel Enterprises as to liability, that it was 55% at fault, and that the affairs of the corporation were conducted in such a manner that the corporate entity should be disregarded and the appellants held personally liable. On May 2, 1995, the trial court entered the judgment from which this appeal comes.

At trial, Jesse Winchel testified that he bought the spreader business in 1983; that they incorporated for the purpose of manufacturing spreaders; and that he and his wife were the sole incorporators, stockholders, and officers. They purchased inventory, which they eventually sold to the corporation, and equipment, which they leased to the corporation. The corporation paid them $3,000 per month for the equipment and they drew a salary. For a period of time, the corporation held annual meetings, kept records, paid corporate taxes, paid Arkansas franchise tax, and was in good standing with the state.

In January 1992, the appellant Jesse Winchel stopped drawing wages because the company was in bad financial straits and could not afford to pay him. Between 1990 and 1993 he loaned money to the corporation in an attempt to keep it afloat. He testified that he always made a promissory note to himself when he loaned the company money, and the company paid some of the notes. He said the company had no assets and could not afford liability insurance. Winchel testified further that when the lawsuit was filed against Winchel Enterprises on December 13, 1992, he had already taken steps to close down the company; that they should have closed down two years previously, but they were trying to make it work. He said that they did not provide for any payment to Craig because they did not know at that time that they had any liability to him. At liquidation the company had assets of some $12,000 in the form of a forklift which was sold and the proceeds went to pay off the bank indebtedness on the forklift. Appellants received no assets at dissolution.

On May 20, 1993, appellants formed a new corporation, Shamrock Spreaders, Inc. Although the Articles of Incorporation stated that the purpose of this new corporation was to manufacture spreader beds, Winchel testified that it could not manufacture the beds because it had no equipment, and the corporation never went into business.

Dan Downing, appellants' accountant, testified that his accounting firm had done the bookkeeping for Winchel Enterprises since 1983 when appellants came to him for advice on how to operate the business they had acquired. Downing said his counsel was to incorporate primarily for income tax purposes. Downing said that the corporate structure had never been abused; that Winchel Enterprises was a solid entity from 1983 through liquidation; and that the corporate records were kept at his office. He testified that the company was bankrupt, had no operating funds, and its dissolution had nothing to do with Craig's lawsuit. Downing said the liquidation plan was a standard plan "taken right out of the Internal Revenue manuals," and the appellants received no money when the company was dissolved. However, he also testified that there was a transfer of assets upon liquidation, but he said the purpose was to clean up the books in order to file a final income tax return showing zero assets.

In regard to the Articles of Incorporation of Shamrock Spread-

ers, Inc., Downing testified that he assisted appellants in setting up the corporation; that it was never activated; that its purpose was to market parts and supplies; and that the Articles of Incorporation contained a clerical error regarding the manufacture of spreaders.

I. *Circuit Court Jurisdiction*

On appeal, appellants first argue that piercing the corporate veil is an equitable remedy, and the circuit court lacked subject-matter jurisdiction to decide that issue.

Appellants contend chancery has exclusive jurisdiction in areas of substantive law developed by equity and cite *In re Long Trust* v. *Holk*, 315 Ark. 112, 864 S.W.2d 869 (1993), and *J.W. Reynolds Lumber Co.* v. *Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992), in support of this argument. However, the exclusive jurisdiction in those cases involved trusts, and the construction, interpretation, and operation of trusts are matters within the jurisdiction of the courts of equity, *Holk*, *supra*, and courts of equity have inherent and exclusive jurisdiction of all kinds of trusts and trustees, *Spradling* v. *Spradling*, 101 Ark. 451, 142 S.W. 848 (1911).

Appellants also cite *Cummings* v. *Fingers*, 296 Ark. 276, 753 S.W.2d 865 (1988). But, the equitable jurisdiction in that case was based upon a statute, that authorized an action "by equitable proceedings" to be filed in aid of execution for the discovery of assets that could be subjected to payment of the judgment on which the execution was issued. The court held that the appellees had "instituted this action to satisfy their judgment through a remedy which, under the circumstances presented, required an equitable proceeding as authorized under [the statute]." 296 Ark. at 281, 753 S.W.2d at 868. And the court remanded for the circuit court to transfer the cause to chancery court. The instant case, however, was not brought in aid of execution and the statute involved in *Cummings* is not involved in the case at bar.

In *Bates* v. *Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), our supreme court discussed the issue of jurisdiction. The court said this must be assessed within the "narrow confines of equity jurisdiction under the Constitution of Arkansas." It explained:

> Article 7, section 11 provides: "The circuit court shall have jurisdiction in all civil and criminal cases the exclusive jurisdiction of which may not be vested in some other court

> provided for by this Constitution." This provision means that unless a cause of action is confided by the Constitution exclusively to another court, it belongs exclusively, or concurrently, to the circuit court. In other words "[a]ll unassigned jurisdiction under the Constitution is vested in the circuit court. . . ." Article 7, section 15, provides: "until the General Assembly shall deem it expedient to establish courts of chancery the circuit court shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law." By Act 166 of 1903, Ark. Code Ann. § 16-13-301 (1987), separate courts of chancery were established by the General Assembly. However, the General Assembly is without authority to give chancery courts any jurisdiction other than that which the equity courts could exercise at the time of the adoption of the Constitution of 1874.

303 Ark. at 91, 793 S.W.2d at 790 (citations omitted).

[redacted] And, in *Pinckney* v. *Mass Merchandisers, Inc.*, 16 Ark. App. 151, 698 S.W.2d 310 (1985), the appellants argued the circuit court lacked subject-matter jurisdiction because the complaint sought injunctive relief and an accounting. We said:

> Under the Arkansas Constitution, circuit courts are the reservoir of unassigned judicial power; they have original jurisdiction in all cases where jurisdiction is not expressly vested in another court. The correct way to determine the circuit court's jurisdiction is to first determine what class of cases are expressly entrusted to the jurisdiction of other tribunals, with the great residuum belonging concurrently or exclusively to the circuit court. In order to successfully attack the circuit court's jurisdiction, it must be shown that another court has been granted exclusive jurisdiction of the subject matter.

16 Ark. App. at 153-54, 698 S.W.2d at 312 (citations omitted).

Here, appellant has not shown that chancery court has been granted exclusive jurisdiction in matters regarding piercing the corporate veil. To the contrary, our supreme court has indicated that "piercing the corporate veil" may be an issue in circuit court.

In *Black and White, Inc.* v. *Love*, 236 Ark. 529, 367 S.W.2d 427

(1963), an appeal from circuit court, the appellants appealed from the trial court's action in allowing certain testimony to be presented. Our supreme court found no error, and said that "the plaintiffs were making an effort to pierce the fiction of the corporate entities of Black & White, Inc., and Checker Cab Company; and that the way the two corporations operated — like a joint venture — was a cogent fact which the plaintiffs were entitled to show." The appellants also objected to an instruction given by the trial court. Our supreme court found no error regardless of whether the instruction complained of was given on the theory of joint venture or the theory of piercing the corporate veil. The supreme court held that the giving of the instruction was justified and found "no error in the entire case."

Therefore, we cannot agree that the circuit court was without jurisdiction to decide the issue of piercing the corporate veil.

II. *Substantial Evidence*

Appellants also argue that the trial court erred in denying their motion for judgment notwithstanding the verdict because there was no substantial evidence to support the jury's decision to pierce the corporate veil.

By jury verdict, returned upon interrogatories, the jury found "from a preponderance of the evidence that the corporate affairs of Winchel Enterprises, Inc., were conducted in such a manner that the corporate entity should be disregarded so as to render Jesse R. Winchel and Verda Winchel personally liable for Robert Craig's damages." The trial court subsequently denied appellants' motion for judgment notwithstanding the verdict on the basis that the jury was correctly instructed on the issue of piercing the corporate veil, and there was substantial evidence to support the jury's verdict in that regard. In the court's letter decision, the court said there was also substantial evidence to support a finding that Arkansas law was violated when the shareholders took no steps to provide for the contingent liability resulting from the filing of the suit for personal injuries against the corporation and which was pending at the time of its dissolution. Moreover, the court said, evidence regarding the formation of the new corporation, Shamrock Spreaders, Inc., constituted substantial circumstantial evidence concerning the intentions and motives of the shareholders.

On appeal, the appellate court will uphold the trial court's denial of a motion for judgment n.o.v. if there is any substantial evidence to support the jury's verdict. *Arkansas Power and Light Co.* v. *Adcock*, 281 Ark. 104, 661 S.W.2d 392 (1983). Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another, forcing or inducing the mind to pass beyond suspicion or conjecture. *Croom* v. *Younts*, 323 Ark. 95, 913 S.W.2d 283 (1996).

Appellants argue that there was no evidence of illegal or fraudulent abuse of the corporate form; no evidence that the dissolution of the corporation came about because of the filing of the appellee's personal injury lawsuit; no evidence that the corporation was undercapitalized; and no evidence that a new corporation was formed with the intention of avoiding the liability of the old one. We do not agree. The appellants' problem is that the jury did not accept the appellants' explanation of the evidence, but the weight and value of the evidence lies within the exclusive province of the jury. *Garrett* v. *Brown*, 319 Ark. 662, 666, 893 S.W.2d 784, 787.

As to the law, in *Humphries* v. *Bray*, 271 Ark. 962, 611 S.W.2d 791 (1981), the Workers' Compensation Commission had combined all the employees who worked at the appellant's separate businesses to hold that the appellant had enough employees to be subject to the workers' compensation law. When the appeal of the holding reached our supreme court, it said the issue was whether there was substantial evidence to find that a corporation was the alter ego of the appellant, and that it was so managed and controlled by him as to constitute a sole proprietorship. The court stated that the conditions under which the corporate entity may be disregarded or looked upon as the alter ego of the principal stockholder vary according to the circumstances of each case.

In *Fausett Co.* v. *Rand*, 2 Ark. App. 216, 619 S.W.2d 683 (1981), this court considered the issue of piercing the corporation veil and said that all three cases cited by one party contained the statement: "It is only when the privilege of transacting business in a corporate form has been illegality abused to the injury of a third person that the corporate entity should be disregarded." And we said that all three cases cited by the other party held that such liability will be imposed only where the corporate structure has been illegally or fraudulently abused to the injury of a third person. All six cases are listed in the *Fausett Co.* v. *Rand* opinion. *See* 2 Ark.

