Eileen BLACKMON *v.* Joe and Deborah BERRY

CA 96-267 939 S.W.2d 863

Court of Appeals of Arkansas
Division I
Opinion delivered March 26, 1997

Chaney W. Taylor, Jr., for appellant.

Blackman Law Firm, by: *Phillip Crego*, for appellees.

JUDITH ROGERS, Judge. This is an appeal from a judgment in favor of appellees, Joe and Deborah Berry, in the principal amount of $4,000, representing the return of a downpayment paid by the appellees for the purchase of land from appellant, Eileen Blackmon. In the judgment, the trial court also dismissed appellant's counterclaim for breach of contract.

For reversal, appellant contends that the trial court erred in allowing appellees to recover the downpayment and that the trial court erred in dismissing her counterclaim. Appellant further contends that the trial court erred in awarding prejudgment interest. We find merit in the first issue raised and reverse. Our reversal on this point renders the argument concerning prejudgment interest moot. However, we cannot disagree with the trial court's

dismissal of appellant's counterclaim and affirm that portion of the trial court's decision.

The record reflects that in July of 1991 appellant and her late husband, Ernest, agreed to sell appellees property located in Stone County for which appellees paid $4,000 as a partial downpayment. The only writing evidencing this agreement was a receipt prepared by appellant, which stated:

> Received of Joseph and Debbie Berry, the sum of $4,000 as a partial downpayment on 10 acres of property at Wolf Bayou, Stone County, Arkansas. As agreed, payment of $225 per month interest on the balance due will be paid until contract is renegotiated, which is to be within 60 days, or October 1st, 1991.
>
> /s/ Ernest Blackmon
>
> /s/ Eileen Blackmon

In March of 1993, appellees filed a complaint seeking the return of the downpayment. In it, appellees alleged that the parties did not complete a renegotiation of the contract, that appellant had sold the property to a third party, and that appellant had refused to refund the downpayment. In her answers to the complaint, appellant contended that appellees were not entitled to recover the downpayment. She alleged that appellees had failed to make the agreed-upon payments despite repeated demands for them to do so, that she had stood ready, willing and able to perform the contract and that she had sold the property when appellees had failed and refused to comply with the contract. As her counterclaim, appellant alleged that she had been damaged as a result of appellees' default for having been forced to sell the property at a loss.

The case was tried to the court. Upon the evidence presented, the trial court ruled that the receipt for the downpayment did not satisfy the requirements of the statute of frauds because it was not signed by the appellees and did not set out the terms of the sale. Based on this finding, the court concluded that the parties had not entered into a binding agreement and thus denied appellant's counterclaim and ordered the return of the downpayment, with interest.

As her first point on appeal, appellant contends that the trial court erred by permitting appellees to recover the downpayment. With that argument, we must agree. Long ago, the supreme court declared the law to be that a person who has paid money upon a parol contract for the purchase of land, which does not meet the requirements of the statute of frauds, cannot maintain an action to recover the money paid so long as the other party is willing to perform and has the ability to perform. *Venable v. Brown*, 31 Ark. 564 (1876). This rule has been given expression in the subsequent cases of *Betnar v. Rose*, 259 Ark. 820, 536 S.W.2d 719 (1976); *Sturgis v. Meadors*, 223 Ark. 359, 266 S.W.2d 81 (1954); *Baker v. Taylor & Co.*, 218 Ark. 538, 237 S.W.2d 471 (1951). Under these circumstances, the vendor is the party for whose protection the statute of frauds is designed, and a breaching vendee is not permitted to take advantage of the statute to recover sums advanced upon the contract. *Sturgis v. Meadors, supra.* As was said by the court in *Baker v. Taylor & Co., supra*, it would be an alarming doctrine to hold that the plaintiffs might violate the contract and make their own infraction of the agreement the basis of an action for money had and received.

Appellees contend, however, that it cannot be said that appellant stood ready, willing and able to perform the contract since she had sold the property. We do not agree. The property was sold by appellant in April of 1992. Appellees' contention overlooks the testimony and phone records offered by appellant demonstrating her efforts to contact appellees prior to the sale. The argument also ignores appellee Deborah Berry's own testimony that she informed appellant in February of 1992 that they did not yet have the funds with which to purchase the property. Appellees had paid nothing save a portion of the downpayment and made no further inquiry about the property until June of that year. We cannot conclude that appellant did not stand ready, willing and able to go forward with the transaction. The trial court's ruling permitting the return of the money based on the statute of frauds is contrary to the law and must be reversed.

We find no merit, however, in appellant's contention that the trial court erred in dismissing her claim for breach of contract. The statute of frauds requires that a written memorandum

be signed by the party to be charged. Ark. Code Ann. § 4-59-101(a)(4) (Repl. 1993). The party to be charged is the one against whom the contract is sought to be enforced, in this instance the appellees. *Norton v. Hindsley*, 245 Ark. 966, 435 S.W.2d 788 (1969). Here, as there was no writing signed by appellees, the trial court did not err in holding that the contract was not enforceable against them.

Affirmed in part; reversed in part.

PITTMAN and CRABTREE, JJ., agree.

Louise SYKES *v.* STATE of Arkansas

CA CR 96-718 940 S.W.2d 888

Court of Appeals of Arkansas
Division III
Opinion delivered March 26, 1997

[redacted]

William R. Simpson, Jr., Public Defender, by: *Scott C. Bles*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar, and *C. Joseph Cordi*, Deputy Public Defender.

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

JUDITH ROGERS, Judge. Appellant, Louise Sykes, was convicted after a bench trial of second-degree battery for spanking her eleven-year-old grandchild with a phone cord. She was sentenced to three years' probation, fined one hundred dollars, and ordered to complete a counseling program. On appeal, appellant argues that the evidence was insufficient to support her conviction. We agree and reverse.

On July 27, 1995, Officer Randy Woodall observed Xavier Calloway, age eleven, and two other young boys playing inside a fenced-in "construction hardware type company." The officer placed the boys in his patrol car and took each of them home. Officer Woodall transported Xavier to appellant's home because she was Xavier's legal guardian and his grandmother. Officer Woodall testified that he informed appellant what Xavier had been doing and explained what could happen to Xavier if this behavior continued and what could have happened if he had chosen to arrest Xavier for criminal trespass.

Xavier testified that he was inside a fenced-in area with two other boys. According to Xavier, one of the boys was a troublemaker, and appellant did not want him around that boy. Xavier said that appellant was not happy about the incident, and that she told him that she did not want him to get in trouble. Xavier testified that after the officer left appellant looked for a belt, but that she could not find one because his sister had hidden them. Xavier admitted that appellant had never used a phone cord before and that she only used the phone cord to spank him after she could not

find a belt. Xavier testified that after he was spanked he ran from the house and called the police. Officer Woodall responded to the call, returning to the home only thirty minutes after he had previously been there. He observed welts on Xavier, and he reported the incident.

The photographs admitted into evidence displayed marks on Xavier's arm, one mark on his leg, and one mark on his bottom. The photographs were taken approximately ten minutes after the spanking. There was no evidence of bruising or bleeding. There were no whelps or marks depicted on Xavier's back or any other part of his body. In fact, there were no other signs of physical injury except the few marks from the cord.

Appellant argues on appeal that the evidence is insufficient to support the finding that she used inappropriate and unreasonable physical force while disciplining her eleven-year-old grandson. We agree.

Arkansas Code Annotated § 5-13-202(a)(4)(C) (Supp. 1995) provides:

> (a) A person commits battery in the second degree if:
>
> (4) He intentionally or knowingly without legal justification causes physical injury to one he knows to be:
>
> (C) An individual sixty (60) years of age or older or twelve (12) years of age or younger.

Physical injury means that impairment of physical condition or the infliction of substantial pain. Ark. Code Ann. § 5-1-102(14) (Repl. 1993). Arkansas Code Annotated § 5-2-605(1) (Repl. 1993) provides:

> The use upon another person of physical force that would otherwise constitute an offense is justifiable under any of the following circumstances:
>
> (1) A parent, teacher, guardian, or other person entrusted with care and supervision of a minor or an incompetent person may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent reasonably necessary to maintain discipline or to promote the welfare of the minor or incompetent person.

The test for determining sufficient proof is whether there is substantial evidence to support the verdict. *Black v. State*, 50 Ark. App. 42, 901 S.W.2d 849 (1995). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* Based on the facts in this particular case, we hold that the evidence is insufficient to support a finding that the physical force used by appellant in disciplining her grandchild was unreasonable or inappropriate under the circumstances. There may be more desirable methods of correction that could have been utilized in this situation, but we cannot say that the punishment inflicted rose to that of a battery in the second degree. Therefore, we find that the evidence is insufficient to support a conviction for second-degree battery.

Reversed.

PITTMAN and MEADS, JJ., agree.

SHELTER INSURANCE COMPANY *v.* Sheila ARNOLD

CA 96-678 940 S.W.2d 505

Court of Appeals of Arkansas
Division II
Opinion delivered March 26, 1997

Matthews, Sanders, & Sayes, by: *Margaret M. Newton* and *Roy Gene Sanders*, for appellant.

Bailey Law Firm, by: *Rita F. Bailey*, for appellee.

ANDREE LAYTON ROAF, Judge. Shelter Insurance Company (Shelter) settled a claim with its insured pursuant to uninsured motorist coverage, and filed an action to recover from the

alleged negligent driver more than three years after the date of the accident. On appeal, Shelter argues that the trial court erred in granting a motion to dismiss based on the three-year tort statute of limitations. We affirm.

Shelter provided an automobile insurance policy to Deborah Day. The policy included medical payments and uninsured motorist coverage. On September 18, 1992, Ms. Day was involved in a car accident with the appellee, Sheila Arnold, who was uninsured. Beginning on May 17, 1993, Shelter paid medical benefits to Ms. Day, pursuant to the uninsured motorist provision in her policy, and paid a final settlement to her on May 15, 1995.

On October 6, 1995, Shelter, as Ms. Day's subrogee, filed a complaint against Ms. Arnold alleging that her negligence caused the accident and resulting injuries to Ms. Day. Ms. Arnold filed an answer denying liability and asserting as an affirmative defense that the action was time barred by the statute of limitations. Ms. Arnold also filed a motion to dismiss that invoked the same affirmative defense. In a brief filed in response to the motion to dismiss, Shelter argued that its cause of action against Ms. Arnold had not accrued until it paid Ms. Day's medical expenses, and attached copies of the drafts it paid to Ms. Day as exhibits. The trial court granted the motion to dismiss, finding that the three-year statute of limitations had run.

Shelter's sole point on appeal is that the trial court erred in granting Ms. Arnold's motion to dismiss based upon the statute of limitations; however, its argument is twofold. Shelter asserts both procedural error and errors in the application of substantive law. We will address each in turn.

First, Shelter asserts that the trial court erred in granting the motion to dismiss pursuant to Ark. R. Civ. P. 12(b), because matters outside the pleadings in the form of the exhibits it attached to its response to the motion to dismiss were presented to and not excluded by the trial court. Shelter contends that, consequently, the motion to dismiss should be treated as one for summary judgment, pursuant to Ark. R. Civ. P. 56, and that this court must view the evidence in the light most favorable to the one against

whom summary judgment was granted. *See, e.g., Pastchol v. St. Paul Fire & Marine Ins. Co.*, 326 Ark. 140, 929 S.W.2d 713 (1996).

In response, Ms. Arnold asserts that she properly raised the statute of limitations as an affirmative defense in both her answer and in a separate motion to dismiss. She argues that Shelter should not be allowed to change the nature of her motion or request for relief by simply attaching exhibits to its response.

Although we agree that it is improper for the trial court to look beyond the complaint to decide a motion to dismiss, *see, e.g., University Hosp. v. Undernehr*, 307 Ark. 445, 821 S.W.2d 27 (1991), it is not clear that the trial court considered Shelter's exhibits in granting the motion to dismiss. Nonetheless, because the procedural dispute will not alter the disposition, we treat the motion as one for summary judgment. *See* Ark. R. Civ. P. 12(b) and (c); *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925 S.W.2d 395 (1996). Summary judgment should only be granted when there are no genuine issues of material fact, and when the case can be decided as a matter of law. *Smothers v. Clouette*, 326 Ark. 1017, 934 S.W.2d 923 (1996).

Turning to the second part of its argument, wherein error in the application of substantive law is alleged, Shelter contends that the trial court erred in granting judgment as a matter of law, because the law in Arkansas is unsettled regarding when the statute of limitations begins to run for an action brought by a subrogee.

Shelter asserted in its response to the motion to dismiss and in arguments to the trial court that its action was not based on tort, but was a subrogation or "contribution indemnity" case. Shelter contends that because Ms. Day had up to five years to sue Shelter for uninsured motorist coverage, the three-year statute of limitations did not apply, or did not begin to run until it paid Ms. Day's medical expenses.

Shelter further argues that if a three-year statute of limitations is applicable when an insurance company becomes the real party in interest as subrogee, the three-year statute of limitations begins to run from either the initial or the final payment of benefits to its insured. This argument is unpersuasive. Furthermore, Shelter's

reliance upon *Courtney v. First National Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989), as authority for the general proposition that the statute only begins to run when there is a "complete and present cause of action" is likewise clearly misplaced.

■■ It is well settled that the gist of the action as alleged determines which statute of limitations applies, *Ernest F. Loewer, Jr. Farms, Inc. v. National Bank*, 316 Ark. 54, 870 S.W.2d 726 (1994), and that the three-year statute of limitations for tort actions begins to run when the underlying tort is complete. *Faulkner v. Huie*, 205 Ark. 332, 168 S.W.2d 839 (1943). Moreover, we agree with Ms. Arnold that *Williams v. Globe Indemnity Co.*, 507 F.2d 837 (8th Cir. 1974), a diversity case interpreting Arkansas law, is persuasive authority for the proposition that a subrogee insurance company is subject to the same limitations as its insured. Globe, like Shelter, contended that its cause of action did not accrue until it made payment to its insured. The court of appeals, in rejecting this argument and holding that Globe had no separate right to indemnification, stated:

> Appellant argues that the insurer acquires the right of indemnification against Appellee when actual payment is made to its insured, thereby implying that an insurer has some type of implied contract or liability imposed by law vis-a-vis the uninsured motorist . . . .
>
> . . .
>
> As a general rule, indemnity is not allowed absent an express or implied contract. There are, however, certain exceptions as between joint tort-feasors, one of whom was liable only because of his relationship to the other joint tort-feasor, or because of a specific statute where the right is imposed. None of these exceptions are applicable to this case. . . .
>
> The duty of the insurer to pay damages arises solely out of its contract with its insured and not by reason of any special relationship between the insurer and the uninsured motorist. The rights acquired by the insurer upon payment to the insured are solely derivative rights of subrogation. . . .
>
> Thus, the insurer stands in the shoes of the insured and takes no rights other than those which the insured had, and this is true regarding the applicable statute of limitations.

Id. at 840 (citing *American States Ins. Co. v. Williams*, 278 N.E.2d 295, 299-300 (Ind. App. 1972).

Globe mirrors the decision of every jurisdiction that has addressed this issue, except for those states that have specific statutory provisions giving insurance companies the expanded limitations period sought by Shelter in this case. *See* Jane Massey Draper, Annotation, *When Does Statute of Limitations Begin to Run Upon an Action by Subrogated Insurer Against Third-Party Tortfeasor*, 91 A.L.R. 3d 844, 850-55 (1979). The holding in *Globe* is further based on the well-settled rule that a subrogee acquires no greater rights and is subject to the same defenses as its predecessor in interest. *See, e.g.*, *Midwest Mut. Ins. Co. v. Arkansas Nat'l Co.*, 260 Ark. 352, 538 S.W.2d 574 (1976).

Moreover, Shelter's policy arguments that this court should judicially legislate a five-year limitation period for subrogation claims to equal the length of its potential exposure to claims by its insureds is not persuasive, and completely ignores Shelter's ability to contractually protect itself from untimely claims made by its insureds.

Finally, Shelter's argument that the three-year statute of limitations may force insurance companies to bring actions against tortfeasors without knowing whether their insureds would seek benefits or the amount of those benefits certainly does not apply to the facts of this case. Here, Shelter began paying Ms. Day's claim in 1993, and paid the last dollar to her on May 15, 1995. The three-year limitations period did not run until September 18, 1995. Shelter thus had ample notice of its subrogation claim, and knew the exact amount of its claim more than four months prior to the expiration of the statute of limitations.

For the foregoing reasons, we hold that in actions based on negligence, a subrogee insurance company is subject to the same three-year statute of limitations period as its insured, and that the trial court correctly dismissed Shelter's action as a matter of law.

Affirmed.

ROBBINS, C.J., and GRIFFEN, J., agree.

Steven Ray MILLIGAN *v.* WEST TREE SERVICE et al.

CA 96-789 946 S.W.2d 697

Court of Appeals of Arkansas
Division IV
Opinion delivered April 2, 1997

[Supplemental opinion on partial granting of rehearing delivered June 4, 1997.]

[redacted]

David J. Potter, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia L. Busfield*, for appellees/cross-appellants.

SAM BIRD, Judge. Steven Ray Milligan, the claimant, appeals from a decision of the Workers' Compensation Commission that found he was not entitled to any additional temporary total disability. West Tree Service has appealed the Commission's finding that approved a change of appellant's physician to the Hand Surgery Centres of Texas in Houston, Texas.

Appellant testified that he had dropped out of school in the tenth grade and started working for Texarkana Mack Trucks in Texarkana, Texas, cleaning the shop, carrying garbage, and going after parts; he then worked for Tyson Foods in Oklahoma processing poultry; he also worked for Barksdale Lumber Company in Amity, Arkansas, making fencing and posts; he went back to work for Tyson Foods; and then he began working for West Tree Service.

On June 19, 1990, appellant was in his early twenties and was working for West Tree Service. He was up in a bucket truck trimming trees around power lines with a chain saw when his right hand swelled up "real big." He was taken to the emergency room by his supervisor and was diagnosed by Dr. Samuel Peebles as having tendinitis. He missed two or three days of work, then returned and worked until February 14, 1991, when his wrist mobility, swelling, and pain forced him to quit.

Dr. Peebles then referred appellant to Dr. Lloyd Mercer of Hope, an orthopedic surgeon. Dr. Mercer referred him to Dr. Marsha L. Hixson, a Little Rock hand specialist, who recommended surgery in the form of a radial shortening osteotomy. After several months of conservative treatment during which his hand condition deteriorated, appellant finally agreed to the surgery, and it was performed in May 1992. Appellant testified that he had wanted to get a second doctor's opinion before submitting to the surgery but the employer's insurance carrier, U.S. Fidelity and Guaranty Company, refused to authorize it, and appellant could not pay for it himself.

Dr. Hixson, testifying by deposition, explained that appellant's injury was to the lunate bone, a half-moon-shaped bone located where the forearm meets the wrist that allows the wrist to swivel. X-rays and other tests revealed that the lunate bone in appellant's right wrist was fragmented and partially collapsed. Dr. Hixson said appellant's condition is known as "Keinbock's Disease," vascular necrosis of the lunate, and it is very rare. She described the surgery she performed as breaking the radius bone in the arm, shortening it, and thereby taking the pressure off the lunate. Dr. Hixson testified that after several months of recovery from the surgery, appellant still had a stiff, painful wrist, decreased sensation in his palm, and a stiff forearm in which he had lost some motion. She said appellant thought he was better off before the surgery than he was afterward. She last saw appellant on November 13, 1992, and assessed a twenty-seven percent loss of the right upper extremity.

Appellant testified that his wrist never got well enough to use and that he had filed a malpractice claim against Dr. Hixson. He said he had been examined by Dr. Michael G. Brown and Dr. Brent Keyser of the Hand Surgery Centres of Texas and was told that the lunate bone in his right wrist was crushed, fragmented, and dead. Dr. Brown recommended surgery during which he would remove the diseased lunate bone and replace it with a soft tissue allograft, repair the damaged nerve, and remove the non-absorbable sutures that had been left in his hand after the previous surgery. Appellant said the sutures go from the bottom part of his thumb through the fatty part of the thumb three and one-half or

four inches, and that anytime he tries to pick up something with his right hand, the sutures feel like "little needles sticking, and sometimes it gets to itching like it's on fire, but I cannot [scratch] it, because I can't stand to touch it. It hurts when you touch it."

Appellant testified that he could no longer do any of the jobs he had previously held because they all involve lifting, pushing, and pulling with both hands, and he cannot do anything that might cause vibration in the right wrist because it could disrupt the precarious blood supply to the lunate. Consequently, appellant has not looked for work since February 14, 1991.

The opinion of the administrative law judge, which was affirmed and adopted by the Commission, states that initially appellee, through its insurance carrier USF&G, agreed to the surgery recommended by Dr. Brown, but subsequently withdrew its approval, citing Ark. Code Ann. § 11-9-102(17) (1987) and the definition of "medical services" contained therein as services performed by any practitioner licensed under the State of Arkansas relating to the healing arts. The record reveals that appellee did not object to the surgery itself; rather, it objected to appellant utilizing physicians from out of state.

The opinion also states that following the initial hearing in this case, an opinion was entered changing appellant's treating physician to a Dr. R. Cole Goodman of Fort Smith. However, Dr. Goodman refused to treat appellant and the law judge withdrew that opinion. The opinion from which this appeal arises says that appellant had speculated that because the community of hand specialists in Arkansas is so small, none of its members will willingly treat a patient who is pursuing a malpractice action against another member of the group. The judge said, "Dr. Goodman's withdrawal of his services is consistent with the claimant's theory," and that it was unlikely that appellant would receive appropriate medical care locally. Consequently, the law judge approved a change of physicians for appellant to the Hand Surgery Centres of Texas.

Appellant described his condition at the time of the hearing:

> [T]he lunate bone is collapsed and disintegrated into my hand and — or into the end of my forearm where it meets my hand,

> and the rest of my hand has been sliding down, you know, over the top of that. I've got that problem that I've had since — since February 14, 1991, in addition to the problem that I've had since May 13th of '92, which I had the radial shortened. I can't turn my forearm all the way, because of the radius and ulnar joint are - well, my radius is shorter, and now it is in a bind. My forearm rotation is in a bind. . . . And I've still got the pain of the collapsed bone. It's like my hand is, from the inside out, crushed like, so to speak, and any movement that you move it, it hurts. You know, it's a crushed joint. Anything I pick up that is very heavy or anything, or even sometimes, if the weather does just right, it swells up, and it hurts. . . . [A]lso, I have pain that runs all the way up that is slanted this a way (witness indicating), up to my elbow.
>
> Q. Indicating from the inside of your arm to the outside of your arm across the top of the elbow?
>
> A. [A]nd any movements whatsoever sets that off.