App. at 221, 619 S.W.2d at 686.

In *Arkansas Bank & Trust Co.* v. *Douglass*, 318 Ark. 457, 885 S.W.2d 863 (1994), our supreme court held that the insurance commissioner did not err in piercing the corporate veil. Although that case involved a parent corporation and its subsidiaries, the principle is the same. In that case, our supreme court discussed the case of *Woodyard* v. *Arkansas Diversified Ins. Co.*, 268 Ark. 94, 594 S.W.2d 13 (1980), a case in which our supreme court held that courts will ignore the corporate form of a subsidiary where "fairness" demands, and said that this is usually where it is necessary to prevent wrongdoing and where the subsidiary is the mere tool of the parent.

In the instant case, one of the jury instructions said:

> You are instructed that under Arkansas law, after dissolution and after paying for or adequately providing for the payment of its liabilities, the corporation, if authorized at a meeting of shareholders, may sell its remaining assets and distribute the same among the shareholders according to their respective shares.

The instruction is taken directly out of the Arkansas Business Corporation Act, specifically Ark. Code Ann. § 4-26-1103 (Repl. 1991), which provides that after dissolution:

> (3) After paying or adequately providing for the payment of its liabilities:
>
> (A)(i) The corporation, if authorized at a meeting of shareholders which is to be held on notice to all shareholders, whether or not entitled to vote, by a vote of a majority of all outstanding shares entitled to vote thereon, may sell its remaining assets or any part thereof for cash or for shares, bonds, or other securities of another corporation, or partly for cash and partly for such securities, and distribute the same among the shareholders according to their respective rights.

In the instant case, there is evidence that the appellee was injured by a spreader manufactured by the corporation Winchel Enterprises; that appellants were its sole incorporators, stockholders, and officers; that the corporation had no liability insurance in case someone was hurt by its equipment; that the appellants dis-

solved Winchel Enterprises and sold or transferred its assets subsequent to appellee filing suit against the corporation; that about a month before the appellants resigned as officers of Winchel Enterprises, they formed a new corporation whose Articles of Incorporation stated that the purpose of the new corporation was to manufacture spreader beds — and this is the same kind of equipment that was manufactured by the first corporation; and that appellants made no provision upon dissolution of the old corporation to provide for payment of any liability it might have to appellee as a result of this suit which was pending at that time.

Judgment notwithstanding the verdict is proper only where there is no substantial evidence for the jury verdict and one party is entitled to judgment as a matter of law. *Findley* v. *Time Insurance Co.*, 269 Ark. 257, 599 S.W.2d 736 (1980). There is substantial evidence to support the jury verdict, and we affirm the judgment of the circuit court.

ROBBINS, STROUD, NEAL, and GRIFFEN, JJ., agree.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. I am in agreement with appellant's argument that the circuit court lacked jurisdiction to afford equitable relief. Therefore, I respectfully dissent to the majority's decision rejecting appellant's argument.

The issue of which court, law or equity, has jurisdiction to grant the relief known as "piercing the corporate veil" is one of first impression. The majority relies, in part, on the decision of *Black and White, Inc.* v. *Love*, 236 Ark. 529, 367 S.W.2d 427 (1963), where the supreme court, upon review of a circuit court case, found no error in the admission of evidence or an instruction touching upon the issue of piercing the corporate entity. Although the court found "no error in the entire case," that finding is not equivalent to a ruling that jurisdiction in circuit court was proper. That issue was simply not raised or even remotely discussed by the court, just as the propriety of the circuit courts' transfer of the issue of piercing the corporate veil to equity was not at issue in the cases of *Parker* v. *Point Ferry*, 249 Ark. 764, 461 S.W.2d 587 (1971), and *Banks* v. *Jones*, 239 Ark. 396, 340 S.W.2d 108 (1965). Consequently, neither the decisions in *Black and White, Inc.*, *Parker*, nor *Banks* can be relied upon as controlling authority on the issue of jurisdiction. The question is decidedly one of first impression, although it is not one

for which there is no guidance.

The majority does not deny that piercing the corporate veil is a remedy that is equitable in nature. Indeed, in *Farmers Gulf Station* v. *Bray*, 271 Ark. 962, 611 S.W.2d 791 (Ark. App. 1981), this court observed that the doctrine of piercing the corporate veil is founded in equity. As observed by the majority, it is a doctrine that is applied to prevent injustice and it is one that is to be applied with great caution. Additionally, the doctrine of piercing the corporate veil is recognized as being an equitable *remedy*, not a cause of action unto itself, which is used as a means of imposing liability. *See* 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, § 41 (1990). With this distinction in mind, the supreme court's decision in *Cummings v. Fingers*, 296 Ark. 276, 753 S.W.2d 865 (1988), provides the answer to the question of whether a circuit court has jurisdiction to grant equitable relief, and that answer is in the negative.

In *Cummings* v. *Fingers*, *id.*, the appellees sought to obtain satisfaction of a judgment rendered in their favor in circuit court by petitioning the court to compel the appellant to obtain and deposit into the court's registry funds appellant was entitled to receive, but which were being held by a government agency. Although the trial judge had recognized that the type of order sought by appellees was cognizable in equity, the judge ruled that he had the inherent authority to compel the appellant to act. The supreme court disagreed, holding in no uncertain terms that the circuit court lacked jurisdiction to grant what amounted to equitable relief. The majority here dismisses the appellant's reliance on *Cummings* by stating that the case was decided on the basis of a statute. However, I do not believe that the holding of the court in *Cummings* can be distinguished with such facility. It is clear from the opinion that the focus of the decision was on the compulsory aspect of the type of relief afforded by the statute, which was said to be equitable in nature. By this decision, the court clearly took the position that circuit courts do not have the power to afford equitable relief, as demonstrated by its rejection of the dissenting viewpoint. *See*, *id.*, 296 Ark. at 280, n.2. In sum, the supreme court did hold that circuit courts do not have jurisdiction to enforce their judgments by means of an equitable remedy. In other words, it was held that jurisdiction lies exclusively in chancery court. *See also Monette Road Improvement Dist.* v. *Dudley*, 144 Ark. 169, 222 S.W. 59 (1920)

(where the supreme court held that the creation of chancery courts in this state left no vestige of equity jurisdiction in the circuit courts), and *Commission on Judicial Discipline and Disability* v. *Digby*, 303 Ark. 24, 29, 792 S.W.2d 594 (1990) (where the supreme court stated matter of factly that injunctive relief is a remedy exclusively cognizable in equity).

The parallels between the instant case and the decision in *Cummings* v. *Fingers*, *supra*, are striking, and I am at a loss to conceive of any reason why the majority finds no application of the holding in *Cummings* to this case. As in *Cummings*, the appellee here is seeking to enforce its judgment, in an effort to impose individual liability, by means of an equitable remedy. As did the court in *Cummings*, we should hold that the circuit court had no jurisdiction to grant equitable relief and reverse and remand with directions to transfer the matter to chancery court. Until the distinction between equity and law courts is abolished in this state, I feel constrained to not blur this separation.

MINNESOTA MUTUAL LIFE INSURANCE CO. *v.* Gayle LOONEY

CA 95-1237 935 S.W.2d 3

Court of Appeals of Arkansas
Division I
Opinion delivered December 23, 1996

Armstrong, Allen, Prewitt, Johnston, & Holmes, by: *Stephen P. Hale* and *Jennifer Zigenhorn*, for appellant.

Kent J. Rubens and *James A. Davis, Jr.*, for appellee.

JUDITH ROGERS, Judge. The appellant, Minnesota Mutual Life Insurance Company, appeals from an order awarding appellee, Gayle Looney, the penalties under Ark. Code Ann. § 23-79-208 (Repl. 1992). On appeal, appellant contends that the trial court erred in finding that it was subject to the statutory penalties and that the court erred in awarding an attorney's fee of $7,500. We find no error and affirm.

The following facts are not in dispute. Joe Looney died on April 28, 1993, survived by appellee, who was his wife, and the children from his first marriage. At the time of his death, Mr. Looney had a life insurance policy with appellant in the face amount of $50,000. The named beneficiary of the policy was the deceased's first wife, who had died. In this event, the policy provided that the proceeds would be distributed to the following persons in this designated order: the surviving spouse, then any surviving children, then parents, and finally the deceased's estate, if none of the above were living. On June 4, 1993, appellant received written notification from the decedent's estate informing appellant of Mr. Looney's death and claiming entitlement to the proceeds. Initially, on July 15, 1993, appellant denied that the policy was in effect, but it reversed this position on August 5th by admitting its liability in correspondence to appellee. In this letter, appellant in-

formed appellee that she was eligible to receive the benefits based on the priority set out in the policy, but it advised her that it would withhold payment because of the claim submitted by the estate. On August 9, 1993, appellee presented her written claim to the benefits, and on August 11, one of the deceased's children made written claim to the proceeds. The estate submitted yet another claim to the proceeds on September 4. It was made known to appellant that the claims of the child and the estate were based on the contention that appellee was precluded from receiving the proceeds under the terms of an antenuptial agreement she had entered into with the deceased.

On October 1, appellant sent a letter to the parties acknowledging the dispute among the various claimants and stating that it would proceed with an interpleader action if the dispute were not resolved by October 18. The parties were unable to settle their differences and, when no action was taken by appellant, the estate filed this lawsuit on November 30, 1993, in which all those claiming the benefits were joined, as well as appellant. On January 7, 1994, appellant answered the complaint and interpled the face amount of the policy, with interest.

On the day of trial, appellee and the family settled their dispute by agreeing that appellee was to receive the proceeds of the policy. Because of the settlement, the only issue remaining was appellee's claim against appellant for the penalties allowed under Ark. Code Ann. § 23-79-208 (Repl. 1992). This issue was submitted to the trial court on cross motions for summary judgment with the arguments of the parties focusing on Ark. Code Ann. §§ 23-79-208 and 23-81-113. Arkansas Code Annotated § 23-79-208(a) (Repl. 1992) provides in pertinent part that in all cases where loss occurs and the life insurance company liable therefor shall fail to pay the losses within the time specified in the policy, after demand made therefor, the corporation shall be liable to pay the holder of the policy, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorneys' fees for the prosecution and collection of the loss. Arkansas Code Annotated § 23-81-113(b) (Repl. 1992) provides that the period for settlement by an insurer shall not exceed two months from the receipt of proofs. Appellee contended that appellant's delay in paying the loss and its failure to take any action in sixty days subjected appellant to the statutory penalties. In response, appellant maintained that any delay was excusable in light of

the conflicting claims presented to it for the benefits of the policy. The trial court ruled in favor of appellee, and this appeal followed.

In its first argument, appellant contends that its failure to take action is excused in this case under an exception which exists when there are conflicting claims made for the benefits of a policy. Appellant points out that, because it did not deny liability, the delay was not intended to defeat the right of recovery. Appellant also argues that the delay was reasonable in light of the multiple claims submitted, which would require judicial determination to resolve since the dispute was based on proof extraneous to the contract of insurance. In making these arguments, appellant relies primarily on the decisions in *Clark Center, Inc.* v. *National Life and Accident Ins. Co.*, 245 Ark. 563, 433 S.W.2d 151 (1968); *Dennis* v. *Equitable Life Assurance Society*, 191 Ark. 825, 88 S.W.2d 76 (1935); and *North British & Mercantile Ins. Co.* v. *Equitable Building & Loan Assn.*, 185 Ark. 476, 47 S.W.2d 797 (1932). We believe that appellant's reliance on the principles espoused in those cases is misplaced given a critical factual difference between them and the case at bar. Here, appellant had full knowledge of the family dispute and set a self-imposed deadline for the parties to resolve their differences before it would resort to bringing an interpleader action. Appellant has offered no explanation as to why it failed to take any action after this deadline had passed with the result that, after another six weeks had elapsed, one of the claimants was forced to institute this litigation. We hold that appellant's failure to act and the delay which it occasioned were unreasonable under the facts of this case. Contrary to appellant's argument, appellant cannot entirely discharge its responsibility by placing the onus on those claiming the proceeds.

Appellant also cites *Usable Life* v. *Fow*, 307 Ark. 379, 820 S.W.2d 453 (1991), for the proposition that an insurance company can fall into peril by filing an interpleader action too quickly. However, this dispute came to a head in the month of August, and as of late November appellant had yet to take any action. In conclusion, we can find no merit in the arguments raised by appellant in this point.[1]

Appellant further contends in this appeal that the trial

[1] Although appellant takes issue with other findings made by the court, we do not find them to be dispositive of this appeal; thus, we find it unnecessary to specifically address them.

court erred in awarding an attorney's fee of $7,500, which it argues is excessive. This issue is not preserved for appeal. The trial court announced its decision and the fee it was awarding in a letter opinion. Appellant raised no objection to the fee set by the court. Consequently, this argument was waived. *Farm Bureau Mutual Ins. Co.* v. *David*, 324 Ark. 387, 921 S.W.2d 930 (1996).

Affirmed.

STROUD and NEAL, JJ., agree.

Glen Curt REAVIS *v.* STATE of Arkansas

CA CR 96-206 936 S.W.2d 764

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996
[Petition for rehearing denied January 22, 1997.]

Stuart Vess, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Glen Curt Reavis, was found guilty by the trial court sitting as the trier of fact of the offenses of simultaneous possession of drugs and firearms and criminal use of a prohibited weapon, for which he was sentenced to a total of fourteen years in prison.[1] At trial, the court also took up the matter of appellant's motion to suppress evidence. In this appeal, appellant raises two issues challenging the trial court's denial of the motion to suppress. Because of the pronounced deficiencies in appellant's abstract, we affirm.

In light of our view of this appeal, we set out only those facts necessary for an understanding of our decision. Wayne Gibson, a patrolman with the Beebe Police Department, testified that he was directed to respond to a disturbance call at a residence on Cypress Street on the evening of March 22, 1995. He was advised that a Carol Reavis had reported that her husband, appellant, was at the home in violation of a restraining order. While en route, he was further advised that the suspect had left the home in a white pickup truck. Officer Gibson testified that he met the vehicle travelling in the opposite direction about three blocks from the house. He said that the truck stopped on the side of the street as he was turning around and that appellant was walking towards him as he exited the patrol car. Gibson said that he conducted a protective search of appellant's person and found a pair of brass knuckles in appellant's pocket. Because of this discovery, he arrested appellant and placed him in the back seat of the patrol car. He then called for a wrecker to impound the vehicle.

Officer Gibson testified that it was department policy to impound vehicles upon an arrest when there is no one else at the scene to take responsibility for the vehicle. He also testified that, for the protection of the department, it was their policy to inventory the contents of impounded vehicles to make sure that there are no valuable items or money that might later turn up missing.

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[1] Appellant had also been charged with the offenses of possession of a controlled substance (methamphetamine) with intent to deliver and possession of a controlled substance (marijuana), but those charges were dismissed on motion of the prosecution.

Gibson testified that, during the roadside inventory, he found a key box on the floor board. He said that he picked it up to see if there was an extra key to the vehicle and that, when he opened it, he found a small, plastic bag containing a green, leafy substance and two other bags that contained off-white, powdery material. Gibson testified that he also found a pistol wrapped in a towel on the front seat of the vehicle.

In his two issues on appeal, appellant contests the validity of the inventory of his truck. He first contends that the officer used the inventory as a pretext for rummaging through his vehicle. Second, he argues that the inventory was invalid because the police department had no policy concerning the opening of closed containers. From our review of the abstract, we learn that, in his written motion to suppress, appellant argued only that the search was founded upon an unlawful arrest. The abstract also contains an "abstractor's note," which states:

> Defendant made a Motion for a Directed Verdict and a Motion to Suppress Evidence. The basis of the Motion was that the key holder that was found was not *listed* on the inventory *list*, the inventory wasn't complete, and there was no policy on the inventory *list*. (emphasis supplied).

It can readily be seen that there is no mention in this abstract of the two arguments raised in appellant's brief.

■ The record on appeal is confined to that which is abstracted. *Davis* v. *State*, 325 Ark. 194, 925 S.W.2d 402 (1996). Parties have an affirmative obligation to abstract those portions of the record relevant to the points on appeal. *Moncrief* v. *State*, 325 Ark. 173, 925 S.W.2d 776 (1996). We do not examine the transcript of a trial to reverse the trial court. *Allen* v. *State*, 326 Ark. 541, 932 S.W.2d 764 (1996). Our supreme court has said that the argument made to the trial court and the trial court's ruling are "vital" to a review of the ruling by the appellate court. *Id.*; *Moncrief* v. *State*, *supra*; *Watson* v. *State*, 313 Ark. 304, 854 S.W.2d 332 (1993). The abstract in this case does not reflect that appellant raised either of the issues advanced in this appeal at trial. Under our longstanding rules, it was the responsibility of the appellant to provide an abstract such that this court could determine the arguments made without resort to an examination of the record.

■ When an abstract is deficient, the lower court's judgment

must be affirmed. *Owens* v. *State*, 325 Ark. 93, 924 S.W.2d 459 (1996). Accordingly, the judgment of conviction is affirmed, and we express no opinion, one way or the other, on the merits of the issues argued in this appeal.

PITTMAN and ROBBINS, JJ., agree.

NEAL, STROUD, and GRIFFEN, JJ., dissent.

OLLY NEAL, Judge, dissenting. It is an oft-quoted maxim that hard cases make bad law. Today's decision demonstrates the corollary, "bad law makes cases hard."

The majority concedes that all that was required of appellant was that he "abstract those portions of the record relevant to the points on appeal." The abstractor's note referenced in the majority opinion was sufficient to establish that appellant challenged the total absence of any police policy regarding inventory of closed containers.

While appellant's argument, "there was no policy on the inventory list," might be forcefully construed to mean that the police department failed to write its policy on its inventory form, the logical interpretation is that the department had no policy regarding what items should be placed on its inventory lists. Inherent in that argument is the proposition "the department has not stated whether its officers should place closed containers or the contents of closed containers on their inventory lists." Significantly, it was only the unlisted closed container that appellant sought to suppress at trial.

The majority avoids addressing the merits of appellant's argument by playing a game of semantics, once again placing form over substance. It is readily apparent from testimony at trial that appellant's lack of policy argument has merit but it is by operation of our procedural rules that this simple case is made difficult. A review of the record in this case only reenforces the strong inference raised in the abstract that appellant challenged the police department's failure to institute any policy regarding inventorying closed containers at trial.

STROUD and GRIFFEN, JJ., join in this dissent.

Marcela JOHNSTON *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 95-1211 935 S.W.2d 589

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996

Mary J. Pruniski, for appellant.

David K. Overton, Office of Chief Counsel, for appellee Department of Human Services.

Kathleen Bailey O'Connor, guardian *ad litem*, for the juvenile.

JOHN F. STROUD, JR., Judge. Marcela Johnston appeals from an order of the juvenile court which determined that her daughter, Blair, was dependent-neglected and placed Blair in a foster home, with appellee Department of Human Services maintaining legal custody. We affirm.

Blair Johnston was born on November 23, 1994. On April 10, 1995, when she was approximately four and one-half months old, the Arkansas Department of Human Services received a complaint concerning Blair, alleging child neglect. A seventy-two hour protective hold was placed on Blair. On April 18, 1995, DHS filed a petition for emergency custody. On the same day, an ex-parte order for emergency custody was entered by the Juvenile Division of the Pulaski County Chancery Court, and Blair was placed in DHS custody. On April 24, 1995, the probable cause hearing was held. The court determined there was probable cause to believe that the emergency conditions which necessitated Blair's removal continued. Blair remained in DHS custody pending the adjudication hearing. The adjudication hearing began on May 16, 1995, and was continued on June 22, 1995. The adjudication order was entered on July 26, 1995, finding that Blair was dependent-neglected; that it would not be in her best interest to return to appellant's custody; and that it was in Blair's best interest to continue in foster care with legal custody remaining in DHS.