The administrative law judge found appellant to be entitled to temporary total disability benefits from February 14, 1991, through January 21, 1992, and again from May 13, 1992, through November 13, 1992, during the time he was recuperating from surgery. In January 1992, Dr. Hixson reported that if appellant refused to have the radial shortening procedure done, he had reached maximum medical benefit. The law judge held, "There is no indication that the claimant has yet entered another healing period and has also become incapacitated to earn wages, so that he would be entitled to additional temporary total disability benefits."

Temporary total disability benefits cannot be awarded after a claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). A claimant's healing period ends when the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve the condition. *Id.* The healing period has not ended so long as treatment is administered for healing and alleviation of the condition and continues until the employee is as far restored as the *permanent character* of the injury will permit. *Arkansas Highway & Transp. Dep't v. McWilliams*, 41 Ark. App. 1,

846 S.W.2d 670 (1993) (emphasis added). The determination of when the healing period ends is a factual determination to be made by the Commission. *Thurman v. Clarke Indus., Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994). The court of appeals must uphold such factual findings unless there is no substantial evidence to support them. *Arkansas Highway & Transp. Dep't v. McWilliams, supra.*

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and we do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). While these rules provide for some degree of insulation of the Commission from judicial review, this insulation cannot be absolute or else this court's function in reviewing these cases would be rendered meaningless. *Arkansas State Police v. Davis*, 45 Ark. App. 40, 870 S.W.2d 408 (1994); *Boyd v. General Indus.*, 22 Ark. App. 103, 733 S.W.2d 750(1987).

In making its decision that appellant's healing period had ended on November 13, 1992, the law judge relied upon Dr. Hixson's statement that she had last seen appellant on November 13, 1992, and felt that he had healed from the radial shortening osteotomy. The Commission apparently failed to discover that in her deposition, taken on February 2, 1993, Dr. Hixson said appellant's healing period from the surgery probably ended around November 13, 1992, but that:

> He was still having some decreased sensation in the palm and he thought that his wrist was still stiff and painful. . . . I thought that he had healed from — I mean, he had healed from the bone and the osteotomy. It generally takes, oh, between sometimes up to a year-and-a-half to heal, I mean to say that things have settled down after that particular operation. So he had healed the soft tissues and the bone, *but I don't think he had fully recovered from surgery at that time*, but he was doing about as expected. I didn't expect any great improvements for a while. (Emphasis added.)

On January 4, 1993, Dr. Hixson wrote to the insurance carrier:

> His [appellant's] limitations at this time are unchanged in that he cannot lift, push or pull more than 10 to 15 pounds using the right wrist, and he is unable to use the wrist in a repetitive fashion. His last measurements indicated a mild loss of motion of the wrist and forearm and a loss of grip strength in the right hand measuring 30 kg on the right versus 55 kg on the left. Based on mild wrist synovitis and loss of forearm and wrist motion, I have calculated a 27% loss of the right upper extremity. At this point, Mr. Milligan is unable to perform his former job due to loss of motion, loss of strength, and pain.

In her deposition Dr. Hixson said, "There is a possibility that over the next six months, he might improve some relative to his distal radial ulnar joint pain, but that wasn't going to affect anything that I had — any restrictions or impairment rating. *So I can't say that he had actually reached maximum medical improvement.*" (Emphasis added.)

In a letter dated June 8, 1993, Dr. Edward R. Weber wrote:

> Mr. Milligan was seen by me on 1/27/93. The diagnosis of Kienbock's disease was confirmed. He had undergone a radial shortening osteoplasty. It usually takes one to two *years* for the navicular to revascularize after such a procedure. Symptoms after that period of time should decrease. I would advise this patient to wait for the healing period to be completed which should be approximately another nine to twelve months. No further surgical intervention is indicated until that time. (Emphasis added.)

Appellee argues that the decision is supported by substantial evidence and emphasizes other evidence in the record.

It appears that since the day his injury incapacitated him in February 1991, appellant has been unable to work, has lost the use of his right hand, has had one unsuccessful surgery and needed another.

We agree with the Commission that appellant was not entitled to temporary total disability because between January 21 and May 13, 1992, according to Dr. Hixson, appellant had reached maximum medical benefit unless he decided to have the recommended surgery. The Commission's decision regarding that time period is affirmed.

However, when we consider the evidence before the Commission we cannot find substantial evidence to support the finding that appellant's healing period ended on November 13, 1992. Dr. Hixson, in a letter dated January 4, 1993, to the insurance adjuster, wrote that "Steve Milligan was last examined here at UAMS on 11/13/92. At that point, I felt that he had healed from the radial shortening osteotomy." She also said in the same letter:

> He was still having problems with the wrist in terms of loss of motion and wrist pain. . . . his limitations at this time are unchanged in that he cannot lift, push or pull more than 10 to 15 pounds using the right wrist, and he is unable to use the wrist in a repetitive fashion. . . . At this point, Mr. Milligan is unable to perform his former job due to loss of motion, loss of strength, and pain.

On February 2, 1993, Dr. Hixson testified by deposition that as of November 13, 1992, appellant's soft tissue and bone had healed but he had not fully recovered from surgery; it sometimes takes a year and one-half to heal; he had not reached maximum medical improvement; his before and after x-rays showed no improvement; and "Milligan has not reached his maximum medical improvement at this point."

In an April 19, 1993, letter, Dr. Brent Keyser of Hand Surgery Centres of Texas, said that appellant has at least a stage III Kienbock's disease; "Comparison of serial x rays from 11-8-91 to 1-20-93 show [sic] progressive collapse and fragmentation of the lunate. . . . Since he has worsening of his pain and progression of the radiologic picture I have recommended that he have a second surgical procedure in order to alleviate his symptoms."

On June 8, 1993, Dr. Edward R. Weber, of the Arkansas Hand and Microsurgery Center, wrote, "It usually takes *one to two years* for the navicular to revascularize after such a procedure [a radial shortening osteoplasty]." On July 19, 1993, Dr. Hixson wrote of the surgery Dr. Brown had recommended. "The proposed second surgery is an attempt to resolve a work-related injury. This is the same problem for which Mr. Milligan has already received treatment from myself and from Dr. Ed Weber.

The surgery sounds reasonable and is aimed towards resolution of Mr. Milligan's more severe problems."

On February 28, 1994, Dr. Brown wrote:

> Radiographs revealed a Stage IV Kienbock's with collapse of the lunate and perilunar arthrosis. . . . This patient had the radial shortening performed for State IV Kienbock's and that is inappropriate. Radial shortening, a joint leveling procedure, is used in early (Stage I) Kienbock's to unload the lunate and preserve the lunate. When the patient had this procedure performed, the lunate had already collapsed and the procedure was doomed to failure. . . . Clearly, the patient needs excision of the lunate and I would replace the lunate with allograft fascia lata. In addition, I would remove the foreign bodies [nonabsorbing sutures left in during the radial shortening surgery] and perform neurolysis of the volar cutaneous branch of the radial nerve in hopes of achieving some relief in that region as well. Should this patient's condition go untreated long enough then he will have complete arthrosis of the entire wrist necessitating total wrist fusion and this would result in a considerate impairment as opposed to performing the lunate excision and arthroplasty and preserving some wrist motion.

On March 3, 1994, Dr. Brown wrote to the appellant, "It is imperative that you have treatment before you have complete degeneration of the wrist."

■ With this evidence before it, we cannot understand how the Commission could have held that appellant's healing period ended November 13, 1992. Consequently, we reverse the Commission's finding that appellant's healing period ended on November 13, 1992. It is clear that at the time the record was closed appellant was still in a healing period. We hold that appellant has remained in his healing period from May 13, 1992, through the entire period covered by the record, which ends on April 2, 1996, and to a date yet to be determined.

■ We remand to the Commission to take additional evidence regarding appellant's surgery in Houston, his recovery period, and up-to-date medical records to determine his current status.

Appellant also argues that we should provide for attorney's fees on the entire claim of temporary total disability pursuant to Ark. Code Ann. § 11-9-715 (1987), because the entire claim was controverted. We agree and remand to the Commission to award appellant's attorney the appropriate fee.

Appellant also argues that we should assess a penalty against appellee for refusal to pay rightfully due benefits on time pursuant to Ark. Code Ann. § 11-9-802(b) (1987). We agree that the actions of the employer and the insurance carrier have been egregious and remand for the Commission to consider assessing a penalty.

Appellee argues in its cross-appeal that the Commission erred in interpreting Ark. Code Ann. § 11-9-102(17) (1987) to mean that appellant could receive treatment from an out-of-state physician. At the time of appellant's injury, the statute read, "'Medical services' means services performed by any practitioner licensed under the laws of the State of Arkansas relating to the healing arts." Although cross-appellant conceded in its oral argument that this definition should not be so narrowly applied as to prohibit a claimant from ever being treated by an out-of-state physician, it contended that a claimant could seek the services of an out-of-state physician only after he or she had shown that there were no medical-service providers licensed in Arkansas that could provide the treatment that claimant required. We do not agree. If, as cross-appellant concedes, section 11-9-102(17) does not prohibit treatment by out-of-state medical-service providers, there is no language in the statute which places on a claimant the burden of first proving that there are no physicians licensed in Arkansas who can provide the necessary treatment. We think a more logical meaning of section 11-9-102(17) is that a claimant may receive compensation only for treatment that is provided by the community of medical-service providers whose discipline is regulated in the State of Arkansas through its licensing procedures. This would exclude compensation for the cost of services charged, for example, by faith healers, psychic healers, or any other purported practitioners of the healing arts that might be recognized in other states but which are not regulated or licensed in Arkansas.

The Commission's order allowing appellant a change of physicians to the Hand Surgery Centres of Texas in Houston, Texas, is affirmed.

Affirmed in part and reversed in part on direct appeal, affirmed on cross-appeal, and remanded with directions to the Commission.

ROBBINS, C.J., and COOPER, J., agree.

SUPPLEMENTAL OPINION ON PARTIAL GRANTING OF REHEARING

946 S.W.2d 697

June 4, 1997

David J. Potter, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia L. Busfield*, for appellees/cross-appellants.

SAM BIRD, Judge. West Tree Service and U.S. Fidelity & Guaranty Co. have filed a petition for rehearing alleging three errors in this court's opinion of April 2, 1997. Because we agree with one of appellees' arguments, we issue this supplemental opinion.

Appellees argue that our order suggesting that the Workers' Compensation Commission consider assessing a penalty against appellees was in error because the issue had not been raised to the Commission and because the statute cited, Ark. Code Ann. § 11-9-802(b) (1987), applies only to the failure to pay benefits that are due and not controverted. We agree, and we grant appellees' petition for rehearing as to this point and withdraw our directive that the Commission consider assessing a penalty against appellees.

However, we disagree with appellees' other assertions in the petition for rehearing. First, we disagree that we have reweighed the evidence in coming to the conclusion that there was not substantial evidence to support the Commission's finding that appellant's healing period ended on November 13, 1992.

The administrative law judge, whose opinion was adopted by the Commission, found that appellant had continued in his healing period until November 13, 1992. The only evidence upon which this finding could be based was the letter of Dr. Marcia Hixon to appellee U.S.F.&G. dated January 4, 1993, in which she opined that the appellant had healed from the radial shortening osteotomy as of November 13, 1992. In a letter from U.S.F.&G. to appellant's attorney dated January 11, 1993, U.S.F.&G. apparently interpreted Dr. Hixon's letter to mean that appellant's maximum medical healing had ended on

November 13, 1992. However, in her deposition on February 2, 1993, Dr. Hixon stated that when she examined appellant on November 13, 1992, appellant "had healed from the bone and osteotomy. It generally takes between sometimes up to a year and a half to heal. I mean to say that things have settled down after the particular operation. So he had healed the soft tissues and the bone, but I don't think he had fully recovered from the surgery at that time. . . ." Subsequently in her deposition, Dr. Hixon stated that she "cannot say that [appellant] had actually reached maximum medical improvement" as of November 13, 1992.

We agree with the appellees that it is the function of the Commission to weigh the evidence, *Teague v. C & J Chemical Co.*, 55 Ark. App. 335, 935 S.W.2d 605 (1996), and we agree with the appellees that it is the limited function of the appellate court on review to determine if the Commission's findings are supported by substantial evidence, *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996). However, in determining whether substantial evidence exists to support a finding of the Commission, we are required to look at the evidence and make a determination of whether there is evidence that could have led fair-minded persons to reach the same result. *Hoskins v. Rogers Cold Storage*, 52 Ark. App. 219, 916 S.W.2d 136 (1996). Where, as here, the medical opinion upon which the Commission relied in making its finding is a doctor's statement that the same doctor subsequently refuted, we cannot agree with appellees that the Commission's finding is supported by substantial evidence.

Secondly, while standing firm in our affirmation of the Commission's decision to permit appellant to receive treatment from an out-of-state physician, we take this opportunity to explain further the basis for our decision and our interpretation of the definition of the term "medical services" as contained in Ark. Code Ann. § 11-9-102(17)(1987).

We wish to make it clear that our decision to affirm the Commission on cross-appeal was not based on the concession by appellees' counsel during oral argument. While we did, in our

opinion of April 2, 1997, make mention of the fact that appellees' counsel did concede that the definition of "medical services" as contained in Ark. Code Ann. § 11-9-102(17) "should not be so narrowly construed as to prohibit a claimant from ever being treated by an out-of-state physician," that conclusion can be reached in this case without appellees' concession by referring to other provisions of the Workers' Compensation Law.

For example, under Ark. Code Ann. § 11-9-401(a)(1) (1987), it is the responsibility of the employer to "secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of employment without regard to fault as a cause of the injury." Further, Ark. Code Ann. § 11-9-514(a)(1)(1987) permits a claimant to change physicians upon a showing "to the satisfaction of the Commission that there is a compelling reason or circumstance justifying a change."

In the case at bar, the law judge apparently found justification for a change of physicians and found that the appellees had "preliminarily agreed" to the change and "did not necessarily oppose the surgical procedure requested" but opposed the use of physicians outside the State of Arkansas. Therefore, the law judge entered an opinion changing the appellant's physician to Dr. R. Cole Goodman of Fort Smith. However, Dr. Goodman refused to treat appellant and that opinion was withdrawn, resulting in a finding by the law judge, consistent with appellant's theory, that as a result of a pending medical malpractice suit by appellant against Dr. Hixon, appellant is unlikely to receive appropriate medical treatment from any hand specialist in Arkansas. As the law judge pointed out, if appellant is to receive the benefits of the employer's continuing statutory obligation to provide appropriate medical care, it is necessary that appellant be permitted treatment by out-of-state physicians. Clearly, it would violate an employer's statutory duty to provide medical care if that care was denied simply because there was no medical service provider in Arkansas who was qualified and willing to provide

the service. Although appellees argued that a sufficient showing had not been made by appellant to justify the Commission's authorization of a change of physicians, we hold that the Commission's decision in that regard is supported by substantial evidence.

We agree with appellees that our interpretation of the term "medical services" as used in our opinion of April 2, 1997, was overly broad, and that interpretation is hereby withdrawn. However, we reach the same result using the analysis set forth above.

The petition for rehearing is granted in part and denied in part.

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

TWO BROTHERS FARM, INC.; Sylvester Holloway and Donnell Holloway, In Their Individual Capacities *v.* RICELAND FOODS, INC.

CA 96-800 940 S.W.2d 889

Court of Appeals of Arkansas
Division IV
Opinion delivered April 2, 1997

Bowden Law Firm, by: *David O. Bowden*; and *Walker, Campbell, Ivory & Dunklin*, by: *George S. Ivory, Jr.*, for appellants.

Williams & Anderson, by: *G. Alan Perkins*, for appellee.

SAM BIRD, Judge. Plaintiffs, Sylvester Holloway and Donnell Holloway, appeal from a decision of the Pulaski County Circuit Court granting a motion to dismiss their complaint for lack of venue pursuant to Ark. R. Civ. P. 12(b)(3). The Holloways are the owners, operators, and officers of Two Brothers Farm, Inc., a corporation licensed under Arkansas law and located in Prairie County, which is also the residence of the Holloways. The appellants brought suit in Pulaski County Circuit Court against Riceland Foods, Inc., an agricultural cooperative association created under Ark. Code Ann. §§ 2-2-101 through 249 (Repl. 1996), which has its main office in Arkansas County and a branch office in Pulaski County. Two Brothers alleged breach of contract, intentional interference with contractual relations and business expectancies, race discrimination, and unfair trade practices.

Two Brothers argues that venue is proper in Pulaski County because Riceland is a corporation or at least an association; therefore, the venue provision under Ark. Code Ann. § 16-60-105 (1987) applies; and that since this provision applies, venue is

appropriate in any county in which the "person, firm, copartnership, or association maintains any office, branch office, suboffice or place of business." However, Riceland argues that venue is improper in Pulaski County because Riceland is an agricultural cooperative association; therefore, none of the specific venue provisions apply. Riceland argues that it is not a corporation or an association and venue would be established under Ark. Code Ann. § 16-60-116 (1987), which is a general venue provision stating that if other venue provisions are not applicable, then venue is proper in the county in which the defendant resides or is summoned. Therefore, appellee argues venue would be proper only in Arkansas County, its principal place of business.

A hearing was conducted on March 1, 1996, and the judge granted appellee's motion to dismiss because "[n]one of the alleged causes of action are addressed in any of the specific statutory venue provisions codified in ACA 16-16-101 [sic] to -115. . . . The Arkansas Supreme Court has said repeatedly that its underlying policy is to fix venue in the county of defendants' residence unless there is a statutory exception." We reverse and remand for further proceedings.

An appellate court will not reverse a court's findings of fact unless they are clearly against the preponderance of the evidence, Ark. R. Civ. P. 52(a); however, whether venue is appropriate in a particular county is a matter of law. In this case, the court erred in finding that venue was not appropriate in Pulaski County.

The appellants argue that venue is appropriate in Pulaski County, and they cite Ark. Code Ann. § 16-60-105, which reads:

> An action other than those mentioned in §§ 16-60-101, 16-60-102, 16-60-106 - 16-60-108, 16-60-110, against a person, firm, copartnership, or association engaged in business in this state which has or maintains more than one (1) office or place of business in this state, may be brought in any county in which the person, firm, copartnership or association has or maintains any office, branch office, suboffice, or place of business, and service of process upon an agent of any person, firm, copartnership, or association at any such office, branch office, suboffice, or place of

> business shall be service upon such person, firm, copartnership, or association.

A person includes a corporation. Ark. Code Ann. § 16-55-102(11) (1987).

Appellants argue that Pulaski County is an appropriate venue in this action against Riceland because Riceland is either an association or a corporation. Even under prior law, a corporation or an association may be sued in the county in which it has its principal place of business, the county where its chief executive officer resides, or the county where it has any branch offices. *Duncan Lumber Co. v. Blalock*, 171 Ark. 397, 284 S.W. 15 (1926), *overruled on other grounds*, *Anheuser-Busch, Inc. v. Manion*, 193 Ark. 405, 100 S.W.2d 672 (1937).

The legislature enacted Ark. Code Ann. § 16-60-105 for the purpose of allowing plaintiffs to sue any of the entities listed in that section in either the county in which its principal place of business is located or in a county in which one of the branches is located. The preamble to Act 74 of 1935, which is now section 16-60-105, reads:

> WHEREAS, large and numerous business enterprises of various kinds are being operated in the State of Arkansas by individuals, firms, co-partnerships and association of persons and under the law as it now exists the venue for suits against them is fixed in the county of their residence or where such person or member of the firm, co-partnership or association may be found, and in many instances this works to the disadvantage of those who deal with such person, firm, co-partnership or association by requiring the person so desiring to sue to go to the place of residence of such person, firm, co-partnership or association and it is the purpose of this Act to relieve against this situation.

See Zolper v. AT&T Info. Systems, Inc., 289 Ark. 27, 709 S.W.2d 74 (1986). In *Zolper*, the court considered the question of whether a corporation may be sued only in the county of its principal place of business or whether it may be sued in a county in which one of its branch offices is located. The court quoted the preamble of Act 74 and further wrote, "The Legislature clearly intended that when a business enterprise, regardless of its form,

maintains an office or place of business in counties other than its principal place of business, the business enterprise should be subject to the venue of those other counties." *Zolper*, 289 Ark. at 30, 709 S.W.2d at 76.

However, appellee argues that neither the statute nor its purpose applies to Riceland because it is not a corporation, but an agricultural cooperative association, a distinct legal entity created by statute, which is codified at Ark. Code Ann. § 2-2-101 through 249 (Repl. 1996). Therefore, the appellee cites the general rule that a defendant should be sued in the county of its residence, unless there is a statutory exception, *Atkins Pickle v. Burrough-Uerling-Brasuell*, 275 Ark. 135, 628 S.W.2d 9 (1982).

We do not find appellee's arguments persuasive. First, Riceland is a business enterprise, as described in *Zolper*. Second, an agricultural cooperative association is considered a unique form of a corporation "and courts have traditionally applied general corporate law principles to cooperative issues." Mary Elizabeth Matthews, *Corporate Statutes — Which One Applies?*, 13 U.A.L.R. L.J. 69, 83-84 (1990). And finally, Ark. Code Ann. § 2-2-428 (Repl. 1996) provides that general corporation laws shall apply to the associations organized under subchapter 2 of Title Two, which sets out the requirements for an agricultural cooperative association. Therefore, corporation laws apply to agricultural cooperative associations, and venue is proper in either the county in which the association's principal place of business is located or in the county in which one of its branch offices is located.

Appellee also argues venue was improper because the case has no relationship to Pulaski County; that the acts alleged to have been committed occurred in Arkansas County and not Pulaski County; and that most, if not all, of the documents, witnesses, and records are located in Arkansas County. For this argument, the appellee cites *Fraser Bros. v. Darragh Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994), which held that if the plaintiff has failed to allege that the defendant has its principal office in Woodruff County, is situated there, or that its chief executive officer resides in the county, then the plaintiff has failed to establish venue and a motion to dismiss for lack of venue should be granted. However,

in the case at bar, the plaintiffs alleged that Riceland has a branch office in Pulaski County and argued that some witnesses will be coming from Russellville, which is closer to Pulaski County than it is to Arkansas County; and that both parties' attorneys are located in Pulaski County.

Because an agricultural cooperative association is governed by general corporation laws, venue for an agricultural cooperative association may be established under Ark. Code Ann. § 16-60-105; therefore, Riceland may be sued in either the county in which its principal place of business is located or in the county in which it maintains a branch office. Therefore, the court erred when it granted appellee's motion to dismiss for lack of venue. The order granting the motion to dismiss is reversed, and this case is remanded to the circuit court for further proceedings.

Reversed and remanded.

JENNINGS and GRIFFEN, JJ., agree.

Edward FRENCH and Sarah L. French *v.* BROOKS SPORTS CENTER, INC. and Mike Brooks, Individually

CA 96-601 940 S.W.2d 507

Court of Appeals of Arkansas
Division II
Opinion delivered April 2, 1997
[Petition for rehearing denied May 7, 1997.]

Bradley & Coleman, by: *Robert J. Gibson*, for appellant.

Lyons, Emerson & Cone, by: *Jim Lyons*, for appellee.

WENDELL L. GRIFFEN, Judge. In April 1973, Appellants Edward and Sarah French entered into an agreement leasing a commercial building to Mike Brooks, individually, and as President of Brooks Sports Center, Inc., for a term of ten (10) years with monthly rent of $2,450.00. There were subsequent amendments to the original lease, extending the term to expire on April 1, 1993. The original lease contained a clause providing that:

> should the tenant fail to pay the rent as herein provided and should said rent remain unpaid for a period of thirty (30) days, the landlord or his agent may declare the lease terminated and re-enter and repossess the demised premises either with or without process of law and expel the tenant or those claiming under the tenant.

Appellees occupied and paid rent on the premises until November 30, 1992, thereafter abandoning the building without giving notice to appellants.

On January 6, 1993, counsel for appellants sent a letter to appellees advising them that they were in default of the lease

agreement, and that under the terms of the lease, appellants were "exercising their option to declare the lease terminated" and intended to reenter and repossess the building to mitigate their damages. The letter stated that appellees would be held responsible for subsequently accruing rent until a new tenant began paying rent, or until the lease expired, whichever occurred first.

Appellants found a new tenant to lease the building, beginning April 1, 1993. Appellants filed suit against appellees for unpaid rent in the amount of $9,800.00, damage to the property of $800.00, and conversion of property resulting in $1,413.00 in damages. Appellees filed an answer and a motion for partial summary judgment, requesting that appellants' claim for rent past January 6, 1993, (the date of the letter terminating the lease) be dismissed. The trial court ruled in favor of appellees without a hearing. Appellants then took a voluntary nonsuit of the property damage and conversion claims and moved for summary judgment for rents due prior to January 6, 1993. Appellants filed a notice of appeal of the partial summary judgment granted in favor of appellees. We hold that this appeal lacks finality, and dismiss the appeal.

We raise *sua sponte* the issue of whether this appeal is from a final judgment. Arkansas Rule of Appellate Procedure 2(a) permits appeals only from final orders of a trial court. An order must be final for the appellate court to have jurisdiction; thus, we may consider this issue even though the parties do not raise it. *Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995) (citing *Wilburn v. Keenan Cos.*, 297 Ark. 74, 759 S.W.2d 554 (1988); *Fratesi v. Bond*, 282 Ark. 213, 666 S.W.2d 712 (1984)). *Haile* cites *Ratzlaff v. Franz Foods*, 255 Ark. 373, 500 S.W.2d 379 (1973), a case with similar facts to the present appeal. In *Ratzlaff*, the plaintiffs brought three claims for relief against the defendants. After the trial court granted a partial summary judgment in favor of the defendants, the plaintiffs took a voluntary nonsuit on the remaining two counts in their complaint. *Id.* The supreme court held that the judgment was not an appealable order, and refused to violate the statutory policy against piecemeal appeals of Arkansas Rule of Appellate Procedure 2(a) (formerly

Ark. Stat. Ann. § 27-2101), which requires that parties may appeal only from final appealable orders. *Id.*

We also addressed this issue in *Community Dialysis Ctrs., Inc. v. Mehta*, 32 Ark. App. 121, 797 S.W.2d 480 (1990), holding that an appeal under similar facts was violative of Arkansas Rule of Civil Procedure 54(b). In that case we held:

> Pursuant to Rule 54(b), an order in which fewer than all claims are adjudicated is not an appealable order unless the trial court expressly directs the entry of a final judgment to the claims disposed of and expressly determines that there is no just reason for delay.

Id. at 122, 797 S.W.2d at 481. The trial court did not give a directive that a final judgment be entered only as to the partial summary judgment rendered in favor of appellees. Parties desiring to appeal from an interlocutory order must comply with Ark. R. Civ. P. 54(b).

The appeal presented has complied with neither Ark. R. App. P. 2(a) nor Ark. R. Civ. P. 54(b); therefore it is dismissed.

Appeal dismissed.

ROBBINS, C.J., and ROAF, J., agree.

Alvie NELSON *v.* TIMBERLINE INTERNATIONAL, INC., Crum & Forster, Carrier, and Second Injury Fund

CA 96-380 942 S.W.2d 260

Court of Appeals of Arkansas
Division II
Opinion delivered April 2, 1997

[redacted]

Dodds, Kidd, Ryan & Moore, by: *Judson C. Kidd*, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Tim A. Cheatham*, for appellee/cross-appellants Timberline International, Inc., and Crum & Foster.

Judy W. Rudd, for appellee Second Injury Fund.

WENDELL L. GRIFFEN, Judge. In this workers' compensation appeal, appellant challenges the decision by the Workers' Compensation Commission that he sustained a 30% decrease to his earning capacity above the permanent physical impairment established by the medical evidence. Appellant argues that the Commission should have found that he is permanently and totally disabled, or that he is entitled to a larger award for the decrease in his wage-earning capacity than the Commission rendered. Appellees Timberline International, Inc. (the employer), and Crum & Forster (its workers' compensation insurance carrier), contend that the Commission's decision is supported by substantial evidence. However, they have cross-appealed that portion of the Commission's decision that held the Second Injury Fund not liable for the permanent disability benefits because appellant's present condition resulted from the cumulative effect of successive injuries in the same employment. *See McCarver v. Munro-Clear Lake Footwear*, 289 Ark. 509, 715 S.W.2d 429 (1986), and *Riceland Foods, Inc. v. Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986). As to the appeal, we find no error and hold that the Commission's wage-earning diminution decision is supported by substantial evidence. Because we do not believe ourselves able to overrule the decisions by the Arkansas Supreme Court in *McCarver* and *Riceland Foods*, we also affirm as to the cross-appeal. Nevertheless, we believe that the "same employer" defense that was judicially created to shield the Second Injury Fund from liability deserves reconsideration by the supreme court in light of serious policy factors that we raise in our opinion.

Appellant worked as a mechanic for eighteen years. In 1981 he began working for Timberline International as a diesel mechanic. Most of his work involved heavy manual labor. He received a compensable back injury in 1988 while torquing the head of an engine, and eventually underwent back surgery resulting in a permanent impairment rating of fifteen percent to the

body as a whole. When he returned to work after surgery, the employer assigned him to lighter work as a mechanic for several months, and then placed him in its parts department where he worked for a year or so before returning to work as a diesel mechanic. On March 31, 1992, while torquing the head bolts on an engine, he suffered another back injury. That injury resulted in surgery by an orthopedist, Dr. Stuart McConkie, in June 1992, and additional surgery by a neurosurgeon, Dr. Thomas Fletcher, in September 1992. He has not returned to work or attempted to return to work since the March 31, 1992, back injury, and Dr. Jim Moore, another neurosurgeon, has assessed his permanent impairment from the 1992 injury to be an additional fifteen percent to the body as a whole.

Appellant argued before the Commission that he is permanently and totally disabled due to the March 31, 1992, injury; alternatively, appellant contended that the decrease to his wage-earning capacity greatly exceeded the fifteen percent impairment assigned to that injury. The Commission found that appellant had suffered a 30% decrease to his wage-earning capacity above the fifteen percent physical impairment, and rejected appellant's claim of permanent and total disability. Of course, our standard of review requires that we affirm the Commission's decision if it is supported by substantial evidence, meaning evidence that a reasonable person might accept as adequate to support a conclusion. *Christian v. Arkansas Crane & Crawler*, 55 Ark. App. 306, 935 S.W.2d 1 (1996). We do not reverse the Commission unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Id.*

Appellant argues that the Commission should have found him permanently and totally disabled under the odd-lot doctrine. According to that doctrine, an employee who is injured to the extent that he can only perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist may be classified as totally disabled. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), supp. op., 40 Ark. App. 113, 846 S.W.2d 188 (1993). However, an injured worker who relies upon that doctrine has the burden of making a *prima facie* showing of being in the "odd-lot"

category based upon the factors of permanent impairment, age, mental capacity, education, and training. If the worker does so, the employer then has the burden of showing that some kind of suitable work is regularly and continuously available to him. *Walker Logging v. Paschal*, 36 Ark. App. 247, 821 S.W.2d 786 (1992).

Although appellant argues that he made a *prima facie* case of entitlement to permanent total disability benefits under the odd-lot doctrine set forth in *Walker Logging v. Paschal, supra*, based on the claim that he cannot work, his treating physicians opined that he can perform light-duty work, including work that involves lifting up to 25 pounds. None of the doctors who treated him for the 1992 injury believe that he is unable to work. Dr. McConkie, the orthopedic surgeon, expressed doubts concerning appellant's physical complaints, and both neurosurgeons (Drs. Fletcher and Moore) concluded that appellant can perform light-duty work. The Commission also received evidence that the employer has attempted to return appellant to light-duty work answering telephones but appellant has not attempted the work. We believe that fair-minded persons presented with this evidence could have concluded, as the Commission did, that appellant was not totally disabled.

Appellant's reliance upon the odd-lot doctrine is misplaced. He did not make the *prima facie* showing of substantial inability to engage in regular and continuous employment that would have obligated the employer to produce evidence that some kind of suitable work is regularly and continuously available to him. As already mentioned, appellant's doctors believe that he can perform light-duty work, and they question the validity of his physical complaints. The employer has indicated that appellant could return to light-duty work, but appellant has made no attempt to do so. These facts constitute substantial evidence for the Commission's decision, even under the odd-lot analysis that appellant advocates. These facts also support the Commission's decision awarding permanent partial disability benefits above the extent of appellant's physical impairment equal to 30% to the body as a whole.

Appellees contend in their cross-appeal that the Commission erred when it refused to hold the Second Injury Fund liable for the permanent disability benefits awarded to appellant for decreased wage-earning capacity pursuant to the *McCarver* and *Riceland Foods* holdings previously mentioned, and urge us to reverse the Commission and overrule those decisions. *McCarver* and *Riceland Foods* stand for the proposition that the Second Injury Fund is not liable when an employee sustains a subsequent injury while still working for the same employer for whom he was employed when a previous permanent injury was suffered. In *Riceland Foods*, our court announced that if successive injuries in the same employment cause total and permanent disability, then the employer or its insurance carrier is responsible to the disabled employee for all permanent disability benefits; however, if the previous disability or impairment arose out of employment by a different employer, then the Second Injury Fund is liable. *Riceland Foods, supra.; see also Death & Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992). In *McCarver* and *Riceland Foods* the supreme court affirmed our court's interpretation of what was previously Ark. Stat. Ann. § 81-1313, now codified as Ark. Code Ann. § 11-9-525 (Repl. 1996), and accepted our reasoning that the following language from the statute supported the conclusion that the Fund is not liable for successive injuries that are permanently disabling when the injuries occur in the same employment:

> (a)(1) The Second Injury Trust Fund established in this chapter is a special fund designed to ensure that an employer employing a handicapped worker will not, in the event the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred *while the worker was in his employment.*
>
> (2) The employee is to be fully protected in that the fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined.

(Emphasis added.)

Both our court and the supreme court reasoned that the italicized language from the opening provision of the statute justified the conclusion that where a worker suffers successive injuries that

are permanently disabling while working for the same employer, then that employer should be held liable for the actual disability or impairment sustained by those injuries. The courts in *McCarver* and *Riceland Foods* also believed that employers would reap a windfall subsidy from the Fund if they are relieved of liability for the wage-earning consequences of successive permanent injuries that occur in the same employment. Finally, the courts reasoned that the Fund's solvency could be jeopardized to the possible detriment of permanently disabled workers who would, in the event of Fund insolvency, be unable to recover disability benefits from their employers because the statute specifically prohibited reverter of liability to employers in case of Fund insolvency.

Ten years have passed since the decisions in *McCarver* and *Riceland Foods*. The Arkansas General Assembly has enacted several major changes to the Workers' Compensation Law statute during that period, but none of the changes have addressed the "same employer" defense now challenged by appellees in their cross-appeal. Indeed, the Second Injury Fund statute has not been revised since 1981. Given that the General Assembly has known about the "same employer" defense announced in *McCarver* and *Riceland Foods*, we are reluctant to conclude that the defense requires judicial abolition, despite the fact that it was judicially created and has not been legislatively adopted by specific language amending the statute. Our reluctance also is based upon deference to the supreme court, whose decisions we are now asked to overrule. Appellees have cited no authority for the proposition that our court can overrule supreme court decisions, and we know of none.

We are also persuaded that Ark. Code Ann. § 11-9-1001 (Repl. 1996) discourages the type of judicial lawmaking that appellees urge us to perform by the following language:

> When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. . . . 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.

(Emphasis added.)

Inasmuch as appellees are urging that the scope of the workers' compensation law be broadened so that the Second Injury Fund would become liable for the wage-loss disability benefits payable to disabled workers in the event of successive injuries during the same employment, it appears that the court of appeals can offer no assistance due to this language.

Our refusal to act pursuant to appellees' insistence that the "same employer" defense be judicially abolished does not indicate that we believe the defense to be justified by the Workers' Compensation Law. In fact, we perceive serious policy problems that the "same employer" defense presents in addition to our view that the statute does not preclude the Fund from being held liable. The concern that abolition of the "same employer" defense would allow employers to escape liability for disability or impairment that actually occurs while a worker is in its employ appears to arise from a misreading of the statute. Rather than reading Ark. Code Ann. § 11-9-525(a) to refer to *employments* that produce successively disabling injuries, the statute should be read to address the successively disabling injuries. After all, *successive injuries*, not successive employments, is the subject addressed by the statute. If the statute did not intend to cover successive injuries occurring in the same employment as the Fund maintains, subsection (d)(1) makes no sense. It explicitly covers how weekly benefits for disability shall be paid where more than one injury occurs *in the same employment* to cause concurrent and consecutive permanent partial disability. If the statute indeed contemplated that the Fund would never be liable in cases of permanent disability resulting from successive injuries sustained in the same employment, one would think that subsection (d)(1) would be unnecessary.

The "same employer" defense also appears inconsistent with the apparent thrust of the Second Injury statute. The statute repeatedly refers to cases of permanent disability or impairment and provides at subsection (b)(1) that it covers all cases of perma-

nent disability or impairment "where there has been previous disability or impairment." If a "same employer" is to be treated no differently in cases involving successive injuries than it would be treated had there been no successive injuries (the result that the "same employer" defense produces), the language extending the scope of the statute to "all cases of permanent disability or impairment where there has been previous disability or impairment" seems out of place.

We have found no other area of the workers' compensation law that excludes a party from liability based upon the unproven possibility of insolvency, yet this was a stated reason advanced for the "same employer" defense in *McCarver* and *Riceland Foods*. This appears to be the only area of the workers' compensation law where solvency is allowed to determine liability. We have found and been cited to no information that supports the idea that the Second Injury Fund is endangered by any species of claims. Indeed, the Fund is specifically created to only pay claims for permanent disability benefits, including permanent total disability benefits, the most expensive variety of permanent disability benefits.

These concerns persuade us that if the "same employer" defense that the appellate courts created ten years ago is subject to judicial revisiting, the time has come to do so. We encourage appellees to petition the supreme court for review.

Affirmed as to the appeal and the cross-appeal.

ROBBINS, C.J., and ROAF, J., agree.

Alta WILSON et al. *v.* Ronnie ADKINS et al.

CA 96-569 941 S.W.2d 440

Court of Appeals of Arkansas
Division I
Opinion delivered April 2, 1997

James B. Pierce, for appellant.

Davis & Cox, by: *Hal W. Davis*, for appellee.

TERRY CRABTREE, Judge. Appellant Alta Wilson, a resident of Florida, sued her nephew, Ronnie Adkins, in chancery court for detrimental reliance, breach of contract, and fraud stemming

from an alleged agreement in which the appellant agreed to donate bone marrow to her ailing sister in exchange for $101,500.00 as compensation for risk in the procedure. The chancellor granted appellees' motion to dismiss on the detrimental reliance count, and the case was transferred to circuit court. Appellees again moved for dismissal, pursuant to Ark. R. Civ. P. 12(b)(6), and the circuit court granted the motion on all counts. Appellants bring this appeal of the trial court's dismissal, arguing that the complaint on its face stated the three causes of action complained of, and dismissal was therefore inappropriate. We affirm the chancellor's dismissal based on the blatantly illegal nature of the alleged contract.

Dismissal under Rule 12(b) is a ruling on the initial complaint alleging some critical deficiency, such as jurisdiction, service of process, or failure to state a claim.

> In reviewing the denial of a dismissal granted pursuant to Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994). When the trial court decides Rule 12(b)(6) motions, it must look only to the complaint. *Id.* This court has summarized Arkansas' requirements for pleading facts as follows:
>
>> Arkansas has adopted a clear standard to require fact pleading: "a pleading which sets forth a claim for relief . . . shall contain (1) a statement in ordinary and concise language of facts showing that the pleader is entitled to relief . . ." ARCP Rule 8(a)(1). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated that these two rules must be read together in testing the sufficiency of the complaint; facts, not mere conclusions, must be alleged. *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and pleadings are to be liberally construed. Id.; ARCP Rule 8(f).
>
> *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 639, 846 S.W.2d 176, 178 (1993).

Malone v. Trans-States Lines, Inc., 325 Ark. 383, 386, 926 S.W.2d 659, 661 (1996).

Despite this stringent review of grants of 12(b)(6) dismissal, courts are very reluctant to allow clearly illegal contracts to survive even the pleading stage of litigation. *See Womack v. Maner*, 227 Ark. 786, 301 S.W.2d 438 (1957).

Here, the complaint states in paragraph II:

> That on or about the 1st day of April 1992, the Plaintiff, Alta Wilson and the Defendant Ronnie Adkins and the Defendant Georgia Adkins, now deceased, entered into an agreement whereby the Plaintiff would elect and act as a bone marrow donor for the benefit of the Defendant, Georgia Adkins.

The complaint artfully characterizes the agreement as an exchange of $101,500.00 for the risk, difficulties, and insurance consequences of appellant's marrow donation. While appellants' attorney goes to great lengths to disguise the nature of the contract, it is, as the trial court noted, "so intertwined and commingled that [it] cannot be separated," and clearly falls under the rubric of federal law on the sale of human organs. Here, the complaint essentially admits that the parties contracted for an illegal sale of organs. No matter how the appellants' attorney characterizes the transaction, the dollar amount and the consideration are telling signs that the contract is one for the sale of an organ in violation of federal law.

Title 42 of the United States Code section 274(e) provides the following:

> (a) Prohibition
>
> It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.
>
> (b) Penalties
>
> Any person who violates subsection (a) of this section shall be fined not more than $50,000 or imprisoned not more than five years, or both.

(c) Definitions

For purposes of subsection (a) of this section:

(1) The term "human organ" means the human (including fetal) kidney, liver, heart, lung, pancreas, *bone marrow*, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.

(2) The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

(3) The term "interstate commerce" has the meaning prescribed for it by section 321(b) of Title 21.

While this statute does allow "reasonable payments" for the cost of the procedure and incidental expenses, it is clear that $101,500.00 is not payment for reasonable incidental expenses incurred in the organ donation, but is an illegal sale of an organ specifically prohibited by federal law.

Since the contract's subject matter is so plainly illegal, long standing Arkansas precedent supports the trial court's grant of 12(b)(6) relief even without a responsive pleading from the appellees.

The case of *Womack v. Maner*, 227 Ark. 786, 301 S.W.2d 438 (1957), is on point in several respects. The appellant in *Womack* sought recovery of a bribe he allegedly paid to a local judge. The appellee demurred (roughly equivalent to a modern 12(b)(6) motion), and the trial court granted the demurrer on the grounds that a cause of action was not stated.

In considering Womack's appeal, the Arkansas Supreme Court stated:

> It is firmly established that in a situation such as is set out in the complaint the law will not aid either party to the alleged illegal

> and void contract. According to the allegations in the complaint, the parties are *pari delicto*, hence, plaintiff cannot recover.

Id. at 787-88, 301 S.W.2d at 439. The *Womack* court went on to cite several instances where the plainly illegal nature of the contract was dispositive of the case.

[redacted] Here, while the contract the appellants seek to enforce is not a bribe, the act of selling one's organs is equally offensive, and just as clearly illegal as bribery. While the statute regarding organ sales is relatively modern (1986), its genesis is in a clear public policy based on long standing attitudes about transplantation of organs. "Laws regarding the removal of human tissues for transplantation implicate moral, ethical, theological, philosophical, and economic concerns which do not readily lend themselves to analysis within a traditional legal framework." *State v. Powell*, 497 So.2d 1188, 1194 (Fla. 1986). In commenting on *Powell*, another court noted:

> For that reason, the courts should look instead to the particular statutes that were written on those subjects in an effort to balance the peculiar interests involved. Recently, the California Supreme Court said that courts should not look to conversion law but to the specialized statutes dealing "with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property." *Moore v. Regents of the University of California*, 51 Cal.3d 120, 271 Cal.Rptr. 146, 156, 793 P.2d 479, 489 (Cal.1990), *cert. denied*, 499 U.S. 936, 111 S.Ct. 1388, 113 L.Ed.2d 444 (1991). The same could be said for resorting strictly to contract law when there is an alleged agreement for the transfer of human remains.

Perry v. Saint Francis Hosp. & Medical Ctr., 886 F.Supp. 1551, 1563 n.7 (D. Kan. 1995).

In *Perry*, the court addressed the issue of an alleged contract between a hospital nurse and a grieving family for the donation of tissues from a deceased patient. While the family did recover on other grounds for the hospital's overreaching organ harvesting, the court rejected a contract approach to the communication between the family and the hospital, stating, "A contract approach is not reconcilable with societal beliefs and values on this subject." *Id.* at

1563. In support of this contention, the *Perry* court cited the Uniform Anatomical Gift Act (1987), 8A U.L.A. 25 at § 10(a), and the federal law, discussed above, at 42 U.S.C. 274(e). Further, the court cited commentary on both the uniform law and the federal act that these laws "embody a commitment to the belief that organs should be given as a gift, either to a specific individual or to society at large." *Developments in the Law — Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1622 (1990); *See also* Commentaries Vol. B, Ark. Code Ann. pp. 440-51 (Repl. 1995).