Appellant raises two points of appeal, both of which have several subpoints. The two major points can be summarized as follows: (1) the trial court erred at the probable cause hearing in finding that probable cause existed for continuation of the emergency order; and (2) the trial court erred at the adjudication hearing in finding that Blair was dependent-neglected. The second point

controls the outcome of this appeal, and we find no clear error in the chancellor's decision.

■ We do not decide the first issue since it is not necessary to the outcome of this appeal. However, we note our serious reservations concerning the amount of evidence left to establish probable cause after the allegations in the affidavit supporting the petition for emergency custody were explored at the probable-cause hearing. Since probable-cause-hearing orders are not final and appealable, the statutory scheme of the juvenile code adds the safeguard of requiring that an adjudication hearing be held within thirty days of the probable cause hearing. In that way, any errors made in the probable cause hearing, which would not be subject to immediate appeal, are minimized by requiring the full adjudication hearing to follow soon thereafter.

Although appellant subdivides her second point of appeal into several subpoints, the root of her argument is that the trial court's finding that Blair was dependent-neglected is clearly against the preponderance of the evidence. We find that the trial court's decision was not clearly erroneous.

At the adjudication hearing, the chancellor heard the testimony of Rickie Lockwood, a clinical therapist for the Little Rock Community Mental Health Center. Ms. Lockwood held a bachelor's degree in sociology and a master's degree in clinical social work, which she received in 1993. However, she had worked professionally in the field of abuse and neglect for eighteen years.

Appellant had a history of psychological difficulties and had been diagnosed as having bipolar disorder, for which lithium is a prescribed medical treatment. Appellant was hospitalized for the condition in June 1994, at which time her mother and brother obtained custody of her other daughter, Randal. When she was released from the hospital, appellant was treated at the Little Rock Community Health Center. Ms. Lockwood began seeing appellant in September 1994 after appellant expressed a desire to have Ms. Lockwood as her primary therapist, rather than the therapist she had been seeing. Ms. Lockwood continued seeing appellant for weekly sessions through January 20, 1995, a period of approximately five months.

For the majority of this five-month period, appellant was pregnant with Blair and therefore unable to take lithium. Blair was

born on November 23, 1994. Appellant's symptoms increased after Blair's birth. She began taking lithium around the first of December 1994, but it takes time for the medication to become regulated and begin working. She was hospitalized from December 12, 1994, to December 21, 1994. Ms. Lockwood last saw appellant on January 20, 1995. Appellant changed doctors and began seeing Dr. Brad Diner in January 1995. He was her treating psychiatrist at the time of the probable-cause hearing and the adjudication hearing.

Ms. Lockwood testified that appellant was very impulsive; that she externalized blame and responsibility for everything that happened; that she exercised poor judgment; that she acted in an adolescent manner; and that she had a history of objectifying or seeing her children as objects rather than as human beings with needs. She also testified that appellant had a history of stopping medication against doctors' recommendations. She stated that she does not think appellant is capable of nurturing Blair emotionally; and that appellant is not capable of caring, understanding, and opening up. She stated that her concern really deepened when appellant commented to her that she had sometimes put Randal, appellant's other daughter, in a room with a baby gate and allowed her to cry herself to sleep or tear up the room. Ms. Lockwood stated that in her opinion appellant's parenting abilities are very limited and that Blair would be at risk in appellant's home.

The other testimony presented at the adjudication hearing was either generally favorable or neutral with respect to appellant's ability to care for Blair. For example, Blair's pediatrician, Dr. Anthony Johnson, testified that he saw Blair when she was two weeks old, ten weeks old, three-and-one-half months old, and four-and-one-half months old; that she was clothed appropriately, clean, developing perfectly; that appellant acted appropriately with Blair during these visits and appeared to be bonded with Blair; that he had seen nothing to make him think there was a problem; and that he has a number of patients who have bipolar disorder and properly care for their children.

Sue Wilson is the DHS caseworker who supervised appellant's visits with Blair during the one-month period between the time Blair was removed from appellant's custody and the adjudication hearing. She testified that there had been at least four or five visits of about two hours each, and that appellant's actions with Blair were very appropriate.

Judy Sanders is the director of the preschool Blair attended prior to her removal to DHS custody. Ms. Sanders testified that she had observed appellant with Blair from January 1995 until April 1995, and that appellant interacted well with Blair and met her physical needs.

Gloria Beard kept Blair in the baby room at the preschool. She saw appellant with Blair on a daily basis. She felt Blair was doing fine and saw no problems.

Nancy Brinkley had known appellant for about one year after working with her at the same place of employment. She testified that appellant interacted appropriately with other persons in the office. She also said that she had seen appellant with Blair on a couple of occasions, and that she interacted really well with Blair.

Reba Gaines was an intake supervisor with the DHS Division of Children and Family Services. She supervised Michael King, the family services worker who investigated the report of child maltreatment concerning appellant which was conducted prior to the probably cause hearing. She testified that King called her from appellant's home and told her he saw no reason to place Blair into custody that day; that she was a happy, healthy baby; and that he felt the situation was good. She said DHS decided to remove Blair based on information received from Rickie Lockwood.

Appellant testified about her medical history, her current treatment and therapy with Dr. Diner, and the allegations contained in the petition that resulted in Blair's removal from appellant's custody.

Dr. Brad Diner testified that he had seen appellant five times since January 1995, approximately thirty minutes each visit, and that he had talked with her by telephone on numerous occasions. However, he had not seen appellant and Blair together. He said that bipolar was still his working diagnosis for appellant; that her lithium levels were in the therapeutic range; that he was comfortable with the fact she was adhering to the minimum requirements necessary to keep her stable; that he had never seen anything to suggest that appellant would harm her children; that he knew of no reason from a mental health standpoint why Blair should not be returned to appellant. He acknowledged appellant's extensive medical history, and acknowledged that there was some confusion among other treating physicians about whether her diagnosis was schizophrenia or bipolar disorder. He agreed that there was a point at which she

had been seriously disturbed, but she was not now; that there are "tons" of people with mental diseases that do not make them unfit parents; that he had no current concerns about appellant complying with her treatment; and that he would have no problem providing the court with periodic reports.

Furthermore, as part of the adjudication hearings, the chancellor ordered appellant to submit to "a parenting assessment designed to formulate a plan to correct any deficiencies." A letter from Larry Clarke, the psychologist who assessed appellant, was introduced at the adjudication hearing. The letter stated that he met with appellant on June 12, 1995, for more than four hours, and that she related her life history, her experiences in her family of origin, her educational background, her marriage and divorce, her decision to have children (Randal, age 7, and Blair, 6 months) by artificial insemination, her treatment with lithium for depression/bipolar disorder, and events surrounding her daughter's being taken from her custody. He was also able to meet with appellant and Blair on June 13, 1995, for approximately thirty minutes during their weekly visit at the DHS offices. He concluded in pertinent part:

> Dr. Johnston's [appellant's] behavior with Blair was entirely appropriate. She brought with her to the visit a number of objects suitable for play with a baby of Blair's age and proceeded to employ them skillfully to keep Blair amused.
>
> Blair's responses to her mother were positive and as expected for an infant of 6-7 months.
>
> My assessment of Dr. Johnston [appellant] detected no reason why she should not be currently capable of caring for her daughter. My own inclination would be to return Blair to her unless there were some substantial evidence she had regularly behaved in ways which placed this child at risk.
>
> The view that her current psychological functioning is adequate to permit good parenting was further supported by the Personality Assessment Inventory which Dr. Johnston [appellant] completed at the time of her evaluation.
>
> . . .
>
> She is a highly educated person who reports that she has a Masters degree in counseling from N.Y.U. and a Ph.D. in psychology from Hofstra.

. . .

> Dr. Johnston [appellant] has been diagnosed with a bipolar disorder.... Although this is a relatively serious psychiatric diagnosis, it is also one which can often be very well controlled through medication.

. . .

> Although Dr. Johnston [appellant] is currently functioning well it is not possible to say how her condition might change if she were to discontinue medication without consulting her physician. For this reason, I have strongly recommended that she make no change in medication without consulting Dr. Diner.
>
> Dr. Johnston [appellant] has indicated that she plans to continue her work with Dr. Diner and would not change her medication unilaterally. Dr. Diner can indicate for the court whether Dr. Johnston [appellant] has been compliant with treatment to date.

The juvenile code requires proof by a preponderance of the evidence in dependency-neglect proceedings. Ark. Code Ann §§ 9-27-325(h)(2)(B) (Supp. 1995). We review a chancellor's findings of fact de novo, and will not set them aside unless they are clearly erroneous, giving due regard to the trial court's opportunity to judge the credibility of the witnesses. Ark. R. Civ. P. 52(a). A finding is clearly erroneous when, although there is evidence to support the finding, after reviewing all of the evidence the reviewing court is left with the definite and firm conviction that a mistake has been made. *Nichols* v. *Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996).

A dependent-neglected child is one who "as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness is at substantial risk of serious harm." Ark. Code Ann. § 9-27-303(12) (Supp. 1995). The juvenile code further defines "neglect" as an act or omission by a parent which constitutes the "[f]ailure or irremedial inability to provide for the essential and necessary physical, mental, or emotional needs of the juvenile." Ark. Code Ann. § 9-27-303(23)(D) (Supp. 1995).

At the adjudication hearing, the chancery court was presented with conflicting testimony concerning appellant's ability

to provide for the essential and necessary physical, mental, or emotional needs of Blair, an infant totally dependent upon her care giver. Therefore, we cannot say that the chancellor's choice of crediting Ms. Lockwood's testimony over that of the other witnesses was clearly erroneous.

Affirmed.

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

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to affirm this case because I think the order appealed from may be moot. The order was entered July 26, 1995, and the final paragraph states: "Jurisdiction is continued with review hearing set for September 25, 1995 at 1:30 p.m." The order also states that "the goal of this case shall be reunification and the case plan developed by DHS is approved."

Thus, here we are in December of 1996 affirming an order which, from its last paragraph, we know may now be moot.