Based on the reasoning in *Perry*, and the equitable concerns implicit in certain types of attempts to contract as summarized in *Womack*, it is wholly appropriate for a trial court to refuse to meddle in the illegal dealings of parties when the subject matter of their agreement is so clearly repulsive to public policy and federal law. Such an analysis is equally persuasive on each count (contract, detrimental reliance, and fraud) where, as in the present case, both parties were *in pari delicto*, or equally culpable or criminal. As stated in *Womack*, "[W]here an illegal contract has been made, neither courts of law nor of equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they have been equally cognizant of the illegality." (Citation omitted.) *Womack*, 227 Ark. at 788, 301 S.W.2d at 439.

Here, it is clear on the face of appellants' complaint that the activity amounted to a sale of organs in violation of federal law. Accordingly, the trial court's dismissal was appropriate.

Affirmed.

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

Howard SKAGGS *v.* Charles Edward CULLIPHER

CA 96-258 941 S.W.2d 443

Court of Appeals of Arkansas
Divisions I & IV
Opinion delivered April 2, 1997

[redacted]

David J. Potter, for appellant.

Wright, Chaney, Berry & Daniel, P.A., by: *William G. Wright* and *Edward M. Slaughter*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Howard Skaggs entered into a compromise settlement with appellee Charles Cullipher to avert litigation of a will contest. Skaggs and Cullipher were subsequently appointed co-administrators of the estate. Skaggs sought to bring wrongful-death and survival actions against Cullipher some nine months after petitioning that the estate be closed, but prior to completing all steps necessary to close the estate. Skaggs appeals a probate court order granting Cullipher's motion for summary judgment and motion to dismiss the wrongful-death and survival actions. We reverse the probate court's findings that the estate was closed by operation of law, and that the settlement agreement precluded the wrongful-death action, and remand.

On October 3, 1992, Sophia Morris Cullipher died a few hours after being run over by a combine operated by her husband, Charles Edward Cullipher, the appellee in this case. Mrs. Cullipher had prepared a Last Will and Testament that could not be found after her death. On October 8, 1992, Mrs. Cullipher's

brother, Howard Skaggs, the appellant in this case, filed a petition in Miller County Probate Court to restore the lost will and appoint him as executor. Filed with his petition was a hand written draft and a typed copy of the will, both prepared by Mrs. Cullipher's attorney. These documents named Howard Skaggs as executor and primary beneficiary, and left Charles Cullipher, the decedent's spouse, nothing.

On October 23, 1992, Cullipher filed a petition opposing probate of the alleged lost will. The petition prayed that an intestacy be declared and that Cullipher be appointed administrator. Since Mrs. Cullipher had no lineal descendants, Cullipher was the sole heir at law. On November 5, 1992, the Miller County Sheriff's Department began an investigation into the death of Mrs. Cullipher, but ultimately, no criminal charges were ever filed against Cullipher.

On November 6, 1992, Cullipher joined the devisees of the lost will in a settlement styled "Memorandum Agreement," that averted litigation of the will contest, and recited as its purpose to avoid "the expenses, delay, and uncertainties of outcome in litigation involving [the] lost will." Accordingly, it purported to be a "compromise and settlement of all matters involved in the administration and distribution of the estate of the decedent." Parties to the Memorandum Agreement included Skaggs, his spouse, daughter, son-in-law, and two minor grandchildren, one of Mrs. Cullipher's three living sisters, and Cullipher. However, several potential beneficiaries under the Arkansas Wrongful Death Statute, Ark. Code Ann. § 16-62-102(d) (1987), including Mrs. Cullipher's mother, two sisters and two brothers, were not made parties to the settlement. The Memorandum Agreement was filed along with a petition for approval of the settlement in the Probate Court of Miller County and was approved by an order which also appointed Skaggs and Cullipher as co-administrators.

Administration of the estate proceeded to distribution of the inventoried assets and payment of attorney's fees, and the co-administrators petitioned to close the estate. An order was entered on July 1, 1993, approving final distribution and discharge of the

personal representatives and closing of the estate "upon report of such payments and distribution." No such reports were ever filed.

On March 10, 1994, after engaging new counsel, Skaggs filed a wrongful-death complaint in Miller County Circuit Court, and moved in Miller County Probate Court to reopen the estate to pursue a survival action and wrongful-death claim. The motion was granted on March 14, 1994, by order which reopened the estate, authorized Skaggs to proceed against Cullipher in his individual capacity, and barred Cullipher from serving as co-administrator. However, on October 18, 1994, the Miller County Probate Court granted Cullipher's motion to dismiss and for a judgment as a matter of law and motion for summary judgment to enforce the family settlement agreement. The order stated that the estate of Mrs. Cullipher was deemed closed by the July 1, 1993, order and directed Skaggs to dismiss with prejudice his wrongful death action pending in Miller County Circuit Court.

Skaggs raises the following four issues in his appeal from the October 18, 1994, order: (1) the court erred in finding the estate was closed or that it lacked jurisdiction to reopen the estate; (2) the court erred in granting summary judgment; (3) the court erred in finding that the Memorandum Agreement settled and released Cullipher from the wrongful death cause of action filed on behalf of the statutory heirs; and (4) the court erred in finding that the Memorandum Agreement settled and released the estate's survival cause of action against Cullipher.

1. Closure of the estate

Skaggs first argues that the trial court erred in finding the estate was closed. He argues alternatively that even if the estate was closed, the court erred in finding that it lacked jurisdiction to re-open the estate based upon Ark. R. Civ. P. 60(b), because Ark. Code Ann. § 28-53-119(a)(1) (1987) specifically provides for reopening a probate estate. We do not reach the issue of whether the probate court had jurisdiction to reopen the estate because we agree that the estate was not closed.

In its order granting Cullipher's motion for summary judgment and motion to dismiss, the probate court found as a

matter of law that the estate of Mrs. Cullipher was closed by its July 1, 1993, order even though certain ministerial duties had not been discharged. Skaggs argues that the estate was never closed, because the July 1, 1993, order required the filing of a report of final payments and distribution to officially close the estate. It is undisputed that the report was never filed. Skaggs further points to the fact that the probate court acknowledged that the estate was open in a Memorandum Opinion of September 28, 1994, when it directed him to complete the "ministerial duties" of the administrator and close the estate within thirty days. This language was inexplicably omitted in the October 18, 1994, order.

On the other hand, Cullipher contends that the trial court was correct in finding the estate closed for either of two reasons: (1) failure to file the administrator's final report as required by the plain language of the July 1, 1993, order did not leave the estate open "for all purposes," and the probate court retained jurisdiction, if at all, only for the specific and limited purpose of accepting the filing of the final report; or (2) assuming the estate remained open for all purposes, the estate was closed by operation of law due to the failure of Skaggs to timely execute his duties as co-administrator.

We do not agree with either of Cullipher's contentions. He cites no authority to support his contention that the estate remained open for only a "limited purpose." With regard to his second contention, Cullipher offers Ark. Code Ann. § 28-52-103 (1987) as authority for the proposition that the estate at some time closed through operation of law; this argument is not persuasive. Although § 28-52-103 provides that a probate court may compel an administrator to discharge his or her lawful duties, nowhere does the statute provide for the closing of an estate independent of affirmative action by a probate court.

Further, Cullipher's assertion that Skaggs's failure to timely close the estate in contravention of Ark. Code Ann. § 28-52-102(a) (1987) allows the estate to be deemed closed on equitable doctrines is equally unpersuasive. This statute merely states "a personal representative shall close the estate as promptly as practicable." *Id.* Moreover, this argument ignores the fact that Cul-

lipher was a co-administrator of the estate along with Skaggs, and also did not file the final report required to close the estate, and does not explain why justice demands that the probate court relieve Cullipher of a burden created by his own inaction. Clearly, Cullipher could have sought closure of the estate by filing the final report, or the probate court could have compelled completion of the remaining ministerial duties and then ordered the estate closed. Neither course of action was taken, and we know of no authority by which an open estate may be closed other than by order of the probate court.

2. Summary judgment on disputed issues

Cullipher next argues that the trial court erred in granting a summary judgment on disputed issues. In a memorandum opinion, the probate court found that Skaggs was aware, or should have been aware of the legal claims that allegedly existed for the wrongful death of Mrs. Cullipher at the time he signed the family settlement agreement. Skaggs contends that he was not aware that the estate had a cause of action against Cullipher until he consulted with his present attorney. We do not find any merit to this argument because ignorance of one's legal rights cannot be asserted as a basis for the failure to pursue a cause of action. *See Wilson v. G.E. Capital*, 311 Ark. 84, 87, 841 S.W.2d 619, 620-21 (1992).

3. Wrongful-death action

Skaggs's third assertion is that the court erred in finding that the Memorandum Agreement settled and released the cause of action for wrongful death filed on behalf of the statutory heirs. In its memorandum opinion, the trial court found that the Memorandum Agreement that averted litigation of the will contest was a family settlement agreement as a matter of law. The trial court also found that the agreement was enforceable and should be enforced, and that the wrongful-death action pending in circuit court was in contravention of the agreement. In the order granting defendant's motion for summary judgment and motion to dismiss, the trial court found that the language of the family settlement agreement released all claims which the estate of Mrs.

Cullipher and the parties to the agreement could have pursued between themselves arising from her death, including an alleged wrongful-death suit against Cullipher.

We agree with Skaggs that the wrongful-death claim did not fall under the purview of the Memorandum Agreement. While the Arkansas Wrongful Death Statute requires that the action be brought by the personal representative of the deceased person, Ark. Code Ann. §16-62-102(b) (Supp. 1995), the statute states further that "[n]o part of any recovery referred to in this section shall be the subject of the debts of the deceased or become, in any way, a part of the assets of the estate of the deceased person." Ark. Code Ann. § 16-62-102(e) (Supp. 1995).

The Arkansas Supreme Court has interpreted the role of the personal representative under the Wrongful Death Statute to be one of a mere conduit that allows the proceeds from a successful suit to reach the beneficiaries under the statute. Accordingly, these proceeds do not become part of the estate. *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961).

Skaggs contends, and we agree, that there is no language in the Memorandum Agreement which would serve to release Cullipher from a wrongful-death action. The agreement recites as its purpose to avoid "the expenses, delay, and uncertainties of outcome in litigation involving [the] lost will," and it purports only to be a "compromise and settlement of all matters involved in the administration and distribution *of the estate of the decedent.*" (Emphasis provided.) We further concur that the agreement is ineffective as a settlement of the wrongful-death action because it was not signed by all of the persons with statutory rights to the proceeds. The statute defines the parties in interest in a wrongful-death suit as follows:

> The beneficiaries of the action created in this section are the surviving spouse, children, father and mother, brothers and sisters of the deceased person, persons standing in loco parentis to the deceased person, and persons to whom the deceased person stood in loco parentis to.

Ark. Code Ann. § 16-62-102(d) (Supp. 1995). In this case, several statutory beneficiaries including Mrs. Cullipher's mother, two

of her sisters, and one of her brothers, were not made parties to the settlement. If indeed the settlement agreement was intended to settle the wrongful-death claim, and in effect relinquish the rights of the statutory heirs, then those persons had to be made parties to the agreement. In *Wallace v. King*, 205 Ark. 681, 170 S.W.2d 377 (1943), the Arkansas Supreme Court held that where a settlement agreement was not signed by all interested parties, it was not binding even on those who did actually sign the agreement.

For the foregoing reasons, we hold that the trial court erred in finding that the wrongful-death action filed against Cullipher was in contravention of the settlement agreement.

Our holding is primarily premised not on who actually signed the agreement, as the dissent by Chief Justice Robbins contends, but upon what the agreement purports to settle — not "all claims between the parties" but rather all matters involved in the administration and distribution of Mrs. Cullipher's *estate*. Consequently, the rationale for enforcing the agreement with regard to claims which would accrue to the estate, *i.e.*, pain and suffering, medical expenses and funeral expenses, of the decedent, does not serve to also foreclose a wrongful-death claim not due or owing to the estate, whether the agreement is signed by the statutory beneficiaries of the wrongful-death action or not. Moreover, the fact that only the beneficiaries named in Mrs. Cullipher's will and her sole intestate heir-at-law, her spouse, signed the settlement agreement supports a finding that the agreement compromised and settled only matters involved in her estate.

4. Survival action

We reach a different conclusion with regard to Skaggs's argument that the court erred in finding that the agreement settled and released the estate's survival cause of action against Cullipher. Skaggs contends that the only intention of the parties to the Memorandum Agreement was to settle the division of assets and debts then known to exist in the estate. He suggests that a careful reading of the agreement and all other documents associated with the estate will prove that they contained no language that could

reasonably be construed to constitute a release of all claims against Cullipher.

However, in this action, Skaggs is acting to marshal assets that will, if the suit succeeds, become part of the estate. The plain language of the agreement states that it is a "compromise and settlement of all matters involved in the administration and distribution of the estate of the decedent." Moreover, the agreement was executed by all parties designated as beneficiaries under the lost will and by Cullipher, the sole heir-at-law to the estate. The administrator is empowered by statute to make settlements on behalf of the estate. Ark. Code Ann. § 28-49-104(a) (1987) states in pertinent part:

> When it appears to be for the best interest of the estate or in the case of an action for wrongful death or for the best interest of the estate or widow and next of kin, the personal representative, upon the authorization of or approval by the court, may effect a compromise settlement of any claim, debt, or obligation *due or owing to the estate, whether arising in contract or tort. . . .*"

(Emphasis supplied.)

Skaggs argues that the agreement should fail because it does not contain all of the elements of a contract, however, he does not dispute the trial court's finding that the Memorandum Agreement was a family settlement agreement as a matter of law. Such agreements are afforded a legal status distinct from typical contracts, and will be enforced without closely scrutinizing the consideration of the transaction or the strict legal rights of the parties. *Giers v. Hudson*, 102 Ark. 232, 143 S.W. 916 (1912). *See also Shell v. Sheets*, 202 Ark. 708, 152 S.W.2d 301 (1941). Accordingly, we do not agree that the trial court erred in finding that the Memorandum Agreement settled the survival action that Skaggs sought to bring on behalf of the estate of Mrs. Cullipher.

As to Judge Rogers's concurring and dissenting opinion that the probate court lacks jurisdiction over torts, the authority upon which she relies stands only for the proposition that a probate court may not litigate tort claims or deal with such claims on a substantive basis. Two of the cases cited, *Eddleman v. Estate of Farmer*, 294 Ark. 8, 140 S.W.2d 141 (1987) and *In re Morgan*, 310

Ark. 220, 833 S.W.2d 776 (1992) involved the attempt to try tort cases in probate court. The other case, *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984), affirmed the probate court's dismissal of letters of administration for the estate of an unborn fetus, but contained dicta that a *wrongful-death* action by the heirs at law would not be precluded. We find that the probate court's exercise of jurisdiction in this case was not an attempt to litigate the tort claim.

A probate court has constitutionally vested jurisdiction over the actions of persons appointed to act on behalf of an estate. Ark. Const. art. 7, § 34. The probate court will therefore have some superintending authority over wrongful-death actions because only a personal representative may bring a survival action if one has been appointed. Ark. Code Ann. § 16-62-102(b) (Supp. 1995); *see, e.g.*, *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994). Moreover, it is clear that probate courts have jurisdiction with regard to the *settlement* of tort claims, pursuant to Ark. Code Ann. § 28-49-104(a) (1987). Furthermore, probate courts have the authority to determine whether there has been a family settlement agreement in the course of approving distribution of estate assets. *Alexander v. First National Bank of Fort Smith*, 275 Ark. 439, 631 S.W.2d 278 (1982). In short, a personal representative has the authority to settle tort claims *due the estate*, and the probate court has the authority to approve such settlements. This is no more than the probate court did in this instance — it determined that a family settlement agreement had been reached which encompassed such a claim.

Affirmed in part, reversed in part, and remanded.

ROBBINS, C.J., CRABTREE, ROGERS, PITTMAN, and NEAL, JJ., agree as to Part I and II.

CRABTREE, J., agrees as to Part III, and ROGERS and PITTMAN, JJ., concur in the result.

ROBBINS, C.J., and NEAL, J., dissent as to Part III.

ROBBINS, C.J., CRABTREE, and NEAL, JJ., agree as to Part IV.

ROGERS and PITTMAN, JJ., dissent as to Part IV.

JOHN B. ROBBINS, Chief Judge, concurring in part and dissenting in part. While I agree with much of Judge Roaf's opinion, and for that reason concur in part, I do not believe that the trial court erred in its finding pertaining to the action filed by Howard Skaggs in the Miller County Circuit Court. The probate court held that the family-settlement agreement released all claims that the estate and the parties to the agreement could have pursued between themselves arising from the decedent's death, and that the action filed by Howard Skaggs in the Miller County Circuit Court was in contravention of this family-settlement agreement. The probate court could properly so hold.

Judge Roaf's opinion affirmed the probate court's finding that the family-settlement agreement constituted a release of any survival action that the estate may have had against appellee. Her opinion does so because the family-settlement agreement was executed by appellee, who stood to inherit the decedent's entire intestate estate as surviving spouse, and all parties designated as beneficiaries under the decedent's lost will. To paraphrase her rationale: inasmuch as all persons interested in the estate, including the beneficiaries under the decedent's lost will and the decedent's surviving spouse, have joined in the family-settlement agreement, they should be bound to it because such agreements are favored at law and will be enforced without scrutinizing the strict legal rights of the parties. Judge Roaf cites *Giers v. Hudson*, 102 Ark. 232, 143 S.W. 916 (1912), and *Shell v. Sheets*, 202 Ark. 708, 152 S.W.2d 301 (1941). I would add *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993).

I submit that this same rationale should apply to the issue addressed in section number three of Judge Roaf's opinion. I believe that she errs by accepting as relevant the major premise on which the appellant's argument is based, i.e., that a valid settlement of a wrongful-death action must be signed by all statutory beneficiaries. This premise is irrelevant, because the trial court did not find that the family-settlement agreement settled and released the cause of action against appellee for wrongful death on behalf of *all* of the decedent's heirs. Although appellant refers to "heirs" of the decedent, his brief clarifies that this reference is meant to refer to the statutory beneficiaries listed in the wrongful-

death statute, which includes "the surviving spouse, children, father and mother, brothers, and sisters of the deceased person, persons standing in loco parentis to the deceased person, and persons to whom the deceased stood in loco parentis." Ark. Code Ann. § 16-62-102(d) (Supp. 1995). Judge Roaf's opinion notes that all of these statutory beneficiaries did not join in signing the family-settlement agreement and agrees with appellant that if the settlement agreement intended to settle the wrongful-death claim then all of these statutory beneficiaries had to be made a party to the agreement. Judge Roaf cites *Wallace v. King*, 205 Ark. 681, 170 S.W.2d 377 (1943), as holding that where a settlement agreement was not signed by all interested parties, it was not binding even on those who did actually sign the agreement. I submit, however, that the holding of *Wallace* is that a contract prepared for and intended to be signed by all of the parties named in it does not bind those who sign it if any of those who were to have signed it refuse to do so. The family-settlement agreement involved in this case was signed by all persons who were intended to sign it.

A close reading of the probate court's order reveals that it did not hold that a statutory beneficiary who was not a party to the family-settlement agreement could not bring a wrongful-death action. It held that the family-settlement agreement released all claims between *the parties to the agreement* arising from the decedent's death, including a wrongful-death suit against appellee, and that the circuit court action brought by Howard Skaggs contravened this agreement. Section I of the complaint filed by Howard Skaggs makes it quite clear that, rather than a statutory wrongful-death action, Mr. Skaggs was seeking recovery only for and "*on behalf of the beneficiaries under the will and testament of Sophia E. Cullipher.*" The beneficiaries under the purported will of Sophia E. Cullipher were Howard Skaggs, Debra Johnson, Darlene DeLaughter, Emma Lang, Abby Lynn Johnson, and Emily K. Johnson. All of these beneficiaries joined in and were parties to the family-settlement agreement. The statutory beneficiaries under the wrongful-death statute include two of the devisees under the will, but also include the following persons for whose benefit the circuit action was not brought: the decedent's mother, Frances Skaggs; the decedent's sisters, Betty Woods and Annie Dale Cashen; and the decedent's brothers, Lewis Skaggs and Charles Skaggs. Although denominated a wrongful-death

action, the complaint only sought recovery for two of these seven statutory beneficiaries. Consequently, it was not a statutory wrongful-death action but something else. But whatever it was, all of the persons for whom recovery was sought in the circuit court action were signatories to the family-settlement agreement.

I think it inconsistent and illogical to hold that the family-settlement agreement does not bar a wrongful-death action because only two of seven statutory beneficiaries were parties to the agreement, yet permit appellant to seek relief for only these same two statutory beneficiaries in his circuit court action. I would be inclined to agree with Judge Roaf's opinion on this issue if the circuit action had been for the benefit of even one of the wrongful-death beneficiaries who had not joined in the family-settlement agreement. But it was not, and I think it is error to base a decision on the rights of persons who were not before the trial court, nor before us on this appeal, and who do not stand to gain or lose by our decision in this matter.

I would affirm the trial court on all issues, except its holding that the probate proceeding had been closed by its order of July 1, 1993.

With respect to the concurring opinion of Judge Rogers, in which she opines that the probate court lacked subject matter jurisdiction to address the issues of the survival action and putative wrongful-death action in circuit court, I disagree for the following reasons. As discussed above, I believe the probate court's action in finding that the family-settlement agreement released all claims that the parties to the agreement could have pursued between or among themselves arising out of the decedent's death, and that Mr. Skagg's circuit court action violated this agreement, did not constitute an exercise of tort-claim jurisdiction. The probate court was simply enforcing a family-settlement agreement in the course of the probate proceeding. Nor was it an original action to cancel or enforce an alleged family-settlement agreement where chancery jurisdiction might attach. *See Alexander v. First Nat'l Bank of Ft. Smith*, 275 Ark. 439, 631 S.W.2d 278 (1982). A probate court has jurisdiction to interpret and enforce a family-settlement agreement during the course of the administration of a decedent's estate. *Id.*

The cases cited in Judge Rogers's concurring opinion deal with the issues of whether a probate court could try a tort claim and whether probate could determine if a tort claim existed that could be tried. *In re Morgan*, 310 Ark. 220, 833 S.W.2d 776 (1992); *Eddleman v. Estate of Farmer*, 294 Ark. 8, 740 S.W.2d 141 (1987); *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984). Here, the probate court neither undertook to try a tort claim nor purported to rule on whether a tort claim existed that could be filed in circuit court. It simply held that the parties to the family-settlement agreement could not initiate this action and that Mr. Skaggs, who had obtained an order from the probate court authorizing him to file the circuit court action, should dismiss it because it violated the family-settlement agreement.