In *Gullick* v. *Arkansas Dept. of Human Services* 326 Ark. 475, 931 S.W.2d 786 (1996), a case somewhat like this one, the dissenting opinion raises the question of whether the order appealed from is a final order.

We can wait for legislative action as suggested in *Gullick* or can do something now. I would issue a writ of certiorari for the trial court to send to this court any order entered in this case since July 26, 1995. I would then, depending on what has happened since, decide what to do about this case.

I dissent from the affirmance of this case.

Louis Albert WEAVER III *v.* WHITAKER FURNITURE CO., Inc.

CA 96-94 935 S.W.2d 584

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996
[Petition for rehearing denied January 22, 1997.]

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

Matthews, Sanders & Sayes, by: *Margaret M. Newton* and *Gail O. Matthews*, for appellee.

JOHN F. STROUD, JR., Judge. Louis Albert Weaver III was working for Whitaker Furniture Company, Inc., on October 28, 1993, when he stepped down from a forklift and fell. He continued to work until his supervisor asked about his arm about four hours later. That afternoon he was sent to Dr. C. W. Koch, Jr., who determined that he had fractured his elbow. Before leaving Dr. Koch's office, appellant gave a urine sample that was forwarded for testing. The laboratory analysis revealed the presence of cannabinoids. A second urine sample, taken two weeks later, had no detectable level of cannabinoids.

Whitaker Furniture contended that appellant's injury was drug-related and contested his claim for workers' compensation benefits. The administrative law judge denied the claim, finding that the preponderance of the evidence failed to show that the claimant had sustained a compensable injury within the meaning of Act 796 of 1993. The Workers' Compensation Commission affirmed and adopted the decision of the law judge after conducting a *de novo* review. On appeal Mr. Weaver contends that the Commission's opinion is not supported by substantial evidence and is erroneous as a matter of law. We disagree and affirm.

Under our prior workers' compensation law, there was a *prima facie* presumption that an injury did not result from intoxication of the injured employee while on duty. *See* Ark. Code Ann. § 11-9-707(4) (1987). Act 796 of 1993, however, changed that presumption so that it now reads as follows:

> The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. . . . An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996).

In the case before us, the Commission's opinion included the following discussion of appellant's burden of proof in overcoming the rebuttable presumption that his injury was substantially occasioned by the use of illegal drugs:

> [I]n determining whether the presumption has been overcome, the results of objective testing and the clear and consistent opinions of experts cannot be overlooked. Additionally, while some accidental injuries might occur with little possible relationship to intoxication, a slip and fall type injury is of the type which could be influenced by the effect of the forbidden substances. Moreover, the record does not reveal whether the other persons who allegedly did not notice intoxication possessed any special training for making such assessments.
>
> Thus, it cannot be said that the claimant has overcome the statutory presumption and proved entitlement to benefits without impermissibly giving him the benefit of the doubt or resorting to conjecture and speculation on his behalf.

Both appellant and a co-worker testified that appellant slipped as he was stepping down from a forklift. The co-worker stated that the forklift leaked brake fluid; that he, too, had slipped on the forklift two or three times; that there was brake fluid on the concrete floor where appellant slipped; and that appellant did not appear to be "high" from drugs before or after the accident. The appellant testified that he had oil on his shoes that morning; and that although he had not used marijuana in three years, he had attended a party four days previously where marijuana smoke was heavy. It was his opinion that the oil on his shoes had caused him to

slip and fall. Appellant introduced into evidence a letter from Dr. Koch, stating that there was no obvious intoxication when appellant was seen on the date of the accident.

The record also contains correspondence from two experts who evaluated appellant's laboratory test results. Cannabinoids detected in the first urine specimen were confirmed by gas chromatography-mass spectrometry showing a level greater than 200 ng/ml carboxy acid THC, the principle metabolite of marijuana. Dr. Henry F. Simmons stated that cut-off levels used to confirm positive screening tests are 15 ng/ml for federal programs and 10 ng/ml in many private programs. He stated that a level of 200 was well above levels expected from passive exposure to marijuana smoke, was not consistent with use of marijuana two to three years before testing, and could dissipate within two weeks to a level below cut-off values. He stated that the technique used by the laboratory was a state-of-the-art method of testing with a false positive rate near zero. Stuart Bogema, Ph.D, confirmed that two weeks after initial results of 200 ng/ml, a follow-up test of an individual who was not a heavy, chronic user and had not used marijuana in the interim would most likely be negative.

Appellant contends that the Commission erred as a matter of law in that it failed to understand that when *any evidence* is presented, the rebuttable presumption evaporates. He contends that the Commission placed an impossible burden upon him in refusing to disregard the rebuttable presumption once he presented testimony that he had not used marijuana in three years, that he was not intoxicated the day of the accident, and that he slipped because of oil on his shoes and brake fluid on the floor.

We do not read the Commission's decision as placing an impossible burden upon appellant, nor do we agree that the Commission erred as a matter of law. The plain language of the last sentence of section 11-9-102(5)(B)(iv) denies compensation "unless it is proved by a preponderance of the evidence that the . . . illegal drugs . . . did not substantially occasion the injury or accident." Furthermore, section 11-7-104(c)(3) requires that all provisions of the chapter be strictly construed. It was up to the Commission to determine whether appellant met its burden of proof in rebutting the presumption, and it did so by addressing in its decision "whether the presumption has been overcome." Whether a rebuttable presumption is overcome by the evidence is a question of fact

for the Commission to determine. *See Eagle Safe Corp.* v. *Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992).

When reviewing a finding of fact made by the Commission, we must affirm if the Commission's decision is supported by substantial evidence. *Purolator Courier* v. *Chancey*, 40 Ark. App. 1, 841 S.W.2d 159 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Southern Steel & Wire* v. *Kahler*, 54 Ark. App. 376, 927 S.W.2d 822 (1996). Furthermore, it is well established that the credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. *James River Corp.* v. *Walters*, 53 Ark. App. 59, 918 S.W.2d 211 (1996). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Jordan* v. *Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

Here, laboratory test results showed high levels of cannabinoids in appellant's urine the day he was injured at work. Under Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996), this created a rebuttable presumption that his injury was substantially occasioned by the use of illegal drugs. The Commission weighed appellant's evidence that he slipped because of a substance on the floor or on his shoes and that he had not used marijuana in three years, against the opinions of experts indicating that appellant had used marijuana or similar substances shortly before his accident at work and could not have attained the level detected by the testing from passive exposure to the smoke at a party a few days before the injury. We conclude that the Commission's finding that appellant did not overcome the presumption is supported by substantial evidence.

Affirmed.

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

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case.

The appellant, Louis Weaver III, was denied compensation because he tested positive for marijuana at the doctor's office where

appellant's supervisor took appellant after he fell from a forklift while at work.

The administrative law judge held that appellant failed to prove by a preponderance of the evidence that he sustained a compensable injury within the meaning of Act 796 of 1993. The law judge's opinion stated:

> To summarize, the opinions of the experts indicated that the claimant had recently used marijuana, or similar substances, at a significant level, but was not a chronic user and had not used the drug following his on-the-job injury, prior to the next test date. The tests further show that passive exposure to marijuana smoke was not the source of the claimant's positive test result.
>
> . . . .
>
> Thus, it is the claimant's burden in this claim to overcome the rebuttable presumption against compensability which arose as a result of the positive results of objective testing for cannabinoids. His proof tended to show that he had not been noticed to be visibly intoxicated at the time of the injury or at the doctor's office, that there was a slippery substance, probably brake fluid, which could have played a part in the injury, and that he denied recent marijuana use.
>
> However in determining whether the presumption has been overcome, the results of objective testing and the clear and consistent opinions of the experts cannot be overlooked. . . .
>
> Thus, it can not be said that the claimant has overcome the statutory presumption and proved entitlement to benefits without impermissibly giving him the benefit of the doubt or resorting to conjecture and speculation on his behalf.

The Commission affirmed and adopted the law judge's opinion which denied compensation.

Arkansas Code Annotated § 11-9-102(B)(iv) (Supp. 1993) provides:

> (B) "Compensable injury" does not include:
>
> . . . .

> (iv) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body. An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

The appellant argues on appeal that the Commission made a mistake as a matter of law in its interpretation of Ark. Code Ann. § 11-9-102(B)(iv). Appellant says the sentence "The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders" means that the presumption is rebutted simply upon presentation of proof to the contrary, and that here, when evidence was introduced regarding the cause of appellant's fall, the presumption evaporated.

I agree with the appellant and I think the Commission erred in finding appellant had not overcome the statutory presumption. I also think the Commission erred in finding that the results of objective testing and the opinions of the experts cannot be overlooked in determining whether the presumption had been overcome.

Recognizing that the rules of evidence do not apply to worker's compensation proceedings and that this case is controlled by our statute, I nevertheless think it is appropriate to turn to evidentiary principles for guidance.

A presumption is a standardized practice under which certain

facts are held to call for uniform treatment with respect to their effect as proof of other facts and a rebuttable presumption is one under which the party against whom the presumption operates can always introduce proof in contradiction. Under what has become known as the "bursting bubble" theory of presumptions, the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact and if that evidence is produced, the presumption disappears. *See* John W. Strong, *McCormick on Evidence* §§ 342, 344 (4th ed. 1992).

Arkansas cases have been in agreement with this general statement of the law. *See St. Louis, Iron Mountain & Southern Railroad Company* v. *Landers*, 67 Ark. 514, 55 S.W. 940 (1900) (the presumption of negligence ends when the railroad company introduces evidence to contradict it, and the presumption cannot be considered with the other evidence); *Missouri Pacific Railroad Company* v. *Ross*, 199 Ark. 182, 133 S.W.2d 29 (1939) (the presumption is at an end when evidence is introduced to contradict it and it cannot be considered with the other evidence, it has no place therein).

And in *Orient Insurance Company* v. *Cox*, 218 Ark. 804, 816, 238 S.W.2d 757 (1951), our supreme court stated:

> "The peculiar effect of a presumption 'of law' (that is, a real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. . . . It is, therefore, a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary." (Citations omitted.)