NEAL, J., joins in this opinion.

JUDITH ROGERS, Judge. The opinion authored by Judge Roaf more than adequately sets out the facts of this case as are necessary for an understanding of the various opinions offered in this matter; therefore, I will not recite them here. Also, since this court is in agreement that the probate court erred in ruling that the estate was closed, I will not revisit that issue in this opinion. Although I concur in the reversal of the probate court's decision ordering the dismissal of the wrongful-death action, I agree to reverse on a different and more fundamental ground, which is that the probate court was without jurisdiction to determine whether the family settlement agreement operated as a bar to the pending wrongful death action in circuit court. For this reason, I dissent to an affirmance of the probate court's decision that the estate's survival action cannot be maintained.

In its order, the probate court ordered the dismissal of the wrongful-death action based on a finding that the family settlement agreement released all claims which the parties could have pursued. In Arkansas, however, the probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers conferred by the constitution or by statute, or necessarily incidental to the exercise of the jurisdiction and powers specifically granted. *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984). It is well settled that a probate court does not have jurisdiction to render decisions dispensing with tort claims. *In re Morgan*, 310 Ark. 220, 833 S.W.2d 776 (1992); *Eddleman v. Estate of*

Farmer, 294 Ark. 8, 740 S.W.2d 141 (1987); *Carpenter v. Logan*, *supra*. In *Eddleman v. Estate of Farmer*, *supra*, the appellant had filed a contingent tort claim against the estate in the probate court. The probate court accepted the appellee's defense and ruled that the statute of limitations had run on appellant's claim. On appeal, the supreme court reversed, holding that the probate court did not have jurisdiction to rule on the tort suit and that its decision on the statute of limitations issue was void. In the case of *In re Morgan*, *supra*, the supreme court affirmed the probate court's dismissal of a tort claim based on its ruling in *Eddleman* that a probate court is without jurisdiction to decide tort claims. And, in *Carpenter v. Logan*, *supra*, the appellant asked the supreme court to determine, in an appeal from a probate court, whether an unborn, viable fetus born dead as a result of trauma caused by negligence or willful and wanton misconduct has a cause of action against the tortfeasor for wrongful death. The court declined to address the issue stating that the action, if any, was a tort action cognizable in circuit court and that it would not entertain it on appeal from an *ex parte* probate proceeding.

It should be clear from these decisions that the probate court in this instance exceeded its jurisdiction by deciding that the claim for wrongful death was barred by the family settlement agreement. By ruling on the appellee's motion for summary judgment, the court effectively exercised jurisdiction over the tort claim pending in circuit court. Indeed, the court reached far beyond the limits of its jurisdiction by ordering the dismissal of that action. In sum, the court determined what amounts to a defense to that action which, like the statute of limitations ruling in *Eddleman*, is void and thus cannot be sustained on appeal. Because this portion of the probate court's decision is void, it is not necessary or even proper for this court to offer any opinion as to the merits of appellee's motion for summary judgment. This same jurisdictional impediment applies equally to this court's decision to affirm the ruling that the release acts as a bar to the estate's survival action. That decision is also beyond the probate court's jurisdiction; therefore, I must respectfully dissent to an affirmance on that point.

In response to the criticism of my view in the other opinions, I respectfully submit that the pursuit of a wrongful-death action has nothing to do with the administration of an estate. Further-

more, although Ark. Code Ann. § 28-49-104(a) (1987) does provide for the probate court's approval of an executor's proposed settlement of a wrongful-death claim, there is nothing in the probate code which requires the executor or any interested party to seek permission of the probate court before pursuing such an action. The fact remains that the probate court ordered the dismissal of the action, which is a decision it was without jurisdiction to make.

I am authorized to state that Judge PITTMAN joins in this opinion.

Howard SKAGGS *v.* Charles Edward CULLIPHER

CA 96-258 941 S.W.2d 443

Court of Appeals of Arkansas
Divisions I & IV
Opinion delivered April 2, 1997

David J. Potter, for appellant.

Wright, Chaney, Berry & Daniel, P.A., by: *William G. Wright* and *Edward M. Slaughter*, for appellee.

PER CURIAM. In the case at bar, the decision of this court is as follows.

The finding of the probate court that the estate was closed is reversed by unanimous decision as expressed in the opinion authored by Judge ROAF.

The finding of the probate court that the family-settlement agreement settled and released the cause of action for wrongful death is reversed upon the opinion authored by Judge ROAF, as joined by Judge CRABTREE, and the opinion authored by Judge ROGERS, as joined by Judge PITTMAN, with Chief Judge ROBBINS and Judge NEAL dissenting.

The finding of the probate court that the survival action of the estate cannot be maintained is affirmed as expressed in the opinion authored by Judge ROAF, as joined by Chief Judge ROBBINS and Judges NEAL and CRABTREE, with Judges ROGERS and PITTMAN dissenting.

It is so ordered.

PEOPLES BANK of Imboden *v.* Geraldine BURGESS

CA 96-794 942 S.W.2d 264

Court of Appeals of Arkansas
Division I
Opinion delivered April 9, 1997

[redacted]

Ponder & Jarboe, by: *Dick Jarboe*, for appellant.

Castleman Law Firm, by: *Bob Castleman*, for appellee.

JOHN B. ROBBINS, Chief Judge. In January 1990, appellant Peoples Bank of Imboden loaned Richard Burgess and his wife, Melinda Burgess, the sum of $160,200.00 toward the purchase of eight acres of land and a salvage business owned by Richard's parents, Gib and Geraldine Burgess. The promissory note to the bank was secured by a mortgage on the real property and a security interest in several vehicles. Richard Burgess and Melinda Burgess were makers of this promissory note, and Gib Burgess and Geraldine Burgess signed as guarantors.

In August 1990, Richard Burgess and Melinda Burgess gave Gib Burgess, now deceased, and Geraldine Burgess, the appellee herein, a promissory note in the amount of $150,000.00. This note apparently represented the remainder of the purchase price owed by Richard Burgess and Melinda Burgess. As security for payment of the note, a mortgage on the same property mortgaged to appellant bank was executed by Richard Burgess and Melinda Burgess in favor of Gib Burgess and Geraldine Burgess.

On March 21, 1991, the appellant bank loaned Richard Burgess $4,501.00 for the purchase of a 1987 Dodge truck, and received a promissory note executed solely by Richard Burgess. On October 1, 1991, the bank loaned $25,024.00 to Richard Burgess and Melinda Burgess and received as collateral a security interest in certain automobiles.

The original $160,200.00 loan to the Burgesses was extended by written agreement on March 9, 1992. The extension agreement reduced the interest rate from 12 percent to 8 1/2 percent and reduced the quarterly payments on the note from $10,050.00 to $5,000.00. The $25,024.00 loan was also extended and its interest rate reduced from 10 percent to 8 1/2 percent.

On December 16, 1993, the bank entered into another loan transaction with Richard Burgess, who signed as sole obligor.

The amount of this loan equaled the unpaid balances of the three previous loans ($129,964.64) and $301.00 of filing fees. The new promissory note was in the principal amount of $130,265.00 with interest at 8 percent and provided that payment of the total indebtedness was due on December 16, 1994. A mortgage on the same eight acres of real property was executed by Richard Burgess as security for the loan. In conjunction with the closing of the December 16, 1993, loan, the appellant bank gave Richard Burgess receipts that reflected payment in full of the indebtedness owed on the first and third loans.

Richard Burgess defaulted on the final, $130,265.00 loan, and on March 13, 1995, the bank commenced a foreclosure action. Appellee Geraldine Burgess was not named as a party in the initial complaint, but on motion she was allowed to intervene. The bank then amended its complaint to include allegations of priority because of its original 1990 loan and mortgage.

After considering the evidence and the arguments of counsel, the chancery court determined that a novation had occurred when the bank combined these three loans and entered into the December 16, 1993, loan transaction with Richard Burgess. The chancery court specifically found that the bank did not intend to release its priority status when it executed the final loan. Nevertheless, the chancery court concluded that the first and third loans had been satisfied, thereby discharging those debts and extinguishing the original mortgage lien. The court found that, due to the bank's negligence, the appellee was entitled to a first lien on the subject real property with the bank's mortgage lien being secondary. The bank was awarded judgment against Richard Burgess in the amount of $148,408.40, and Geraldine Burgess was awarded judgment in the amount of $181,633.00. The court ordered that the proceeds of a public foreclosure sale of the real property be first applied toward satisfaction of the judgment in favor of Geraldine Burgess.

For reversal, the bank argues that the chancery court erred in finding that Geraldine Burgess was entitled to a first lien on the subject property. It contends that its final loan to Richard Burgess was merely a consolidation of existing loans and was made as an

accommodation to him. The bank relies on the fact that it never intended to release its original mortgage, and submits that this fact should have prevented its lien from becoming inferior to that of Geraldine Burgess. The bank asserts that, whether the final transaction with Richard Burgess constituted a novation, extension, or modification, it should still have retained a first lien.

In their briefs, both appellant and appellee cite *Home Federal Savings and Loan Assoc. v. Citizens Bank*, 43 Ark. App. 99, 861 S.W.2d 321 (1993). In that case, the appellant held first, second, and third mortgages on property owned by a third party. When the mortgagors needed additional time to repay the three notes secured by these mortgages, the appellant agreed to consolidate them. The new note not only included the amount owing on the three prior notes, but also included an additional indebtedness and had an interest rate different from the earlier notes. The appellant released the first, second, and third mortgages, and recorded the mortgage securing the new note.

Prior to releasing its mortgages, the appellant in the *Home Federal* case failed to discover that the appellee bank had obtained a judgment against the mortgagors, which had been entered of record and become a lien after the original three mortgages were recorded but prior to the new, consolidated mortgage. The chancery court found that the new note was intended to be a new loan rather than a continuation or renewal of the three prior notes, and concluded that the appellant had lost its priority status. On appeal, this court affirmed. In doing so, we noted that the appellee failed to show any reliance or possible prejudice if the appellant's mortgages were reinstated. Nonetheless, we stated that, in such cases, a mortgagee must be free from culpable negligence in order to have its mortgage reinstated. We found that, under the facts of that case, the chancellor's finding that the appellant demonstrated culpable negligence was not clearly against the preponderance of the evidence.

In the instant case, it is our duty to affirm the findings of the chancery court unless they are clearly erroneous. *See RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). The chancery court found that Peoples Bank

of Imboden lost its priority status through its own negligence and poor banking practices. We find that this decision was not clearly erroneous and, therefore, affirm the order of the chancery court.

Although the bank in the case at bar did not intend to release its original mortgage lien, its actions produced this effect. The supreme court has observed that "payment of the debt instantly and of itself discharges the mortgage," and that "there can be no lien when there is no debt." *Burnside v. Futch*, 229 Ark. 664, 647, 317 S.W.2d 717, 720 (1958). Although proceeds from the final loan made by the bank to Richard Burgess were used in part to satisfy the initial loan that was secured by a mortgage lien on the same real property, the proceeds were also used to pay off other loans that were not so secured. In addition, the interest rate on the final loan was 8 percent, a rate different from the interest rate on the initial loan. All of the parties to the first loan were not also parties to the final loan, and it has been held that a change in the parties renewing a mortgage amounted to satisfaction of the discharged lien, and not a continuation of the old mortgage as against intervening liens, at least where the instrument of discharge contains an express recital of payment. *See* 55 AM. JUR. 2D *Mortgages* § 404 (1996). In the present case, the parties to the two mortgages were not identical, and the bank gave Richard Burgess a receipt that reflected payment in full of the indebtedness on the first loan.

We think that Peoples Bank of Imboden could have taken steps to protect its priority status in this case. We find no error in the chancellor's conclusion that the bank failed to do so, and that the bank released its first lien on the subject property when it extinguished the prior loans and entered into the loan transaction of December 16, 1993.

Affirmed.

STROUD and CRABTREE, JJ., agree.

Winston BRYANT, Attorney General for the State of Arkansas
v. ARKANSAS PUBLIC SERVICE COMMISSION

CA 95-629 941 S.W.2d 452

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered April 9, 1997

Winston Bryant, Att'y Gen., by: *Shirley E. Guntharp*, Deputy Att'y Gen.; *M. Shawn McMurray*, Deputy Att'y Gen.; and *Virginia H. Castleberry*, Ass't Att'y Gen., for appellant.

Connie Griffin Carroll, for appellee Arkansas Public Service Commission.

Kathleen D. Alexander, Gen. Counsel; *Charles D. Harder*, Ass't Gen. Counsel; and *Wright, Lindsey & Jennings*, by: *N.M. Norton Jr.* and *J. Mark Davis*, for appellee Arkansas Louisiana Gas Company.

JOHN E. JENNINGS, Judge. This appeal results from Order No. 8 entered by the Arkansas Public Service Commission (Commission) in Docket No. 94-175-U, which approved a Joint Proposed Stipulation (Stipulation) entered into by Arkansas Louisiana Gas Company, a division of NorAm Energy Corporation (Arkla), the Staff of the Arkansas Public Service Commission (Staff), and Arkansas Gas Consumers (AGC). The Stipulation allowed Arkla to raise its overall rates by $6,976,606 and allocated these rates among Arkla's various classes of ratepayers. The Attorney General was also a party to the proceedings but objected to the Commission's adoption of the Stipulation and brings this appeal. He contends that the Stipulation's allocation of the rate increase is not supported by substantial evidence; that the Stipulation's provision allowing Arkla to recover its corridor rate costs from all ratepayers is an abuse of the Commission's discretion and unreasonably and illegally discriminatory; and that the allocation of the corridor rate costs among the ratepayers is not supported by substantial evidence. We affirm the decision of the Commission.

In May 1994, Arkla filed an application with the Arkansas Public Service Commission for an annual rate increase of approximately $10 million. Docket No. 94-175 was established, AGC was granted intervenor status in the docket, and the Attorney General notified the Commission of his intent to participate in the proceedings. Staff then began conducting an extensive audit and analysis of Arkla's application, books, and records. Over 5,000 pages of exhibits, records, and direct, rebuttal, and surrebuttal testimony were filed by the parties. Arkla amended its request to seek a $10.1-million annual increase in rates, Staff recommended a $4.6-million annual increase for Arkla, and the Attorney General argued that Arkla was entitled to a $2.7-million increase. One week before the Commission's hearing on Arkla's application was to begin, the parties began preliminary discussions to determine

whether there was a possibility of narrowing the issues or settling the entire matter. As a result of their discussions, a stipulation was reached among Arkla, Staff, and AGC, that was filed with the Commission on January 23, 1995.

The Stipulation reflected an agreed-upon revenue deficiency that allowed Arkla to increase its rates by $6,976,606.00. The resulting rate increase was allocated among Arkla's customer classes, with $6,860,988.00 (98.3%) of the increase being assigned to the residential class. The Stipulation also provided for the allocation of the revenues lost from the use of the corridor rates. The Stipulation included Arkla's agreement not to file another application requesting a general change in its rates and tariffs prior to June 1, 1996, unless an immediate and impelling necessity existed under the provisions of Ark. Code Ann. § 23-4-408, and Arkla's agreement to dismiss its appeals before the Arkansas Court of Appeals in Case Nos. CA 94-487 and CA 94-731.

Order No. 8, entered by the Commission on March 15, 1995, approved the Stipulation in its entirety. The Attorney General petitioned for rehearing of Order No. 8, and the Commission denied his petition in Order No. 9. On June 13, 1995, the Attorney General filed a notice of appeal from Orders No. 8 and 9.

This court's review of the Commission's order is limited and governed by Ark. Code Ann. § 23-2-423(c) (Supp. 1995), which provides in part:

> (3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.
>
> (4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.

It has repeatedly been held that the Commission has wide discretion in choosing its approach to rate regulation and this court does not advise the Commission as to how to make its findings or exercise its discretion. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark.

App. 157, 168, 924 S.W.2d 472 (1996); *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 219, 907 S.W.2d 140 (1995). The appellate court is generally not concerned with the method used by the Commission in calculating rates as long as the Commission's action is based on substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful, or discriminatory. 50 Ark. App. at 219-20. The appellate court views only the evidence most favorable to the appellees in cases presenting questions of substantial evidence, and the burden is on the appellant to show a lack of substantial evidence to support an administrative agency's decision. *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 102, 877 S.W.2d 594 (1994). To establish an absence of substantial evidence to support a decision, the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *AT&T Communications of the SW, Inc. v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 131, 843 S.W.2d 855 (1992); *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 71-72, 813 S.W.2d 263 (1991). The question on review is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made. 35 Ark. App. at 72.

The Attorney General's first point on appeal concerns the Commission's approval of its Stipulation's allocation of the $6.9 million rate increase among the rate classes. The Attorney General does not appeal the overall rate increase, but the Stipulation's apportionment of the rate increase among the various classes of ratepayers. Specifically, he focuses on the Stipulation's provision that allows 98% of the rate increase to be allocated to the residential ratepayers, which he contends is not supported by substantial evidence. In support of his contention, he relies on the cost-of-service studies[1] that his expert witness and Staff prepared in order to determine Arkla's revenue requirement. He argues that these

[1] Cost of Service - A term used in public utility regulation to mean the total number of dollars required to supply any total utility service (i.e., revenue requirements); it must include all of the supplier's costs, an amount to cover operation and maintenance expenses, and other necessary costs such as taxes, including income taxes, depreciation, depletion, and amortization of the property not covered by ordinary maintenance.

studies reflect that, at the time of Arkla's rate request, it was earning a positive rate of return on its residential ratepayers and a negative rate of return on its GS-5 and GS-6 ratepayers and that the figures refute Arkla's assertions that the residential ratepayers have been subsidized by the industrial ratepayers.

Staff's cost-of-service study[2], Exhibit DC-2, showed that, based on equal rates of return, Arkla was receiving a 4.69% rate of return from its residential ratepayers compared to a -5.34% rate of return from its GS-5 class. Staff's surrebuttal Exhibit DC-7 cost-of-service study, showed that Arkla received a 3.96% rate of return from its residential class as compared to a -2.59% rate of return from its GS-5 class. The Attorney General's cost-of-service studies demonstrated that rates would need to be increased by 18.07% for the GS-5 class as compared to 1.45% for the residential class to achieve equal rates of return.

The Attorney General is correct in his assertion that the individual cost-of-service studies prepared by his expert witness and Staff's witness showed that Arkla was earning a positive rate of return from its residential class and a negative rate of return from some of its industrial classes. These cost-of-service studies, however, were not the only evidence before the Commission, nor did Staff advocate allocating the rate increase based on these studies. Staff's senior gas analyst, Donna Campbell, who prepared

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Included also is a fair return in order that the utility can maintain its financial integrity, attract new capital, and compensate the owners of the property for the risks involved.

[2] A "cost of service study" is made in order to assist in determining the total revenue requirements to be recovered from each of the various classes of service. The amounts to be recovered from each of the classes of service is determined by the management or a commission after study of the various factors involved in rate design. Cost analysis or cost allocation is an important factor in rate design but only one of several important factors. Cost analysis does not produce a precise inflexible "cost of service" for any individual class of service because cost analysis involves judgment in certain cost areas. Its principal value is in determining the minimum costs attributable to each class of service. Other factors that must be considered in rate design are the value of the service, the cost of competitive services, the volume and load factor of the service and their relation to system load equalization and stabilization of revenue, promotional factors and their relation to the social and economic growth of the service area, political factors such as the sizes of minimum bills, and regulatory factors. American Gas Association, *Glossary for the Gas Industry* 13 (4th ed. 1986).

Staff's cost-of-service studies, testified that she proposed no change in GS-5's and GS-6's revenue requirements because of bypass[3] concerns. This Court recognized in *Bryant v. Arkansas Public Service Commission*, 50 Ark. App. at 237, that a cost-of-service study is merely one tool that may be used in rate-design determinations and noncost factors can also be taken into consideration. *See also Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 216, 222, 727 S.W.2d 146 (1987). The Commission is never compelled to accept the opinion of any witness on any issue before it, nor is it bound to accept one or the other of any conflicting views, opinions, or methodologies. *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. at 103.

We also note that the results of the Attorney General's and Staff's cost-of-service studies were disputed by Arkla and AGC because of their gas main allocations. In preparing its cost-of-service study DC-2, Staff used the zero-intercept method. It used a minimum pipe size of 1.25 inches in preparing DC-7. The Attorney General's cost-of-service studies allocated mains based on the zero-intercept method and the demand method.

In his prefiled testimony, Arkla witness Collier Mickle testified that Arkla's system serves a considerable number of customers in rural areas; that its distribution grid is used far more by the lower-volume customer classes, especially the residential classes, than larger-volume customers; and that, because of the rural nature of Arkansas's system, there is a high ratio of pipe investment per customer, which is rarely found in serving industrial customers. He stated that Arkla takes these factors into consideration by recognizing that the annual throughput has practically nothing to do with the cost of pipe investment. Pipe investment, he explained, is undertaken according to the flow requirements that are expected to be placed upon it at a given location at a given time and, therefore, Arkla's cost-of-service study used pipes that

[3] Bypass occurs when large customers arrange direct access to a pipeline supplier; in addition to diminished contribution to fixed costs, bypass can adversely affect remaining customers by reducing the economics of scale achieved by local distribution companies. The bypass of a regulated utility may result in stranded investment, duplicative facilities, and higher rates for remaining customers. *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. at 92, n. 1.

are two inches in diameter as the prevalent minimum size. He stated that, in allocating all costs to customer classes, Arkla used an allocation methodology which yields a result that more closely approximates the actual cost of providing service to an individual customer or group of customers and that Arkla modified the results of its cost-of-service study for purposes of rate design in order to reduce the rate impact on residential customers. He stated that the modification results in greater cost recovery from some nonresidential-customer classes as compared to the results of its cost-of-service study but also represents an additional step toward "true" cost-of-service rates. Mr. Mickle's testimony was corroborated by that of Arkla witness David Sullins, who also noted that Staff's calculation used only plastic pipe, which represents only 31% of the pipe footage in Arkla's system, and that Arkla has a significant investment in steel within its system.

Staff's senior gas analyst, Donna Campbell, argued that performing a zero-intercept analysis of the cost of gas mains was not possible because of data constraints and also recommended use of a minimum-size methodology, although she disagreed with Arkla's use of a two-inch main as the minimum size. She acknowledged that Arkla had indicated that a two-inch main would be installed regardless of the required diameter needed and that virtually all new mains that are designed to directly serve residential or small-business customers are two-inch mains.

Richard Baudino, a utility rate and economic consultant, testified for AGC. He also disagreed with Staff's and the Attorney General's allocation of gas mains, stating that Staff omitted steel mains from its calculation which excludes 69% of the distribution mains and recommended that Arkla's two-inch main be adopted. He also stated that the Attorney General's zero-intercept method was flawed because he used only data for plastic pipe. He stated that allocating gas mains solely on demand skews the results in favor of the residential class and unfairly loads the cost on general service customers.

In addressing the allocation of gas mains in *Bryant v. Arkansas Public Service Commission*, 50 Ark. App. at 234, this Court noted that it is an area in which it is appropriate to recognize the

Commission's experience, technical competence, and specialized knowledge, and the discretionary authority conferred upon the Commission. The Public Service Commission has wide discretion in choosing its approach to rate regulation, and it is not bound by a particular method of evaluation. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 567-68, 593 S.W.2d 434 (1980).

The Attorney General also seeks to discredit Arkla's cost-of-service study by arguing that the Attorney General's sales forecast is the only one supported by substantial evidence. We disagree. Sufficient evidence was presented to support Staff's and Arkla's sales forecasts that predicted a downward trend in gas use. Arkla witness Lisa Black testified that, because of improved energy-efficient construction standards, extensive renovation and weatherization of existing homes, and the use of more efficient end-use equipment, conservation is the primary cause of Arkla's declining load. Staff witness Kim Davis also testified that loss of gas-fired air-conditioning customers is a significant factor in the decline of Arkla summer usage and that, at the current rate of decline, Staff projects that no residential gas-fired air-conditioning units will be in service in three to four years.

The Attorney General has not demonstrated that the Commission erred in not adopting his or the Staff's cost-of-service studies, nor has he demonstrated that the rate allocation included in the Stipulation and approved by the Commission is not supported by substantial evidence. He argues that neither Staff nor the Attorney General show in their cost-of-service studies that residential ratepayers should be singled out for the largest rate increase; however, counsel for the Attorney General acknowledged in her opening argument to the Commission that the residential ratepayers did not lose as much in the Stipulation as they would under Arkla's, AGC's, or Staff's testimony. The Commission also had for its consideration over 5,000 pages of prefiled testimony and exhibits, which were admitted into evidence.

Arkla witness David Sullins testified that the allocation of costs among customer classes was an open issue with respect to the Stipulation and that all of the parties except the Attorney General

were able to reach a compromise on that issue. He stated that only the Attorney General recommended rate increases for the larger industrial customers, and in that respect, the Stipulation represents a compromise of the positions of all parties, including the Attorney General. He also stated that the Attorney General suggested further increases for the industrial customers but that such increases were inconsistent with Arkla's cost-of-service study and the recommendations and findings of Staff.

Arkla witness Todd Cooper stated that Arkla's cost-of-service study indicated that its largest gas consumers continue to pay more than their economic cost of service and therefore Arkla proposed to hold constant the distribution rates for GS-2, GS-3, GS-4, GS-5, and GS-6 customers and collect the requested increase from residential and GS-1 customers. He stated that this approach over time will tend to negate the unequal rate of return that currently exists between customer classes without causing rate shock.

Staff witness Donna Gray testified that the evidence in the record and the possibility of rate stability over the next two years were the primary factors that Staff considered in deciding to enter into the Stipulation. She stated that there had been a pattern from the previous rate cases of annual increases of $5 million, that Staff had determined that ratepayers would be faced with at least a $3-million increase over the next two years, and that, in her opinion, the Stipulation provided a more favorable outcome than the ratepayers would have gotten through litigation in another rate case. She stated that the approximate $6.8-million rate increase that will be borne by the residential ratepayers represents a 3.8% increase in their total overall gas bill and will cause an average residential bill to increase $1.46 per month. Ms. Gray further explained that the industrial ratepayers' potential for bypass and its impact on the remaining customers was a major consideration for Staff in developing its ultimate recommendations with regard to cost allocation and rate design.

Richard Baudino, consultant for AGC, stated that, based upon his evaluation of the strengths and weaknesses of the parties' cases, the Stipulation's revenue-increase allocation strikes a balance between the parties' various testimony, the cost-of-service studies

filed, the avoidance of rate shock to any classes, and the risk of litigation.

The Commission found that the provisions of the Stipulation were clearly within the reasonable range of opinions and recommendations presented by the various expert witnesses and that, based upon their expert testimony, substantial evidence existed to support its conclusion that the Stipulation presented a just and reasonable resolution of the case. We cannot say the Commission's finding in this regard is not supported by substantial evidence.

It is appropriate for this Court, in reviewing the sufficiency of the evidence to support the rate allocation in the Stipulation, to consider the Stipulation itself, as it is the functional equivalent of testimony in support of it and evidence that the rates included in it are just and reasonable. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. at 102-03. The evaluation of testimony in a rate case is for the Public Service Commission, not the courts, and in order to hold the testimony does not constitute substantial evidence, the court must find the testimony has no rational basis. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. at 568.

We decline to address the Attorney General's argument that the Commission's failure to state in Order No. 8 the proper method for allocating gas mains or the cost-of-service study it used in approving the Stipulation is enough to justify remand. The Attorney General admits in his brief that the Commission does not have to rely entirely on a particular cost-of-service study to decide how rates are allocated per class. Furthermore, the Attorney General did not make such a request in his petition for rehearing. "No objection to any order of the commission shall be considered by the Court of Appeals unless the objection shall have been urged before the commission in the application for rehearing." Ark. Code Ann. § 23-2-423(c)(2) (Supp. 1995).

The Attorney General's second point concerns the Commission's approval of the Stipulation's provision that allows Arkla to collect its corridor rate costs from all ratepayers. Arkla witness

David Sullins explained that corridor rates are rates designed by Arkla to accurately reflect the cost of servicing customers for whom bypass is economically and operationally feasible. The Stipulation includes two corridor rate schedules: the metering and regulating rate schedule (MR-1) and the pipeline corridor rate schedule (PC-1). Customers eligible for MR-1 rates consist of those customers whose delivery point on Arkla's distribution system is within 300 feet of an alternative pipeline or other natural gas source and who can demonstrate that bypass of Arkla's distribution system is economically feasible. Customers eligible for PC-1 rates are those within 2,000 feet. Under the terms of the Stipulation, Arkla is allowed to recover from its remaining ratepayers its corridor rate costs, *i.e.*, the rates it will lose if a ratepayer elects to receive corridor rates, in the following proportions:

Residential	70.6%
GS-1	10.1%
GS-2	11.3%
GS-3	2.7%
GS-4	1.8%
GS-5	2.3%
GS-6	1.2%
Total	100%

Sullins testified that Arkla had identified thirty-four customers that appear to qualify for the corridor rate schedules and that, if all eligible customers elected to receive corridor rates, the maximum amount of lost rates that would be collected from the remaining ratepayers would be $500,000.

The Attorney General argues that the Stipulation's provision that allows Arkla to recover from its other ratepayers its corridor rate costs violates the "just and reasonable" provisions of Ark. Code Ann. §§ 23-4-103 and 23-4-104 (1987) and is price discrimination, prohibited by Ark. Code Ann. § 23-3-114(a) and (b) (1987).

Arkansas Code Annotated § 23-4-103 (1987) provides:

> All rates made, demanded, or received by any public utility, for any product or commodity furnished, or to be furnished, or

> any service rendered or to be rendered, and all rules and regulations made by any public utility pertaining thereto shall be just and reasonable, and to the extent that the rates, rules, or regulations may be unjust or unreasonable, are prohibited and declared unlawful.

Arkansas Code Annotated § 23-4-104 (1987) states that all charges, tolls, fares, and rates shall be just and reasonable and that no charge shall be made in any tariffs, rates, fares, tolls, schedules, or classifications except as provided in this act. Arkansas Code Annotated § 23-3-114 (1987) provides:

> (a)(1) As to rates or services, no public utility shall make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage.
>
> (2) No public utility shall establish or maintain any unreasonable difference as to rates or services, either as between localities or as between classes of service.
>
> (b) The commission, in the exercise of its jurisdiction granted by this act, may fix uniform rates applicable throughout the territory served by any public utility whenever in its judgment public interest requires such uniform rates.

Section 23-3-114 does not prohibit rate differences; it merely prevents *unreasonable* rate differences. *Wilson v. Arkansas Pub. Serv. Comm'n*, 278 Ark. 591, 594, 648 S.W.2d 63 (1983); *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. at 238. Whether a rate difference is unreasonable is a question for the Commission. Ark. Code Ann. § 23-3-114(c). Here, evidence was presented to the Commission from which it could find that corridor rates were a just and reasonable response to the threat of bypass.

Arkla witness David Sullins testified that, in developing corridor rates, Arkla was confronted with bypass of its largest customer, that bypass was economically feasible for that customer, and that several other large customers had indicated that they were in the process of assessing their bypass options. He stated that the corridor rates represent the costs of servicing the customers that qualify for those rates and are necessary to prevent a substantial

number of customers from bypassing Arkla's distribution which would result in an even greater degree of revenue shifting to its remaining customers as a result of bypass.

Staff witness Donna Gray also testified that the corridor rates directly identify a portion of the bypass potential and are a reasonable solution at this time. She stated that a major consideration for Staff in developing its ultimate recommendation with regard to cost allocation was the impact on the remaining ratepayers if industrial ratepayers left the system and their fixed costs were spread among the remaining customers.

AGC witness Richard Baudino recommended approval of the corridor rates, stating that they would allow Arkla to continue to receive fixed cost contribution from the ratepayers who had bypass options and thereby mitigate the loss of revenue that would occur if a customer bypassed the system.

The Commission in Order No. 8 stated that the potential for bypass of Arkla's system was indeed present and that even the Attorney General's witness recognized the existence of this problem. The Commission stated that, although it had some concerns regarding the treatment of the revenues lost to corridor rates, its concerns were not with the availability of the corridor rates as appropriate tools to assist Arkla in controlling bypass. We find that substantial evidence existed for the Commission's approval of corridor rates and the Attorney General has failed to show that the corridor rates are unjust, unreasonable, or discriminatory.

The Attorney General also argues under this point that the Commission erred in not finding that the establishment of the corridor rates constitutes a promotional practice under Section 2 of the Commission's Promotional Practice Rules and Title 23 of the Arkansas Code. We do not address this issue because it was not timely raised. It first appears in the Attorney General's post-hearing brief that was filed after the hearing was concluded. Rule 3.13 of the Commission's Rules of Practice and Procedure provides that "[a] hearing shall be deemed concluded when the presiding officer so determines." The Attorney General has not cited

us to any authority that allows a new issue to be presented after the hearing is concluded.

The Attorney General's final point involves the Stipulation's provision that allows Arkla to collect from its remaining ratepayers the revenue lost as a result of an industrial ratepayer's election to use corridor rates. The Attorney General argues that the allocation of these corridor rate costs to the remaining ratepayers is not based upon substantial evidence. Specifically, he argues that, although neither Arkla nor Staff suggested that residential ratepayers should bear any of the cost of these rates, the Stipulation requires residential ratepayers to bear 70.6% of their cost.

Arkla witness David Sullins testified that it was AGC who recommended that the corridor rate costs be applied to all customer classes, including the residential class. He explained that the Stipulation reflected a compromise of all the parties and that AGC agreed to an increase for its larger customers in return for the agreement to include the residential customers in the allocation. There was also evidence that, even with the additional allocation of corridor rate costs, the residential rate would still be less than the deficiencies for the residential class that were recommended by Staff witness Donna Campbell.

We recognize that the Stipulation represents a compromise of the parties' positions. To hold that the Commission could not adopt the Stipulation because no party in its prefiled testimony testified in support of the exact same terms as those included in the Stipulation would effectively eliminate the Commission's power to set rates which it finds are just and reasonable. *See Bryant v. Arkansas Public Service Commission*, 46 Ark. App. at 103. It is the total effect of a rate order that we must review, and if the total effect of a rate order cannot be said to be unjust, unreasonable, unlawful, or discriminatory, judicial inquiry is concluded. 46 Ark. App. at 103.

The Attorney General also refers us to our opinion in *Bryant v. Arkansas Public Service Commission*, 50 Ark. App. at 213, where we stated that the local distribution companies (LDC) such as Arkla also must share some responsibility in balancing the interests between all ratepayers and "[w]here the LDC can be shown

to have lost the contributions of industrial customers through imprudent judgments, LDC shareholders, rather than LDC ratepayers, may be made to bear the consequences of the LDC's inability to handle competition." 50 Ark. App. at 239. Here, however, there is no evidence that Arkla acted imprudently. While we share the Attorney General's concern for the residential ratepayers and continue to urge the Commission to closely scrutinize the allocation of a utility's rate increase, we cannot say, under the facts of this case, that the Commission's approval of the allocation of the corridor rate costs is not supported by substantial evidence.

The Attorney General also stresses that Arkla has no incentive to deny GS-4, GS-5, and GS-6 class applications for corridor rates because Arkla will collect its lost revenues from other ratepayers. The Commission expressed the same concern. To that end, it required Arkla to keep and provide detailed justification records so that the Commission can consider at Arkla's next rate hearing all factors and circumstances bearing on the issue of automatic recovery of lost revenues from Arkla's remaining customers. The Commission took the steps that it deemed necessary to determine whether the allocated revenues should be recovered. We have repeatedly held that the Public Service Commission has wide discretion in choosing its approach to rate regulation, and the appellate court does not advise the Commission on how to make its findings or exercise its discretion. *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. at 219.

Affirmed.

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

CRABTREE and ROAF, JJ., concur.

TERRY CRABTREE, Judge, concurring. As the residential consumer assumes proportionately more of the cost of providing services, a public utility's business judgment, bypass options, and cost allocation proposals must be carefully scrutinized to avoid placing the greatest cost burden on the consumers who are least able to afford such costs. This court is mindful that the Commission has broad discretion in exercising its regulatory authority and,

if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then we must affirm that order. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 168, 924 S.W.2d 472, 480 (1996).

The 5,000-page record developed throughout the course of this rate case and the complexity of the issues effectively prevent any simple discussion of the allocation of rates among the utility ratepayers. The majority concludes that this settlement is a compromise agreement of the interested parties and is adequately grounded in substantial evidence to preclude this court's intervention. Based on this court's deference to the expertise of the Commission and our limited review, I agree, but I suspect that this case pushes the bounds of what can possibly survive review as "reasonable" without reducing our standard of review to a mere formality. The bottom line is that this court has found that an allocation of 98.3% of a rate increase for the residential class is not unjust, unreasonable, unlawful, or discriminatory. What then could possibly amount to an unreasonable allocation for future rate increases?

The evidence presented to the Commission shows that the bypass problem is not likely to go away or be easily addressed. In fact, in its decision, the Commission acknowledged its concern about this issue and the problems it will continue to present in the near future. Under our appellate standard of review, solutions to this problem cannot come from this court. I therefore write this concurrence to stress that solutions to this problem must be addressed by the utilities, the Public Service Commission Staff, the Commission, and all other interested parties, including the Attorney General.

ROAF, J., joins.

Sheila Marie RITCHEY *v.* Rick Allen FRAZIER

CA 96-698 940 S.W.2d 892

Court of Appeals of Arkansas
Divisions III & IV
Opinion delivered April 9, 1997

[redacted]

Everett O. Martindale, for appellant.

John S. Kitterman, for appellee.

JUDITH ROGERS, Judge. The appellant, Sheila Ritchey, appeals from an order denying her motion for an increase in child support which she had brought against appellee, Rick Frazier, her former husband. Appellant raises two issues for reversal of the chancellor's decision.[1] She contends that the chancellor erred by refusing to increase child support at the conclusion of the hearing held on November 29, 1995, and that the chancellor erred by refusing to allow her to present evidence demonstrating appellee's income at the time her motion for an increase was filed. We find no reversible error and affirm.

Our review of the record discloses that the parties were divorced in 1987. On January 27, 1994, an agreed order was entered, based upon the joint motion of the parties, reducing appellee's child support obligation to $50 a week. On August 23, 1994, appellant filed a motion to modify the agreed order based on the allegation that appellee's income had increased since entry of the order. Appellee countered with a motion for a change of custody of their two children. Other motions, not pertinent to this appeal, were filed as well. All matters pending before the court were set down for a hearing on September 5, 1995. However, testimony was not concluded on that date and further hearings were held on November 29, 1995, and February 14, 1996. By order of March 27, 1996, the chancellor disposed of the various motions submitted, which included the denial of appellant's motion requesting an increase in child support. This appeal followed.

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[1] Appellant raised a third issue concerning the chancellor's denial of an award of attorney's fees, but that issue was later abandoned by appellant in her response to a motion filed by appellee in this appeal.

The issues in this appeal arise from events which transpired at the hearings on November 29 and February 14. Near the end of the day of trial on November 29th, it was apparent that the hearing would run on to another day, and the chancellor expressed the desire to go forward with the proposed testimony of the children so as to avoid their having to appear at a later date. Appellant's counsel then asked the chancellor for a ruling on the request for an increase in support, stating that the motion had been pending for more than a year and that he had elicited "the only testimony we have regarding that motion." Appellee's counsel moved for a directed verdict on the ground that appellant had failed to show a change in circumstances since no evidence had been presented as to appellee's income at the time the agreed order was entered. In the following discussion, appellant's counsel stated that he had not yet had the opportunity to elicit much testimony, but he noted that the chart amount based on appellee's current income was twice the amount reflected in the agreed order. The chancellor disagreed with counsel's representation that he had not had the chance to question appellee, recalling that she had hinted to counsel during his cross-examination of appellee that evidence of appellee's income at the time of the previous order was needed in order for her to determine whether circumstances had changed. The chancellor did not make a definitive ruling on the motion; however, she held counsel to his previous statement that all the testimony he intended to introduce had been presented and ruled that the record was closed on the issue of support. At the subsequent hearing on February 14, the chancellor refused to allow further evidence on the subject, even refusing the appellant the opportunity to make an offer of proof, which consisted of a verification from appellee's employer showing appellee's income as of August 1994.

As her first point, appellant contends that the chancellor erred by not granting her motion for an increase in support at the hearing on November 29. Appellant argues that it was shown that appellee presently earned $405 a week, which results in a child-support payment of $100 a week according to the applicable family support chart. She argues that a sufficient change in circumstances was demonstrated since the current chart amount is twice

the amount reflected in the agreed order. Appellant is mistaken in the belief that this evidence alone demonstrates a change in circumstances.

A change in circumstances must be shown before a court can modify an order regarding child support, and the party seeking modification has the burden of showing a change in circumstances. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993). In *Ross v. Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989), we held that a child-support obligation cannot be modified based solely on the current chart amount without there also being proof of a change in circumstances. The change in circumstances asserted by appellant was that appellee's income had increased since the entry of the agreed order. However, appellant failed to introduce evidence of appellee's income when the agreed order was entered, or perhaps counsel failed to comprehend the chancellor's prompting that such evidence was necessary in this case.

A chancellor's determination as to whether there are sufficient changed circumstances to warrant an increase in child support is a finding of fact, and this finding will not be reversed unless it is clearly erroneous. *Roland v. Roland, supra.* Since the record contains no evidence demonstrating appellee's income as of the time of the agreed order, we cannot say that the chancellor's decision that appellant failed to show that appellee's income had increased since the entry of that order is clearly erroneous. We note that appellant's argument might have proven successful if it had been shown that the previous amount of support had been set in accordance with the child-support chart. However, the amount contained in the order was based upon the agreement of the parties, and there was testimony that it was not based on appellee's income in reference to the support chart.

Appellant next argues that the chancellor erred in refusing to allow her to present proof of appellee's income as of August 1994, the date the motion for an increase in support was filed, or to allow her to proffer that evidence. While we may look with disfavor on the actions of the chancellor, particularly since the interests of minors are involved, we can discern no prejudice to appellant flowing from the chancellor's rulings. The only evi-

dence appellant sought to introduce was evidence of appellee's income at the time the motion for an increase was filed. Since appellant failed to meet her initial burden of showing a change in circumstances, proof of appellee's income at that point in time cannot possibly affect the outcome of this case, and is thus of no consequence. We will not reverse in the absence of prejudice. *Mikel v. Hubbard*, 317 Ark. 125, 876 S.W.2d 558 (1994). Therefore, we cannot say that reversible error occurred.

Affirmed.

PITTMAN, COOPER, BIRD, and STROUD, JJ., agree.

MEADS, J., dissents.

MARGARET MEADS, Judge, dissenting. The majority opinion overlooks certain facts which, I believe, are determinative of the correct result in this case. Although appellant filed her motion for increased child support before appellee's motion for change of custody, the trial court decided to hear appellee's motion first. Hearing of this motion lasted two days and was still incomplete, with a third day scheduled two and one-half months later. Toward the end of the second day of testimony, the court interrupted appellant's cross-examination of appellee, but stated that she could reserve the rest of her cross-examination of this witness.

Appellant asked for a ruling on her support motion even though she had not yet had the opportunity to present her case, because hearing of the motion had been delayed for over a year. Counsel for appellant stated: "That's the only testimony we have regarding that motion, Your Honor." Counsel for appellee then moved for a directed verdict on the support motion. The court announced that the record was closed on the issue of child support.

When the hearing resumed on February 14, 1996, appellant attempted repeatedly to offer proof of appellee's income, but the court denied the proffer, stating again that the record was closed on the child-support issue.

I agree with the majority that the evidence in the record is insufficient on the issue of changed circumstances to justify a

child-support modification. However, I agree with appellant that the chancellor should have allowed her to present her case and that the chancellor's refusal to do so was an abuse of discretion. While appellant unwisely pressed for a ruling on the child-support motion before presenting her case, it appears that her insistence resulted from confusion, misunderstanding, and frustration over the inordinate delay in getting a proper hearing of the motion.

Our court has stated:

> [F]ailure through inadvertence to place before the trier of fact important evidence is a basis for reopening the evidence, and that refusal to permit it to be reopened under such circumstances will result in reversal. The principle involved is that evidence should be reopened where to do so would serve the interests of justice and cause no undue disruption of the proceedings or unfairness to the party not seeking to have it reopened.
>
> Many of the cases in which a trial court has been held to have exceeded its discretionary authority . . . involve inadvertent failures to produce evidence without which the court is forced to direct a verdict against the party whose inadvertence caused the lapse. (Citations omitted.)

H & M Realty v. Union Mechling Corp., 268 Ark. 592, 597, 595 S.W.2d 232, 235 (Ark. App. 1980).