And in *Martin* v. *Young*, 17 Ark. App. 128, 705 S.W.2d 445 (1986), a worker's compensation case, this court held that when a properly addressed and stamped letter is shown to have been mailed, there is a presumption that it was received by the addressee in due course; however, the presumption ceases where the addressee denies having received the letter.

Thus, according to the above cited authority, in the instant

case, when the appellant put on some proof from which the fact finder could reasonably find that the appellant's injury was not caused by the use of alcohol or illegal drugs, the statutory presumption disappeared and could no longer be considered.

A reading of the statute brings me to the same conclusion. The statute first states that "the presence of alcohol . . . shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol." It then provides that "An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or . . . did not substantially occasion the injury or accident." Because this second provision is included, I believe that it must mean something different from the former provision and refer to something other than the presumption or there would be no reason for its inclusion in the statute.

Therefore, under our statute, once appellant put on some reasonable proof that alcohol or drugs did not cause the accident the statutory presumption disappeared and had no force, and the results of objective testing and the opinions of the experts were not applicable in determining whether the presumption had been overcome. Appellant was then free of the presumption and left only with the burden of proving by a preponderance of the evidence that alcohol or drugs did not "substantially occasion" his on-the-job injury or accident.

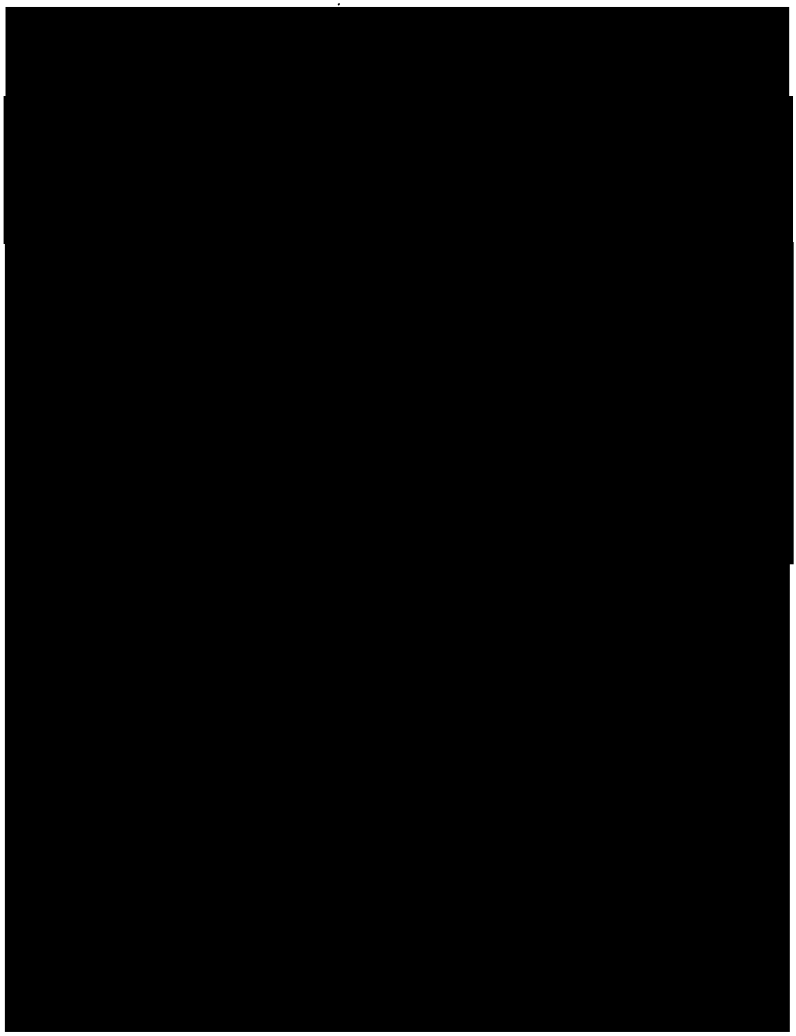
Consequently, the Commission erred by improperly applying the statute. The last sentence of the Commission's opinion, quoted above, in plain effect says even if the claimant rebuts the presumption — we cannot allow him benefits without "impermissibly giving him the benefit of the doubt." How about — when he rebuts the presumption — just considering the evidence without using the *presumption* he has rebutted.

I dissent.

E.A. WHITTEN *v.* HAROLD AUSTIN CONSTRUCTION, INC.

CA 95-1326 935 S.W.2d 579

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996



John Harris Jones, for appellant.

Bart Mullis Law Firm, by: *Bart G. Mullis*, for appellee.

OLLY NEAL, Judge. E.A. Whitten brings this appeal from a Jefferson County Chancery Court order denying his prayer for specific performance of a land-sale contract he allegedly entered into with appellee. The chancellor found that the offer and acceptance upon which appellant's claim is based, was executed on behalf of Harold Austin Construction, Inc., by one of its minority stockholders who lacked authority to bind the corporation. Harold Austin was the majority shareholder of the corporation, holding ninety-five percent (95%) of its stock. We find that the chancellor's findings of fact are not clearly erroneous, supported by substantial evidence and therefore, affirm the judgment.

Appellant alleged in his complaint that on March 24, 1994, appellant, acting through Worthen Trust Company Realty Service, communicated an offer to purchase "farm #2148," a 360-acre farm located in Jefferson County from appellee for the sum of $355,000. The offer recited that its terms would be binding if accepted within three (3) days and was signed by appellant as buyer and by Mark Maxwell, vice-president of Worthen Trust, as agent. The offer was accepted the following day by Sylvia Austin on behalf of Harold Austin Construction, Inc. Sylvia Austin, wife of Harold Austin, owned 5% of the corporation's stock. At all relevant times, Harold Austin was confined to a wheelchair, and in fact, is paralyzed from the neck down.

At the December 8, 1994, trial, testifying on his own behalf, appellant E.A. Whitten recalled that he had made a preliminary offer to purchase a farm from appellee for the sum of $350,000 which was rejected. Appellant also remembered that his second offer was accepted by appellee on March 24, 1993, and that he went to Little Rock, Arkansas, the following day to arrange to pay cash for the acquisition. At the time, Mr. Whitten was not aware that Austin Construction was a corporation, and "presumed [he] was purchasing from Harold Austin and wife." Mr. Whitten stated that he was not aware of any problems with the contract until he was informed by Maxwell several days after it was executed that the Austins were unwilling to consummate the deal. Appellant admitted that he never met the Austins and that he accepted responsibility for paying Maxwell's commission. According to Mr. Whitten, appellant, at all times, considered Maxwell his own agent.

William Mark Maxwell, the Worthen Bank employee who was responsible for all agricultural and real-estate transactions, testified on direct examination that he contacted Harold Austin and talked with Austin about whether Austin was interested in selling the farm. After Mr. Austin indicated that he would consider selling, Maxwell contacted appellant, showed Mr. Whitten the property, and transmitted Whitten's written offer to the Austins. Maxwell testified that his first offer was rejected, and he then conferred with appellant and was authorized to offer a greater price and $5,000 earnest money. The Austins asked Maxwell to wait until the next day. Although he couldn't remember specifically, Mr. Maxwell testified that he believed that Mrs. Austin contacted him the following day and informed him that Austin Construction had decided to accept the second offer of $355,000. Maxwell also admitted that prior to Mrs. Austin's signing the sale contract, Mr. Austin stated that he didn't want to "do the deal." After the contract was signed, Mr. Austin made no further comments. Two days later, Mrs. Austin contacted Maxwell and attempted to back out of the deal.

On cross-examination, Mr. Maxwell stated that Harold Austin was involved in all phases of negotiation of the contract and that Mr. Austin was the person he dealt with. Maxwell never knew that Mrs. Austin was president of the corporation or that she and Mr. Austin comprised the entire board of directors. Maxwell admitted that he never asked for a corporate resolution at the initial execution of the contract, and only decided to do so after he returned to the bank and was asked to secure one by the bank's trust department.

Sylvia Austin testified that she recalled the circumstances surrounding the farm transaction and remembered that Mark Maxwell initiated the deal by contacting her husband and asking him if he was "interested in selling the Roberts place." Upon receiving a somewhat ambiguous, "Oh, I might sell if the price is right," Mr. Maxwell secured an offer and visited the Austins several times, even after the first offer was rejected and Mrs. Austin asked him not to return. After Maxwell's final visit prior to the signing of the contract, Maxwell left the contract with the Austins and the Austins stayed up all night discussing the proposition. Mrs. Austin denied calling Maxwell to confirm the deal, and remembered at trial that, when Maxwell entered the Austin residence the following day, Mr. Austin immediately told the agent, "she's not going to sign them

papers. I don't want to sell that place." Mrs. Austin stated that she accepted the papers and signed them, and Maxwell immediately left the premises. Mrs. Austin admitted that she did not have her husband's permission to sign the final contract, and did so, in direct defiance of her husband's wishes, only because she was "wore out" from staying up the previous night and from dealing with the constant pressure applied by Mr. Maxwell. Mrs. Austin also admitted that she never held herself out as the president of the corporation and only signed some documents as president because Mr. Austin was unable to write.

Harold Austin testified that he specifically communicated to both Mrs. Austin and Mark Maxwell that he did not want to go through with the transaction. Although Mr. Austin had considered accepting appellant's offer, he ultimately decided that the offered price wasn't high enough. According to Mr. Austin, by March 24, 1994, the day the contract was signed, he had completely changed his mind and decided that he didn't want to sell for any price.

■ It is an established principle of appellate review that we will not reverse a chancellor's finding of fact unless it is clearly erroneous. *Hot Stuff, Inc.* v. *Kinko's Graphic Corp.*, 50 Ark. App. 56, 901 S.W.2d 854 (1995). *Fennell* v. *Ross*, 289 Ark. 374, 711 S.W.2d 793 (1986). Appellant here argues first that the chancellor erred as a matter of law when he ruled that Mark Maxwell was the agent of appellant. In the *Fennell* case, the supreme court delineated the relative positions of agents and principals in land sale contract cases. The supreme court held in *Fennell*, that as a matter of law, in all cases involving properties listed with the Multiple Listing Service the listing agent is conclusively the subagent of the seller. However, in the instant case, appellant's reliance on *Fennell* is misplaced. In framing the issue in *Fennell*, the court stated:

> The [trial] court obviously, and we think correctly, regarded the question of whether [the listing agent] was the agent of the sellers or of the buyers as one of law. That is the question his decision turned upon, and it is thus the one we must address. Here we are dealing with a garden variety MLS property sale transaction conducted by two real estate broker through their agents. Obviously, the broker and agent who listed the property with MLS was the representative of the sellers, but what of the others...