Also, in *Sugarloaf Development Co. v. Heber Springs Sewer Improvement Dist.*, 34 Ark. App. 28, 805 S.W.2d 88 (1991), appellant filed a motion for a new trial asking that the record be reopened for the taking of testimony. On appeal, appellant argued that the chancellor erred in denying its motion for a new trial, and at oral argument appellant's counsel conceded that the evidence had inadvertently been omitted at trial, but urged that "in equity and good conscience" the chancellor should have allowed the reopening of the record for further proof. Our court noted that the evidence was necessary to appellant's request for relief, and held the chancellor abused his discretion in not reopening the record for the presentation of the proof.

I believe these cases are analogous to the instant case and, therefore, even if the chancellor was correct in considering that counsel had concluded his evidence, I believe the chancellor

abused her discretion in not allowing appellant to present proof on the issue of child support.

The evidence was necessary to appellant's request for relief, no prejudice would have resulted to appellee, and the court would not have been inconvenienced by permitting the evidence to be admitted. Moreover, while it is true that appellant asked for a ruling on the motion for an increase in child support, it is also true that the motion had been pending for fifteen months; that appellant had not put on any witnesses; that counsel's cross-examination of appellee was interrupted by the court; that cross-examination was not completed; and that appellant repeatedly asked to be allowed to present evidence on that issue. Under these circumstances I believe there was at least some confusion which contributed to appellant's failure to submit evidence important to proving her case. Moreover, appellee would have suffered no prejudice by allowing appellant to present the evidence. Finally, because the interests of children are involved, I believe the chancellor should have allowed appellant to put on evidence regarding the issue of child support.

I would reverse and remand for the chancellor to take evidence of the issue of child support.

I respectfully dissent.

Leamon L. ASHE *v.* STATE of Arkansas

CA CR 96-418 942 S.W.2d 267

Court of Appeals of Arkansas
Division I and IV
Opinion delivered April 16, 1997

[Supplemental opinion on denial of rehearing
delivered May 21, 1997.]

Donald A. Forrest, for appellant.

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

SAM BIRD, Judge. Appellant Leamon Ashe was found guilty by a jury of theft of property and sentenced as an habitual offender to thirty years in the Arkansas Department of Correction and fined $5,000. A motion for judgment NOV, for new trial, and for reduction of sentence was filed, and on December 13, 1995, the

trial court entered an order denying appellant a new trial but reducing his sentence to fifteen years with credit for time served. Both appellant and the State have appealed. Appellant argues that the trial court (1) should have granted his motion to dismiss for lack of sufficient evidence to convict, and (2) erred in departing from the model jury instruction. The State, as cross-appellant, argues that the trial court erred in reducing the defendant's thirty-year prison sentence, which had been fixed by the jury, to a sentence of fifteen years in the Arkansas Department of Correction.

At trial, Susan Foster testified that she was part owner of Clyde's Used Cars in West Memphis, Arkansas, and on May 5, 1995, she reported the theft of a 1983 greenish-gray Cadillac from her lot. She said she had sold the car the day before for $995, closed the business at about 5:30 p.m., and the next morning when the buyer came to pick the car up, it was gone. Ms. Foster said she did not see the vehicle again until she picked it up at the Memphis impound lot several weeks later. She also testified that she did not know Leamon Ashe and that no one at her business gave him authorization to use the vehicle.

G.R. Herbert, a Memphis police officer, testified that on June 26, 1995, he was dispatched to the Overton Manor Apartment Complex at 3046 St. Clair Place about 8:45 p.m. to look for a stolen car. He said that although this was a fairly large apartment complex, each apartment had its own number, and he found a 1983 gray Cadillac parked closest to and in front of 3046 St. Clair. He said the steering column was broken, the trunk lock was punched out, a tire was flat, and it had no license plate. Officer Herbert said he ran the vehicle identification number and found that the car was stolen so he had it towed to the impound lot.

C.I. Woodruff, another Memphis police officer, testified that he worked in the crime scene unit, took photographs, made diagrams of crime scenes, inventoried and tagged evidence, looked for latent fingerprints, and preserved evidence. He processed the Cadillac on June 27, 1995, and took pictures of the car that depicted the damage. Officer Woodruff said the only identifiable fingerprint he found was on the front corner of the rearview mir-

ror, which was lying on the floorboard near the front passenger's seat.

Frank Stuckey testified to the procedure he used in taking appellant's fingerprints, and the fingerprint card was introduced into evidence without objection. Andre Nagoski testified that he is a latent fingerprint examiner for the Memphis police department, and he identified the fingerprint found on the rearview mirror in the floorboard of the Cadillac as matching the right ring finger of the appellant.

Memphis Police Officer Michael W. Allen testified that he had interviewed the appellant, who gave his address as 3046 St. Clair Place, Memphis, Tennessee, and said he had a sister who lived in West Memphis on South 11th Street, within a few blocks of Clyde's Auto Sales.

Appellant argues in his first point for reversal that the evidence was insufficient to support his conviction. A person commits theft of property if he knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 1993). Our standard of review in a case such as this was stated by the Arkansas Supreme Court in *Nichols v. State*, 280 Ark. 173, 655 S.W.2d 450 (1983):

> On appellate review of the sufficiency of the evidence, we seek to determine whether the verdict is supported by substantial evidence. We reiterated in *Jones v. State*, 269 Ark. 119, 598 S.W.2d 748 (1980), that substantial evidence, whether direct or circumstantial, must be of "sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond suspicion or conjecture . . . . [T]he test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences." Evidence is not substantial whenever the factfinders are left "only to speculation and conjecture in choosing between two equally reasonable conclusions, and merely gives rise to a suspicion." *Surridge v. State*, 279 Ark. 183, 650 S.W.2d 561 (1983). A directed verdict should be

> granted where there is no evidence from which the jury could have found, without resorting to surmise and conjecture, the guilt of the defendant. *Fortner & Holcombe v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975). In *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978), we said: "Where inferences are relied upon, they should point to guilt so clearly that any other conclusion would be inconsistent. This is so regardless of how suspicious the circumstances are."
>
> Here, there is no evidence upon which the jury could base its convictions except upon surmise and conjecture. When the evidence is found insubstantial on appeal, the double jeopardy clause of our federal constitution requires a dismissal of the action. *Roleson v. State*, 277 Ark. 148, 614 S.W.2d 656 (1981); *Polland v. State*, 264 Ark. 753, 574 S.W.2d 656 (1978); *Burks v. U.S.*, 437 U.S. 1 (1978); and *Greene v. Massey*, 437 U.S. 19 (1978).

Nichols v. State, 280 Ark. at 175-76, 655 S.W.2d at 452.

Appellant submits that the State's only evidence against him was: (1) An unsubstantiated report that he had relatives living within two to four blocks of the car lot from which the car was stolen; (2) the car was found in Memphis, Tennessee, about a month after the theft, parked in front of 3046 St. Clair Place, which was the address appellant gave as his address; (3) a fingerprint matching one of appellant's fingerprints was found on the unattached rearview mirror that was lying on the floor of the car; and (4) a hearsay report about a "Crimestopper's tip" that led police to the car. Appellant submits various scenarios that would innocently explain these facts.

In determining the sufficiency of the evidence, it is necessary to ascertain only the evidence favorable to the appellee State, and it is permissible to consider only that testimony that supports a verdict of guilt. *Gardner v. State*, 296 Ark. 41, 67, 754 S.W.2d 518, 531 (1988). The evidence against appellant was circumstantial, but circumstantial evidence is sufficient to constitute substantial evidence. *Hooks v. State*, 303 Ark. 236, 795 S.W.2d 56 (1990). In determining whether the evidence was substantial we consider only the evidence that supports the conviction without weighing it against other evidence favorable to the accused. *Key*

v. State, 325 Ark. 73, 76, 923 S.W.2d 865 867-68 (1996); *Farris v. State*, 308 Ark. 561, 826 S.W.2d 241 (1992). Circumstantial evidence alone may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996). Once the evidence is determined to be sufficient to go to the jury, the question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide. *Key, supra*; *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995); *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993); *Lolla v. State*, 179 Ark. 346, 15 S.W.2d 988 (1929). The credibility of the witnesses who testify in a criminal trial is a matter for the jury to determine, and it may reject, in whole or in part, the testimony of any witness, including the defendant, who is the person most interested in the outcome of the trial. *Moore v. State*, 315 Ark. 131, 134, 864 S.W.2d 863, 865 (1993); *Atkins v. State*, 310 Ark. 295, 302, 836 S.W.2d 367, 371 (1992); *Zones v. State*, 287 Ark. 483, 702 S.W.2d 1 (1985).

In the instant case the State proved that appellant's sister lived within walking distance of the car lot from which the Cadillac was taken; when the car was located, it was parked directly in front of the apartment in which appellant lived; and one of appellant's fingerprints was found on the rearview mirror that was lying in the floor of the car.

Appellee informs us that many jurisdictions have held that the State puts before the jury substantial evidence when it proves that the defendant's fingerprints were found at the scene of the crime. *See* Annotation, *Fingerprints, Palm Prints or Bare Footprints as Evidence*, 28 A.L.R.2d 1115, 1150-55 (1953 and Later Case Service). Arkansas has followed this trend. In *Tucker v. State*, 50 Ark. App. 203, 901 S.W.2d 865 (1995), we reviewed our case law:

> Fingerprints, under some circumstances, may be sufficient to sustain a conviction. *See Brown v. State*, 310 Ark. 427, 837 S.W.2d 457 (1992) (fingerprints found both on exterior window glass and inside the structure); *Howard v. State*, 286 Ark. 479, 695 S.W.2d 375 (1985) (fingerprint removed from exact place where robber was seen placing his hand as he vaulted into booth); *Ebsen*

> *v. State*, 249 Ark. 477, 459 S.W.2d 548 (1970) (fingerprints on both sides of a plate glass window that had been broken in and propped up inside the store). However, fingerprints alone have been held to be insufficient. *See Standridge v. State*, 310 Ark. 408, 837 S.W.2d 447 (1992) (thumbprint found on disposable cup beside a tent that was several feet from marijuana plants is not enough where there was no evidence to suggest when or where the appellant had touched the cup, whether he had purchased it, or how it came to be near the marijuana); *Holloway v. State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984) (fingerprints on piece of glass located outside the house where a burglary occurred are not enough).

50 Ark. App. at 206-07; 901 S.W.2d at 867. The fingerprint on the mirror, the proximity of the stolen Cadillac to the apartment in which appellant was living, and the fact that appellant had relatives living within walking distance of the car lot the Cadillac was stolen from, considered together, constitute sufficient evidence to support the jury's finding of guilt.

Appellant also argues that the trial court erred in departing from the Arkansas Model Criminal Instructions. During deliberations the jury returned to the courtroom and asked:

> JUROR: We have a question, sir. We would like for you to explain in laymen's terms what you mean by exercised unauthorized control.
>
> THE COURT: Let me see that instruction. That simply means to use the automobile without the permission of the owner.

Appellant contends that with this instruction, the jury was not required to find that he knew the car was stolen or that his purpose was to deprive the owner of its property, but only had to find that he had "use[d] the automobile without the permission of the owner." Appellant contends the jury was improperly instructed and that gave the State a "much lessened burden from AMCI." Appellant admits that if the court had read the entire instruction again, substituting "without the permission of the owner" for the words, "exercised unauthorized control," he would be without this argument. He suggests, however, that because of what the court did "the jury was given the very wrong impression that it

only need find that Ashe operated the car without the owner's permission and need not find that appellant had knowledge and purpose to deprive the owner thereof."

In support of this argument appellant cites *Cavin v. State*, 313 Ark. 238, 855 S.W.2d 285 (1993), in which our supreme court said:

> It is not error for the trial court to refuse to give a non-AMCI jury instruction if the other instruction given covered the issue. *See Williams v. State*, 304 Ark. 279, 801 S.W.2d 296 (1990); *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985). An instruction not included in AMCI should be given only when the trial judge finds that the AMCI instruction does not state the law or if AMCI does not contain a needed instruction on the subject. *Ventress v. State*, 303 Ark. 194, 794 S.W.2d 619 (1990).

313 Ark. at 249-50, 855 S.W.2d at 291. Appellant also cites *Donovan v. State*, 26 Ark. App. 224, 764 S.W.2d 47 (1989), in which this court said:

> Although the appellant argues that the instruction was unduly emphasized when the court did not repeat all the instructions, we do not agree. We do agree that additional instructions must be used with care. The case of *Hicks v. State*, 225 Ark. 916, 287 S.W.2d 12 (1956), cited by appellant, makes it clear that it is preferable to settle the instructions in chambers. Moreover, *Rush v. State*, 239 Ark. 878, 395 S.W.2d 3 (1965), shows the danger of giving new or repeated instructions after jury deliberations have begun. However, in *McGaha v. State*, 216 Ark. 165, 224 S.W.2d 534 (1949), the court said:
>
>> The trial court did not err in reinstructing on the degrees of homicide after the jury reported agreement on the question of defendant's guilt as to some offense. It is within the province of the presiding judge to give further instructions when, in the exercise of proper discretion, he regards it necessary to do so in the furtherance of justice, and it is not always necessary in such cases that he should repeat the whole charge. (Citations omitted.)
>
> 216 Ark. at 171-72. Also, in *Wood v. State*, 276 Ark. 346, 635 S.W.2d 224 (1982), the court said:

> It is within the province of the presiding judge to recall the jury and [give] them further instructions when, in the exercise of a proper discretion, it is necessary to do so in the furtherance of justice. *Harrison v. State*, 200 Ark. 257, 138 S.W.2d 785 (1940). It is not always necessary in such cases that he should repeat the whole charge. *Harrison v. State, supra.*

276 Ark. at 349. Furthermore, Rule 33.4 of the Arkansas Rules of Criminal Procedure provides, in part, as follows:

> (d) The judge may recall the jury after it has retired to deliberate and give it additional instructions in order to:
>
> (i) correct or withdraw an erroneous instruction;
>
> (ii) clarify an ambiguous instruction; or
>
> (iii) inform the jury on a point of law which should have been covered by the original instructions.
>
> (e) Should additional instructions be given, the judge in his discretion may allow additional argument by counsel.

> While *McGaha* and *Wood, supra*, approved additional instructions under situations where the jury had requested the instructions, and the appellate court found no error since the jury had indicated it understood all the other instructions, both opinions specifically state that it is not always necessary to repeat all the instructions. Both opinions also say that additional instructions may be necessary in the furtherance of justice, and both opinions recognize that the real problem is the proper exercise of the trial court's discretion.

26 Ark. App. at 231-33, 764 S.W.2d at 51.

The appellee characterizes appellant's argument as an assertion that by the way the trial court defined "exercised unauthorized control," he so emphasized that part of the statutory definition of theft of property that, in the minds of the jurors, the rest of the definition of theft of property faded away, leaving the theft of property a strict-liability offense that did not require proof of a culpable mental state. Appellee concedes that appellant makes a very good argument that the trial court should not have defined the term for the jury but should have reread the entire statutory definition of theft of property. Appellee argues, however, that

appellant has failed to preserve this argument for appeal because appellant did not ask the court to give the entire instruction. The appellant must make known to the court the action he wishes the court to take. *Dumond v. State*, 290 Ark. 595, 599, 721 S.W.2d 663, 665 (1986) (citing *Walker v. State*, 280 Ark. 17, 20, 655 S.W.2d 370, 372 (1983)). "It is the duty of a party desiring relief to apprise the trial court of the proper basis upon which he relies in order to preserve an issue for appeal." *Baker v. State*, 310 Ark. 485, 490, 837 S.W.2d 471, 473 (1992).

Appellee argues that appellant's second argument is also procedurally barred because the only relief appellant requested was a mistrial. Mistrial is an extreme remedy that should only be granted when justice cannot be served by continuing the trial. A mistrial is only appropriate when the error is beyond repair and cannot be corrected by any curative relief. A trial court has broad discretion in granting or denying a motion for a mistrial, and the trial court's decision will not be reversed absent abuse of that discretion. *Cook v. State*, 316 Ark. 384, 872 S.W.2d 72 (1994); *Jiminez v. State*, 24 Ark. App. 76, 749 S.W.2d 331 (1988). It was appellant's burden to request curative relief, and his failure to request a limiting instruction cannot inure to his benefit on appeal. *Haynes v. State*, 311 Ark. 651, 846 S.W.2d 179 (1993); *Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992). If appellant had brought to the trial court's attention that he wanted the jury to hear the entire theft-of-property instruction again, as he argues on appeal, the judge probably would have done that. We cannot agree that the trial court's actions were an abuse of discretion, particularly where appellant did not request the judge to reinstruct the jury on the entire definition of theft of property.

On cross-appeal the State argues that the trial court erred in reducing appellant's thirty-year sentence, which had been fixed by the jury, to fifteen years. The State is permitted to appeal the imposition on a defendant of a sentence that was illegally imposed by the circuit court. *See, e.g.*, *State v. Rodriques*, 319 Ark. 366, 891 S.W.2d 63 (1995); *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993); and *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993). The State has the right to such appeals pursuant to Arkansas Rules of Appellate Procedure—Criminal 3(b), (c)

(1996) (formerly codified as Arkansas Rule of Criminal Procedure 36.10(b); (c)). Moreover, in a criminal case the State is permitted to pursue an appeal as a cross-appellant. *See, e.g. Moore v. State*, 321 Ark. 249, 258-61, 903 S.W.2d 154, 158-60 (1995) and *State v.Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979).

Appellant was convicted of theft of property pursuant to Ark. Code Ann. § 5-36-103(b)(2) (Repl. 1993), a Class C felony. Arkansas Code Annotated section 5-4-401(a)(4) (Repl. 1993) sets the sentence for a Class C felony at not less than three nor more than ten years. However, at the beginning of the penalty phase of the trial, the prosecution entered evidence that appellant was a habitual offender with five prior felony convictions. Arkansas Code Annotated section 5-4-501(b)(4) (Supp. 1995) provides that a defendant who is convicted of a Class C felony after June 30, 1993, and has four or more prior felony convictions may be sentenced to a term of not less than three nor more than thirty years. Thus, the sentence of thirty years' imprisonment imposed by the jury was within the statutory range of permissible sentences for someone with more than four prior felony convictions who is convicted of a Class C felony.

After the jury recommended a sentence of thirty years in the Arkansas Department of Correction, the trial court pronounced sentence from the bench. A formal, written judgment and commitment order was filed on November 15, 1995. On November 28, 1995, appellant filed a motion for reduction of sentence, because "the sentence is clearly too harsh for the crime for which this jury has convicted him." On December 13, 1995, the court, without a hearing and without explanation, modified appellant's sentence, stating simply:

> The Defendant's Motion for Judgment NOV and Motion for New Trial are denied, but the Defendant's Sentence of Thirty (30) years in the Arkansas Department of Correction and fine of five thousand dollars ($5,000) is hereby reduced to a term of fifteen (15) years in the Arkansas Department of Correction with credit for time served.

In response to the State's argument that the reduction of his sentence was error, appellant argues that appellee did not preserve

this issue for appeal because no record was made of the hearing and the prosecution did not object to the reduction of the sentence. The State responds in its reply brief that no hearing was held to make a record of and that it did object to the reduction of appellant's sentence when it filed an answer to appellant's motion.

The State may raise at any time the illegality of reducing a sentence, and the issue of an illegal sentence may be raised for the first time on appeal. In *Bangs v. State*, 310 Ark. 235, 239, 835 S.W.2d 294 (1992), the Arkansas Supreme Court said, "[W]e treat allegations of void or illegal sentences similar to problems of subject matter jurisdiction in that we review such allegations whether or not an objection was made in the trial court. *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986). A sentence is void when the trial court lacks authority to impose it. *Id.*" We also find that the State, by filing its answer objecting to appellant's motion for reduction of his sentence, reserved this issue for appeal, particularly since the court granted the motion without conducting a hearing.

A criminal defendant is sentenced when the statutory authority of a circuit court to reduce a sentence of imprisonment ends and the constitutional authority of the Governor to grant clemency begins. Our case law tells us that a defendant is sentenced when the trial judge enters a judgment and commitment order. *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995); *Pannell v. State*, 320 Ark. 250, 895 S.W.2d 911 (1995); *Kelly v. Washington*, 311 Ark. 73, 843 S.W.2d 797 (1992); *Redding v. State*, 293 Ark. 411, 738 S.W.2d 410 (1987); *Wooten v. State*, 32 Ark. App. 194, 799 S.W.2d 555 (1990). A trial court is without jurisdiction to modify a sentence once it has been put into execution. *DeHart v. State*, 312 Ark. 323, 325, 849 S.W.2d 497, 499 (1993); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989); *Toney v. State*, 294 Ark. 473, 743 S.W.2d 816 (1987).

Once a defendant has been sentenced, any motion for reduction of the length of the sentence is a request for clemency, *Smith v. State*, 262 Ark. 239, 555 S.W.2d 569 (1977), which is reserved to the Governor, Ark. Const. art. 6 § 18. In *Shelton v. State*, 44 Ark. App. 156, 160, 870 S.W.2d 398, 400 (1994), we

noted that the Arkansas Supreme Court has been very careful to consider the separation of powers when reviewing the authority of trial courts to reduce a defendant's sentence. Because of the power to pardon held by the Governor, courts have no authority to reduce a defendant's sentence on the basis that it is unduly harsh. *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990); *Coones v. State*, 280 Ark. 321, 657 S.W.2d 553 (1983); *Rogers v. State*, 265 Ark. 945, 582 S.W.2d 7 (1979); *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974).

In *Parker* the Arkansas Supreme Court said:

> In the past this court did reduce sentences. *Carson v. State*, 206 Ark. 80, 173 S.W.2d 122 (1943). We later decided that such an action was wrong because it violated the separation of powers doctrine. *Osborne v. State*, 237 Ark. 5, 371 S.W.2d 518 (1963). There we decided that the power to exercise clemency is vested, not in the courts, but in the chief executive. Since then we have uniformly held that the sentence is to be fixed by the jury and not by this court. If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce it even though we think it unduly harsh. *Id.* at 7, 371 S.W.2d at 520.

302 Ark. at 512, 790 S.W.2d at 895.

As stated in *Coones, supra*:

> In *Williams, Standridge & Deaton v. State*, 229 Ark. 42, 313 S.W.2d 242 (1968), we recognized that:
>
> > The great weight of authority supports the rule that when a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way either during or after the term or session of the court at which the sentence was pronounced; any attempt to do so is of no effect and the original sentence remains.
>
> We reiterated this rule in the recent cases of *Cooper v. State*, 278 Ark. 394, 645 S.W.2d 950 (1983); and *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983), where we said that, "Once a valid sentence is put into execution the trial court is without jurisdiction to modify, amend or revise it." To the same effect are *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 454 (1977); and *Emerson v. Boyles*, 170 Ark. 621, 280 S.W. 1005 (1928). In *Emer-*

> *son* we recognized "the rule, well established, that where the defendant has entered upon the execution of a valid sentence, the court loses jurisdiction over the case."