Id. at 377.

The court concluded:

> The law of agency contemplates that an agent may serve only one principal with respect to any one transaction (citation omitted). We agree with the authorities and authors cited above who have reached the conclusion that in an MLS transaction like this one the selling agent is a subagent of the sellers.

Id. at 379.

The court's limitation of its holding to MLS cases is based on sound reasoning. In what the court described as "garden variety MLS" cases, the potential seller clearly evinces an intent to sell his property by listing the property with multiple agencies: by signing a listing contract the seller in effect states, "I will pay you if you will find a buyer for my property at a fair price." Under such an arrangement, it is the seller who pays the listing agent for his services and ultimately he who benefits from any transaction. The listing agency and subagent obviously work on behalf of the seller. In cases such as the one before us, where the property is never listed for sale and the owner of the property does nothing to indicate that he wishes to sell his property, the rationale for holding the selling agent as his subagent as a matter of law is somewhat dubious. Under this type of arrangement, the agent may actually be the person who initiates the sale for the purpose of collecting a commission, or the buyer may solicit the assistance of an agent to secure property for himself at a below-market price. In both instances, it would be irrational to hold that the real estate agent represents the seller. The court recognized in *Fennell* that selling agents in MLS cases are somewhat constrained by their legal duty to the seller and may only serve one principal per transaction.

In non-MLS cases, the general rule remains that the existence of the agency relationship may be established by the testimony of other witnesses who possess knowledge of the facts, that circumstantial evidence may be sufficient to establish the agency, and that the agent's declarations may be used to corroborate other evidence of agency. *See Hawthorne* v. *Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980). Also, an owner or seller must do some affirmative act that tends to prove he accepted the broker as his agent; mere selling to the party whom the broker procured is insufficient proof.

Walker v. *Huckabee*, 10 Ark. 165, 661 S.W.2d 460 (1983).

In the case at bar, the chancellor found that Maxwell acted as the buyer's agent in the transaction. The supreme court's ruling in *Fennell, supra* does not preclude that finding as a matter of law as this is not an MLS case. Mr. and Mrs. Austin's testimony that Mr. Austin clearly communicated to both Mrs. Austin and Mr. Maxwell that he did not wish to sell his property, appellant's testimony that it was he who was to pay Maxwell's commission, and Maxwell's testimony that he actively solicited the sale are all circumstantial evidence of an agency relationship between appellant and Maxwell and is contrary to a finding that the Austins accepted Maxwell as their agent.

Appellant also argues that the chancellor erred in its finding that Mrs. Austin was acting within the scope of her apparent authority when she signed the contract and, therefore, her principal, Harold Austin Construction, Inc., should be bound by her actions. That argument is without merit. Mr. Maxwell, appellant's agent, as well as appellant himself, admitted that at the time of the transaction, he had no idea Austin Construction was incorporated or that Mrs. Austin was its president. Maxwell assumed that the Austins jointly owned the farm. That admission, when considered in light of Mr. Maxwell's admission that Mr. Austin clearly stated that he did not want to proceed with the sale forecloses appellant's argument that Mrs. Austin had apparent authority to bind the corporation. Mr. Maxwell, and therefore appellant, his principal, had notice of the restrictions on her ability to unilaterally sell the property in question.

Appellant's third argument is that the contract should have been upheld based on principles of ratification or acquiescence. This argument fails for some of the same reasons cited above; the evidence tended to show that Mr. Austin, the majority stockholder in the corporation expressed his opposition to the sale prior to the signing of any documents, and additionally, did no other act consistent with ratification. Ratification may be proved by showing that all the shareholders of a corporation had notice or knowledge of the authorized act of one of its managers or agents, and either expressly consented thereto, or remained silent and took no steps to disaffirm the act within a reasonable time after receiving such notice or knowledge. *M & F Bank* v. *Harris Lumber Co.*, 103 Ark. 287, 146 S.W.2d 510 (1912). The unequivocal testimony at trial established

that Mr. Austin was paralyzed from the neck down, and was unable to so much as pick up a telephone. Under the circumstances, the two-day period that elapsed between the time he informed Mrs. Austin and Mr. Maxwell of his desires and the time Mrs. Austin attempted to rescind her signature was not unreasonable. Mr. Austin had no power to notify anyone outside of his home that the contract was invalid and of necessity had to wait for Mrs. Austin to comply with his wishes. A party's manifestation of assent to a contract is judged objectively and may be proved by circumstantial evidence. *Childs* v. *Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995).

Similarly, appellant's arguments asserting waiver and estoppel as a defense must fail. Appellant inappropriately cites *Julian James Stores, Inc.* v. *Bennett*, 250 Ark. 279, 465 S.W.2d 94 (1971), as support for his waiver argument. That case dealt solely with the issue of whether a seller may defeat a brokers's claim to commission by asserting a ground different than the ground originally stated for revoking his acceptance. That case has no application to the present facts as Mr. Maxwell has presumptively received his commission; a selling agent who procures a willing buyer is entitled to his commission regardless of the outcome of the agreement between buyer and seller. *Graham* v. *Crandall*, 11 Ark. App. 109, 688 S.W.2d 548 (1984). Under the circumstances, Mr. Austin, the majority stockholder, cannot be said to have waived the defense of lack of authority.

Estoppel applies where an owner of realty "stands by and permits it to be sold, without giving notice of or asserting his rights." *Williams* v. *Davis*, 211 Ark. 725, 202 S.W.2d 205 (1947). There was ample evidence that Mr. Austin expressed his intent not to sell the subject property prior to Mrs. Austin's signing the contract, and he cannot be said to have sat idly by and watched his property sold.

Affirmed.

ROGERS, GRIFFEN, ROBBINS, and PITTMAN, JJ., agree.

STROUD, J., dissents.

JOHN F. STROUD, JR., Judge, dissenting. I respectfully dissent from the majority opinion in this case because it is my view that there was an enforceable contract.

Harold Austin, a quadriplegic, owned 995 shares of the stock

of the appellee company; his wife, Sylvia Austin, owned the remaining five shares. Sylvia Austin signed the offer and acceptance on behalf of the corporation, and it was established that she had signed other instruments for the company as president due to the inability of her husband to sign papers. It was also established that although the corporation was validly formed, no meetings or minutes were ever prepared or placed in the minute book since the organizational meeting twenty years before.

Appellee admitted in its answer that a contract was entered into on March 23, 1994, but denied that it was valid and binding on the corporation. Mr. Maxwell, a realtor, made an initial contact with Mr. Austin and asked if he would sell the 360-acre farm. Mr. Austin indicated he would sell for the right price. After one offer was refused, another offer was presented by the realtor. The Austins asked him to wait a day, and Mr. Maxwell brought out the offer and acceptance on the following day. Mr. Austin said he didn't want to do the deal, but his wife said that was ridiculous and signed the agreement. She made copies, kept the earnest money check, and delivered the signed contract to their realtor. Mr. Austin admitted in his testimony that before Mr. Maxwell left, he asked Mr. Austin, "Are you sure this is what you want to do?" and that Mr. Austin did not respond.

In my opinion, there was a valid contract, and if Mr. Austin did not agree, he at least had the obligation to respond to Mr. Maxwell when he asked if that was what Mr. Austin wanted to do. Failure to make any response to such a pointed question either evidences agreement or acquiescence to the execution of the agreement by the corporation. He obviously knew that the realtor would immediately deliver a fully executed copy of the agreement to the buyer. The testimony was that Mr. and Mrs. Austin argued much of the night before the contract was signed as to whether or not the corporation should sell the farm for the increased offering. The court found that Mr. Austin was mad at his wife, and he felt he was being forced into the transaction. That may be so, but the point is that, forced or not, he did allow the corporation to enter into the agreement. The fact that Mrs. Austin did not deposit the earnest money check, that she called the realtor two days later and left a message that they did not want to sell, or that she testified that it was her belief that she could rescind the agreement within three days are of no consequence except as further evidence that there

was an agreement.

Nan B. BLACKFORD *v.* ARKANSAS EMPLOYMENT SECURITY DEPARTMENT and the National Medical Rental

E 95-227 935 S.W.2d 311

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1996

Appellant, pro se.

Allan Pruitt, for appellee.

WENDELL L. GRIFFEN, Judge. Nan B. Blackford has appealed the decision of the Arkansas Board of Review concerning her claim for unemployment insurance benefits arising out of her employment with The National Medical Rental of Dardanelle, Arkansas. The Board of Review adopted the decision of the Appeal Tribunal upon the finding that Blackford was discharged from her job with National Medical Rental for misconduct connected with the work, and, therefore, held her disqualified from receiving unemployment benefits for eight weeks of unemployment pursuant to Ark. Code Ann. § 11-10-514(a) (Repl. 1996). Blackford's appeal requires us to determine whether the finding of misconduct connected with the work is supported by substantial evidence. Because we hold that substantial evidence is not present to support the finding, we reverse and remand to the Board of Review so that Blackford's benefits can be awarded.

Appellant was discharged from her position as a customer service representative on May 16, 1995, after having worked for National Medical Rental for eleven years. During the fall of 1994, she began falling behind in her work without apparent cause. She was counseled concerning this problem in January 1995, and her

employer temporarily relieved her of some work duties so that she could bring her paperwork current. However, after appellant became current on the paperwork and resumed her regular workload she again fell behind. The record contains clear proof that appellant's work in customer service had been substandard, including proof that she informed customers on several occasions that items would be delivered when she had not first verified that the items were available.

The proverbial last straw appears to have occurred on May 10, 1995, when appellant directed a delivery driver to a customer's residence in Clinton, Arkansas. The customer was being released from hospitalization on that date, and was supposedly en route home. Although appellant informed the delivery driver about that situation, the customer had not arrived home two and a half hours after the driver arrived to make the delivery. After this incident, appellant was discharged due to poor job performance. Her claim for unemployment benefits was denied on the finding that she had been discharged for misconduct connected with the work.

In unemployment compensation cases, the scope of review by an appellate court is governed by the substantial evidence rule. Substantial evidence is defined as such relevant evidence as a reasonable person might accept as adequately supporting the conclusion. *Haig* v. *Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983). Whether the findings of the Board of Review are supported by substantial evidence is a question of law, and the Court of Appeals may reverse a finding of the Board of Review which is not supported by substantial evidence. *St. Vincent Infirmary* v. *Arkansas Emp. Sec. Div.*, 271 Ark. 654, 609 S.W.2d 675 (Ark. App. 1980).

This standard of judicial review requires us to determine whether the Board of Review's finding that appellant was discharged from her last job because of misconduct connected with the work is supported by such relevant evidence as a reasonable person might accept as adequately supporting that conclusion. In doing so, we are guided by the long-standing principle 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 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. *Willis Johnson Co.* v. *Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980). We have repeatedly stated that misconduct which precludes benefits for unemployment compensation contemplates willful or wanton disregard of an employer's interest as is manifested in the deliberate violation or disregard of those standards of behavior which the employer has a right to expect from its employees. *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987). As we stated in *A. Tennenbaum Co.* v. *Director*, 32 Ark. App. 43, 796 S.W.2d 348 (1990), there is an element of intent associated with a determination of misconduct, and mere inefficiency or poor performance does not, in itself, constitute misconduct. The Board of Review must determine that there was an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design in order to find misconduct. For example, in *St. Vincent Infirmary* v. *Ark. Emp. Sec. Div.*, *supra*, we reversed a finding by the Board of Review that two day care center workers had been discharged for "reasons other than misconduct" where the undisputed proof was that the workers left their workplace without permission during the busy period of the workday, and their absence placed the day care center in violation of regulations concerning the ratio of adult employees to the number of children present. In that case, we concluded that the actions of the discharged employees were intentional and displayed a substantial disregard of the employer's interests as well as their duties and obligations as employees.

This case is fundamentally different. The parties do not dispute that appellant was discharged in the wake of the May 10, 1995, incident when she routed a delivery driver to the home of a customer who had been released from hospitalization, but who was not home two and a half hours after the driver arrived to make the medical supply delivery. Appellant's evidence that she had spoken with the hospital and been informed that the customer was en route home was not contradicted. Appellant informed the delivery driver about the customer's recent release, so it cannot fairly be said that she intentionally withheld information vital to the employer's interest, or that she was deliberately inefficient, or guilty of such negligence as to be deemed in deliberate violation of the employer's rules. Indeed, it is difficult to fathom how appellant could have been more dutiful in the situation, considering that the customer apparently desired or needed the ordered item shortly after being

released from the hospital.

Based upon our review of the record consistent with the substantial-evidence standard, we hold that the Board of Review's decision that appellant was discharged from her last job because of misconduct connected with the work is not supported by substantial evidence. Therefore, we reverse that decision, and remand the case to the Board of Review so that an order can be issued granting appellant's unemployment benefits.

Reversed and remanded.

ROBBINS, STROUD, and NEAL, JJ., agree.

PITTMAN and ROGERS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent from a reversal of the Board's decision because it represents a departure from our standard of review. The focus of the Board's finding of misconduct was on the recurring deficiencies in appellant's performance of her duties over an extended period of time. As stated by the majority, misconduct can be found when the failure of good performance is of such a degree or recurrence as to manifest an intentional disregard of the employer's interest. That is what the Board found to constitute misconduct in this case. While the majority recognizes that the final delivery incident was the "last straw," it treats this as an isolated incident rather than the last occurrence in a series of events demonstrating unsatisfactory performance in all of her duties. By focusing on this one incident involving one aspect of her duties, the majority has succumbed to the temptation of substituting its judgment for that of the Board in a misguided effort to decide this case as if it were the trier of fact. That this is so is further demonstrated by the majority's mention of only the decision of the Board, but not the findings of fact made by the Board in support of that decision.

It is for the Board to translate the evidence before it into findings of fact, and it is our function, upon review, only to determine whether those findings are supported by substantial evidence. As noted by the Board in its findings, appellant, a long-term employee, possessed the demonstrated ability to do her job, but for reasons appellant did not explain (in her "uncontradicted" testimony), her performance declined and continued on a downward slope despite the warnings and the opportunities afforded by her

employer to improve her performance. Thus, the Board reasoned that this was not a case of mere inefficiency or the failure of good performance as the result of inability, but rather a case where the evidence revealed a pattern of poor performance of such a degree as to manifest an intentional disregard of her employer's interest.

This case is similar to *Perry* v. *Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995), in which we affirmed the Board's finding of misconduct when a ten-year employee, who had a proven ability to perform the job, inexplicably and recurrently over a period of time began to fail to meet the employer's minimal standards.

Whether an employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question for the Board to decide. *Rucker* v. *Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). The Board's denial of unemployment compensation based on a finding of misconduct is fully supported by substantial evidence and should be affirmed.

ROGERS, J., joins in this dissent.

Richard WASHINGTON *v.* STATE of Arkansas

CA CR 96-781 936 S.W.2d 559

Court of Appeals of Arkansas
Opinion delivered December 23, 1996

James P. Clouette, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

PER CURIAM. The attorney general filed a motion in this case to dismiss appellant's appeal from a second-degree murder conviction, alleging that his notice of appeal was not timely filed. The judgment and commitment order was entered on February 5, 1996. Appellant filed a motion for a new trial on March 6, and an addendum to the motion on March 12. The trial court held a hearing on the motion on April 1 and denied the motion from the bench, but did not enter a written order. Appellant filed a notice of appeal on April 4. *Nance* v. *State*, 318 Ark. 758, 891 S.W.2d 26 (1994), is dispositive of the pertinent facts here. *Nance* provides that a notice of appeal must be filed within thirty days of the entry of the judgment and commitment order or the order denying a post-trial motion, that a notice of appeal filed prior to the entry of a final judgment is ineffective, that a decision announced from the bench denying the motion does not become effective until the order is filed, but that it is deemed denied thirty days from the filing of the motion. We agree with the attorney general that the notice of appeal was not timely filed.

As was stated in the three-judge dissent in *Nance*, the rules are ambiguous and should be interpreted to facilitate rather than thwart appeals. Nevertheless, until the rules or their interpretation is changed by the Arkansas Supreme Court, we must follow them.

The motion to dismiss the appeal is granted without prejudice to the appellant to file a petition with the supreme court for permission to file a belated appeal.

ROBBINS, NEAL, and GRIFFEN, JJ., agree.

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

MAYFIELD, J., dissents.

COOPER, J., not participating.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the decision to grant the State's motion to dismiss this appeal and join in all but the next-to-last paragraph of the per curiam opinion. I do not agree with that part of the opinion that states that the rules of appellate procedure are ambiguous, and I believe that the paragraph in question, expressing a view previously rejected by a majority of the court that drafted the rules, has no place in an opinion speaking for this court.[1]

JENNINGS, C.J., and ROGERS, J., join in this concurrence.

MELVIN MAYFIELD, Judge, dissenting. The State has filed a motion to dismiss this appeal on the basis that the notice of appeal was not timely filed. The motion was served on appellant's attorney, and he has filed no response to it.

According to the State's motion, the appellant was convicted of second-degree murder and sentenced to 240 months by a judgment and order of commitment entered on February 5, 1996. He filed a motion for new trial on March 6, 1996, and the court held a hearing on April 1, 1996, at which he denied the motion but no written order has been entered to reflect that action.

On April 4, 1996, the appellant filed a notice of appeal from his "conviction and sentence rendered by the Court on April 1, 1996," and the record was subsequently filed in the Arkansas Court of Appeals.

The State's motion to dismiss contends that the notice of appeal was not effective to appeal the judgment of conviction because it was not filed within thirty (30) days after the judgment of conviction was entered as required under Rules of Appellate Procedure—Crim. 2(a)(1), and it was not effective to appeal the denial of new trial because it was filed before the motion was deemed denied and before a written order was entered denying the motion. The cases of *Nance* v. *State*, 318 Ark. 758, 891 S.W.2d 26 (1994), *Tanner* v. *State*, 318 Ark. 888, 887 S.W.2d 311 (1994), and *Schaeffer* v. *City of Russellville*, 52 Ark. App. 184, 916 S.W.2d 134 (1996), are cited to

[1] It should be noted that the rules were amended after *Nance* v. *State*, 318 Ark. 758, 891 S.W.2d 26 (1994), cited by the majority, and before the judgment of conviction in this case, *see* Ark. R. App. P.—Crim. 2, but the changes do not affect the issue presented by this motion.

support the contention that the notice of appeal was not effective to appeal the denial of the motion for new trial.

If this matter is as clear as the State's motion contends, we should dismiss the appeal. However, as the cases of *Nance* and *Tanner* hold, the appellant's attorney can file a motion for a rule on the clerk to file the appeal which may be granted if the attorney will accept full responsibility for not timely filing the notice of appeal. However, under Rule 1-2(a)(10) of the Rules of the Supreme Court and Court of Appeals, a motion for rule on the clerk may have to be filed in the Supreme Court.

The 1996 Rules of Appellate Procedure—Crim. 2(e) provides that the "Supreme Court may act upon and decide a case in which the notice of appeal was not given . . . in the time prescribed, when a good reason for the omission is shown by affidavit." This rule was originally made by a per curiam issued on February 5, 1979. *See* 265 Ark. 964. In *Smith* v. *State*, 325 Ark. 34, 921 S.W.2d 953 (1996), the court treated a motion for a rule on the clerk as a motion for a belated appeal under what is now Appellate Procedure —Crim. Rule 2(e). Since the record is filed in the instant case, a motion for belated appeal rather than for a rule on the clerk would seem to be the proper motion.

In sum, I would agree to certify this case to the Arkansas Supreme Court, but I dissent to dismissing the appeal.

[redacted]