280 Ark. at 322-23, 657 S.W.2d at 555. And *Abbott v. State, supra,* says:

> Appellant also contends that the sentences are excessive and a deterrent to his rehabilitation. The state, in its brief, reminds us that we have held that review of sentences which are not in excess of statutory limits is not within the jurisdiction of this court because the exercise of clemency is a function of the executive branch of the government under Art. 6, Sec. 18 of the Arkansas Constitution, and this court is not at liberty to reduce a sentence within statutory limits, even though we might think it unduly harsh. *Osborne v. State,* 237 Ark. 5, 371 S.W.2d 518. *See also, Hurst v. State,* 251 Ark. 40, 470 S.W.2d 815.

256 Ark. at 562, 508 S.W.2d at 733.

Appellant also argues that the sentencing statutes do not prohibit discretion of judges to reduce sentences and cites Ark. Code Ann. § 16-90-111 (1987). That statute is entitled "*Fixing of punishment — Correction of illegal sentence — Reduction of sentence*" and provides in its entirety:

> (a) Any circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.
>
> (b)(1) The court may reduce a sentence within one hundred twenty (120) days after the sentence is imposed or within one hundred twenty (120) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal.
>
> (2) The court may also reduce a sentence upon revocation of probation as provided by law.

This statute is not applicable in the instant case. It pertains, as the title states, only to illegal sentences. In *Peterson v. State,* 317 Ark. 151, 153, 876 S.W.2d 261 (1994), our supreme

court held that Ark. Code Ann. § 16-90-111 (1987) provides a narrow remedy whereby the trial court may correct an illegal sentence at any time, and may correct a sentence imposed in an illegal manner within 120 days after a guilty plea. An illegal sentence is a sentence that is illegal on its face. *Lovelace v. State*, 301 Ark. 519, 520, 785 S.W.2d 212 (1990); *Abdullah v. State*, 290 Ark. 537, 720 S.W.2d 902 (1986). *Cothrine v. State*, 322 Ark. 112, 907 S.W.2d 134 (1995), held that Ark. Code Ann. § 16-90-111 (Supp. 1991), which permits the trial court to correct a sentence imposed in an illegal manner within 120 days after the receipt of the affirming mandate of the appellate court and which permits an illegal sentence to be corrected at any time, is in conflict with Ark. Crim. P. Rule 37. *See also*, *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1995), and *Smith v. State*, 321 Ark. 195, 900 S.W.2d 939 (1995).

Appellant's original sentence was within the statutory range of permissible sentences for someone convicted of a Class C felony who has more than four prior felony convictions. Therefore, his sentence is modified to reinstate the original sentence recommended by the jury: thirty years in the Arkansas Department of Correction and a five thousand dollar ($5,000) fine.

Affirmed on direct appeal. Reversed on cross appeal and modified.

STROUD and JENNINGS, JJ., agree.

COOPER, NEAL, and CRABTREE, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I believe that there was insufficient evidence to convict the appellant of theft.

The State was required to prove that the appellant knowingly took or exercised control over the auto with the purpose of depriving the owner thereof. *See* Ark. Code Ann. § 5-36-103 (Supp. 1995). The State did prove that a twelve-year-old auto was stolen from a used car lot within a few blocks of where the appellant's sister lived, that the auto was found nearly two months later in the parking lot of the apartment complex where the appellant lived, and that a detached rearview mirror found on the passenger side front floorboard bore the appellant's fingerprint.

The State's evidence is wholly circumstantial. As such, it will provide substantial evidence only if it excludes every other reasonable hypothesis. Although this is a question for the fact-finder to determine, the fact-finder must not be left to speculation and conjecture; two equally reasonable conclusions regarding what occurred merely give rise to a suspicion of guilt, and that is insufficient as a matter of law to sustain a criminal conviction. *Carter v. State*, 324 Ark. 395, 921 S.W.2d 924 (1996); *Reams v. State*, 45 Ark. App. 7, 870 S.W.2d 404 (1994).

Every essential element of the offense must be established by substantial evidence. *See Ward v. Lockhart*, 841 F.2d 844 (1988). But where is the evidence that the appellant "knowingly took or exercised control over" the auto in the case at bar? Although the evidence might perhaps be sufficient to show that the appellant had been a passenger in the auto, there is nothing to indicate that he took or exercised control over it. The majority places great reliance on the single fingerprint found on the detached rearview mirror, and declares that Arkansas has followed a trend toward considering the presence of a defendant's fingerprints at a crime scene to be substantial evidence *per se*. This is a misstatement of the law. The presence of fingerprints may or may not establish whether an offense has been committed, depending upon the elements of the offense charged and the circumstances of the particular case. *See Tucker v. State*, 50 Ark. App. 203, 901 S.W.2d 865 (1995).

For example, in *Smith v. State*, 34 Ark. App. 150, 806 S.W.2d 391 (1991), we held that twelve fingerprints on an automobile were insufficient to sustain a conviction for theft by receiving where the vehicle was parked in a place accessible to the general public and no one had seen the appellant in control of, or even inside, the vehicle. In the case at bar, the appellant was convicted of the greater offense of theft on similar evidence, and I dissent.

NEAL and CRABTREE, JJ., join in this dissent.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

May 21, 1997

Donald A. Forrest, for appellant.

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

SAM BIRD, Judge. Appellant petitions for rehearing and points out that in our opinion dated April 16, 1997, we appear to have affirmed appellant's conviction on direct appeal and reversed the trial court's reduction of appellant's sentence on cross-appeal by a vote of three to three. As appellant correctly notes, under our rules, a tie vote would affirm the lower court on direct appeal but would not have the effect of reversing the lower court on cross-appeal. Although this is the apparent effect of our April 16, 1997, opinion, it is the result of an unfortunate mistake that we now correct in this supplemental opinion. Our original opinion of April 16, 1997, should have reflected that this court's votes on the direct appeal and on the cross-appeal were as follows:

> Affirmed on direct appeal.
> STROUD and JENNINGS, JJ., agree.
> COOPER, NEAL, and CRABTREE, JJ., dissent.
>
> Reversed on Cross-Appeal and modified.
> COOPER, STROUD, JENNINGS, NEAL, and CRABTREE, JJ., agree.

This supplemental opinion is being delivered for the sole purpose of setting forth the correct votes of the court on appel-

lant's direct appeal and the State's cross-appeal, and it is not intended to change the result of either as announced in our original opinion of April 16, 1997.

JENNINGS, STROUD, NEAL, and CRABTREE, JJ., agree.

Lisa R. Comer BUTLER *v.* Carson COMER

CA 96-232 942 S.W.2d 278

Court of Appeals of Arkansas
Division I
Opinion delivered April 23, 1997

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

Billy J. Allred, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Lisa R. Comer (now Butler) and appellee Carson Comer were divorced in Madison County Chancery Court on February 13, 1989. Pursuant to a written agreement by the parties, which was incorporated by reference into the divorce decree, Mrs. Butler received primary custody of their minor child. Mr. Comer was awarded certain visitation during the summer and during the Christmas holidays. By order of the Madison County Chancery Court, the visitation arrangement was modified on November 6, 1989, on December 20, 1990, and again on May 3, 1993. The May 3, 1993, modification provided that Mr. Comer was to have visitation for six weeks during the summer and one week during Christmas in odd-numbered years. In even-numbered years, he was to have seven weeks of summer visitation with no visitation during Christmas.

On July 5, 1995, Mrs. Butler and the minor child resided in Idaho. On that date, Mrs. Butler received a letter notifying her that Mr. Comer would pick the child up on July 8 for his 1995 summer visitation. However, when Mr. Comer's parents attempted to pick the child up on that date, Mrs. Butler refused to allow it. Thereafter, on July 21, 1995, Mr. Comer filed a motion for contempt against Mrs. Butler in Madison County Chancery Court.

The Madison County Chancery Court issued an order directing Mrs. Butler to appear on September 11, 1995, and show cause why she should not be held in contempt of court. Mrs. Butler responded with a motion to dismiss the action on September 8, 1995, in which she alleged that the chancery court lacked subject-matter jurisdiction because she had filed a petition to modify custody in the State of Idaho on June 29, 1995. The case eventually came to a hearing on September 29, 1995, at which Mrs. Butler failed to appear. The Madison County Chancery Court found Mrs. Butler in contempt of court and ordered her to

serve ten days in jail. She was also ordered to pay $4,204.00 for Mr. Comer's lost wages, travel expenses, and attorney's fees related to the action filed in Idaho and his father's travel expenses incurred when he attempted to pick up the child for visitation in July 1995.

Mrs. Butler now appeals from the order of the Madison County Chancery Court. For reversal, she argues that the trial court erred in proceeding with a hearing on the merits on September 29, 1995, without giving her an opportunity to plead further or appear and defend the case on the merits. In addition, Mrs. Butler asserts that the chancery court erred in awarding attorney's fees and expenses related to the Idaho case.

During the September 29, 1995, hearing, Mr. Comer testified about his attempt to exercise his visitation rights during the summer of 1995. He indicated that, prior to that time, he was always able to visit his son in the summer. He stated that in late June of 1995, however, Mrs. Butler notified him that he would not be able to visit the child. Thereafter, Mr. Comer's attorney sent a letter informing Mrs. Butler of Mr. Comer's intention to pick the child up on July 8, 1995. Proof was introduced that Mr. Comer's father incurred travel expenses in an unsuccessful attempt to pick the child up for summer visitation, and attorney's fees in defending the action that Mrs. Butler filed in Idaho. Mr. Comer incurred travel expenses and lost wages in defending the Idaho court action.

After the adverse ruling of the Madison County Chancery Court, Mrs. Butler filed a motion for relief from the order. In this motion, she alleged that her attorney instructed her not to attend the September 29, 1995, hearing because of his mistaken belief that the scope of the hearing would be limited to the jurisdictional issue. Mrs. Butler asserted that she stood ready and willing to appear and respond to the allegations of contempt. The chancery court dismissed this motion for failure to state a claim for which relief can be granted.

Mrs. Butler's first argument is that she should have been given an opportunity to appear and defend on the merits prior to the chancery court's September 29, 1995, decision. She notes

that the chancery court's docket sheet reflects that on September 11, 1995, a hearing on her motion to dismiss was scheduled for September 29, 1995. However, the docket was silent as to the setting of any hearing on the merits. Mrs. Butler's motion to dismiss was premised on three of the grounds listed in Rule 12(b) of the Arkansas Rules of Civil Procedure. Rule 12(d) provides:

> The defenses specifically enumerated (1) — (8) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

Mrs. Butler submits that, since the chancery court did not defer the hearing on her motion to dismiss until the time of the hearing on the merits, she should have been granted a later hearing at which she could have appeared and defended the contempt charges against her. Rule 12(j) provides:

> Attorneys will be notified of action taken by the court under this rule, and, if appropriate, the court will designate a certain number of days in which a party is to be given to plead further.

Pursuant to the above rule, Mrs. Butler argues that, in addition to being entitled to a hearing on the merits, the chancery court should also have granted her an opportunity to plead further.

We reject Mrs. Butler's first argument because it was not properly raised before the trial court, and the supreme court has repeatedly stated that arguments that are raised for the first time on appeal will not be addressed. *See Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996). During the hearing held September 29, 1995, no objection was made to the court's consideration of the merits of the contempt motion. Rather, Mrs. Butler's attorney simply stated:

> My client is not here at this time. I was under the understanding from [the appellee's attorney], just yesterday, that there was a possibility this might go to the merits after the jurisdiction question has been addressed.

Although Mrs. Butler now submits that the above statements should have made it apparent that her attorney was objecting to a

hearing on the merits, we disagree. Furthermore, we find that Mrs. Butler's motion for relief from the contempt order fell short of apprising the chancery court of the arguments that are now being raised. In that motion, Mrs. Butler indicated only that she missed the hearing pursuant to the advice of her attorney and that she stood ready to appear and defend on the merits of the contempt motion. She made no mention of entitlement to another hearing pursuant to Rule 12, as is now being asserted. Because her present Rule 12 arguments were not raised below, we need not consider them here.

Mrs. Butler's remaining argument is that the chancery court erred in assessing attorney's fees and travel expenses against her. The chancery court determined that Mrs. Butler was responsible for the expense incurred by Mr. Comer's father when he attempted to pick the child up in Idaho on July 8, 1995. In addition, the chancery court awarded attorney's fees and travel expenses incurred as a result of Mr. Comer defending the action that Mrs. Butler brought in Idaho. Mrs. Butler argues that these awards were erroneous, citing *Payne v. White*, 1 Ark. App. 271, 614 S.W.2d 684 (1981). In that case, attorney's fees were awarded for services performed in a California child-custody case based, in part, on the fact that the attorney's services in California were necessary to protect the appellee's rights in the child-custody case pending in Arkansas. Mrs. Butler points out that, in *Payne v. White*, *supra*, the California court concluded that it was without jurisdiction to hear the case, and in the case at bar the Idaho court made no such determination. Mrs. Butler contends that this distinction requires a disallowance of attorney's fees in the instant case. In addition, she argues that no travel expenses should have been awarded because it was unnecessary for Mr. Comer or his father to travel to Idaho because they knew in advance that she would not allow the ordered visitation and because their presence was not necessary during the initial proceedings in the Idaho court.

In *Payne v. White*, *supra*, we recognized the principle that, in certain cases, process for contempt can be used to effect civil remedies, the result of which is to make the innocent party whole from the consequences of contemptuous conduct. In the case now before us, we hold that, as a result of Mrs. Butler's contempt, Mr. Comer's father reasonably incurred $884.00 in travel

expenses when he attempted to pick up the minor child in accordance with the visitation arrangement prescribed by the most recent custody order. Thus, this award is affirmed. However, we find that the award for attorney's fees and travel expenses incurred in Mr. Comer's defense of the Idaho action was inappropriate. These fees and expenses were not a result of Mrs. Butler's contempt. Nor were these expenses related to the contempt hearing that took place in the Madison County Chancery Court.

The circumstances here differ significantly from those in *Payne v. White, supra,* where the contemnor mother sought a custody modification in the State of California. The child resided in Arkansas with his father, who had court-ordered custody. During a visit with the child's mother in California, the mother filed an action there for custody and refused to return the child. The custodial father participated in the California proceeding and ultimately it was dismissed for lack of jurisdiction. A basis for California jurisdiction was not at all apparent. Here, however, Mrs. Butler and the child have resided in Idaho for five years and the State of Idaho may have acquired jurisdiction under the Uniform Child Custody Jurisdiction Act and the federal Parental Kidnapping Prevention Act to modify custody and visitation. Although Mrs. Butler selected a court of improper venue in Idaho to file her action seeking modification of Mr. Comer's visitation rights, there is nothing in the record to show that this was done for the purpose or with an intent to delay or frustrate Mr. Comer's defense of the action. The proceeding had been transferred to a court of proper venue and was still pending when this appeal was taken. Under these circumstances we find that the chancery court's decision to award attorney's fees and expenses related to the Idaho claim was an abuse of discretion. Consequently, we reduce the judgment granted to Mr. Comer for travel expenses and Idaho attorney's fees from $4,204.00 to $884.00. The judgment is otherwise affirmed.

Affirmed as modified.

STROUD and NEAL, JJ., agree.

Russell DANIEL *v.* FIRESTONE BUILDING PRODUCTS
and Gallagher Bassett

CA 96-1119 942 S.W.2d 277

Court of Appeals of Arkansas
Division II
Opinion delivered April 23, 1997

Kinard, Crane & Butler, P.A., by: *Steve R. Crane*, for appellant.

Dunn, Nutter, Morgan & Shaw, by: *Nelson V. Shaw*, for appellees.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case filed a claim after he slipped and was injured while pulling extremely heavy sheets of rubber over rollers in the course of his employment with the appellee. The Commission denied the claim because it found no evidence to satisfy the "objective findings" requirement of Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996). For reversal, the appellant contends that the Commission erred in concluding that the medical evidence was not based on objective findings. We agree, and we reverse.

"Objective findings" are defined at Ark. Code Ann. § 11-9-102(16) (Repl. 1996) 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 Commission found that the appellant was injured and had physical difficulties as he related at the hearing but concluded that the strict construction required of the new Workers' Compensation Act mandated a finding that there was no medical evidence that satisfied the "objective findings" requirement.

The Commission correctly noted that the legislature has mandated that our new workers' compensation law, Act 796 of 1993, must be strictly and literally construed by the Commission and the courts. Ark. Code Ann. § 11-9-1001 (Repl. 1996). We think it apparent that the Commission is making every effort to comply with the legislative mandate, a difficult task that requires that a fine balance be struck between the legislature's prohibition against broadening the scope of the workers' compensation statutes and the legislature's express statement that the controlling purpose of workers' compensation is to pay benefits to all legitimately injured workers. *Id.* Nevertheless, we think that the Commission erred in the case at bar. In its opinion, the Commission noted that Dr. Green testified regarding the appellant's injuries, stating that:

> He has had no surgeries. X-rays dated July 8, 1994 of the pelvis and hip were normal. These were the only x-rays.
>
> On physical examination, he has 5 cm by 5 cm fibrous mass on the right iliac crest, probably from the contusion, fibrous from the fall. He has pain on flexion over this area. Range of motion of his lumbar spine was within normal limits, as well as the lower

> extremities. He had no loss of strength against resistance. He could heel and toe walk. He is able to squat. He had no sensory deficits. His patella and ankle reflexes were normal.
>
> . . .
>
> His diagnosis is probably sprain, but I do feel (MRI should be taken) to rule out any pathology. He should have a therapy program of stretching and isometric strengthening of his lumbar and abdominal muscles and possibly a trigger point injection. . . .

We hold that Dr. Green's direct observation of a "5 cm by 5 cm fibrous mass" constituted an objective finding pursuant to § 11-9-102(16), and we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

ROGERS and MEADS, JJ., agree.

Paul RANKIN *v.* STATE OF Arkansas

CA CR 94-278 942 S.W.2d 867

Court of Appeals of Arkansas
Division I
Opinion delivered April 23, 1997

John Joplin, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Paul Rankin, was charged by information with the offense of first-degree murder in connection with the shooting death of Charlotte Geiger. After a jury trial, appellant was found guilty of second-degree murder and was sentenced to a term of twenty years in prison. Appellant raises four issues for reversal of his conviction. He argues that: (1) the trial court erred in denying his motion for a directed verdict; (2) the trial court erred in denying his motion to suppress evidence seized in a warrantless search; (3) the trial court erred in allowing irrelevant and prejudicial testimony; and (4) the trial court erred in denying appellant's motion for a recess to allow an expert witness to testify. We find merit in the last issue raised. Consequently, we reverse and remand for a new trial.

Charlotte Geiger, the victim, owned a duplex at 701 North 8th Street in Fort Smith. She lived in one apartment while the

other was occupied by James Stevenson. Ms. Geiger also owned a residence at 715 North "G" Street, which was located behind the duplex. It was said that these homes were in a bad neighborhood and that Ms. Geiger was always careful about locking her door.

There was testimony that on February 1, 1993, appellant, Mr. Stevenson, and Charles Storey were helping Ms. Geiger make repairs to the "G" Street residence. Mr. Stevenson testified that appellant was intoxicated and that appellant and Ms. Geiger had argued about the way appellant was doing the work. When they finished late in the afternoon, Ms. Geiger went inside her home and Mr. Stevenson and appellant remained outside for a brief time talking. Mr. Stevenson later visited a friend at the bus station and returned to his apartment. At around 6:30, Mr. Stevenson left again to get a friend to come help him with repairs in his apartment. He said that he heard the sound of moaning coming from Ms. Geiger's apartment when he left. Shortly after Mr. Stevenson and his friend returned, they heard a knock at the door. Mr. Stevenson opened the door to find Ms. Geiger, covered in blood, standing in the hallway separating their apartments. She was taken to the hospital where it was learned that she had been shot twice in the face. She died three days later without identifying her assailant. It was said that her wounds had been caused by .25 caliber bullets.

The investigating officers conducted a warrantless search of Ms. Geiger's apartment after speaking with witnesses at the hospital. During the search, they discovered a large amount of blood on the bed, as well as on the floor, a telephone, and another piece of furniture. There were two shell casings at the foot of the bed and an empty holster was found sitting on a coffee table. There was testimony that appellant had acquired the holster with an X-Cam .25 caliber handgun in a trade with a friend for stereo equipment. There was also testimony that appellant had pawned the holster and gun on November 21, 1992, and that he had retrieved those items from the pawn shop the day of the murder. Despite extensive efforts to locate this weapon, the police were unable to find it.

Appellant was arrested on the morning of February 2, 1993, as he was walking toward the back door of the "G" Street residence. There were scratches and lacerations on his forehead and hands, and there appeared to be blood on his clothing. In an interview with the police, appellant told the officers that on the day of the murder he had gone to sleep in his bed after working on the house and that he had slept all night. He recalled that he had argued with Ms. Geiger, but he could not remember what had happened in the argument. When asked about his pistol, appellant gave differing accounts of its whereabouts. First, he said that it had been stolen, but he also told them that he had last seen it on a coffee table in Ms. Geiger's apartment the previous day. The officers testified that throughout the interview appellant responded to questioning by saying that he had either blacked out and could not remember, or that he had no answers to their questions. For instance, when asked if he had shot Ms. Geiger, appellant responded, "I have no answer for that." When asked to deny that he had shot her, appellant replied, "I have no answer for that as well."

Appellant first contends that the trial court erred in denying his motion for a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Bradford v. State*, 325 Ark. 278, 927 S.W.2d 329 (1996). In order to preserve this issue on appeal, a defendant must move for a directed verdict at the conclusion of the evidence presented by the prosecution and again at the close of the case; otherwise, any question pertaining to the sufficiency of the evidence to support a jury's verdict is waived. Ark. R. Crim. P. 33.1. Here, appellant failed to make the required motion after the State had presented rebuttal testimony. Therefore, this issue is not preserved for appeal, and we do not consider it. *Heard v. State*, 322 Ark. 553, 910 S.W.2d 663 (1995); *Christian v. State*, 318 Ark. 813, 889 S.W.2d 717 (1994).

As his second point on appeal, appellant argues that the trial court erred in denying his motion to suppress evidence seized in the search of Ms. Geiger's apartment. The State contends, as was argued below, that appellant lacks standing to protest the search of Ms. Geiger's home. In reviewing a trial court's denial of a motion to suppress evidence, we make an independent determi-

nation based on the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996).

At the suppression hearing, evidence was introduced revealing that Ms. Geiger was the sole owner of the duplex at 701 North 8th Street. It was also disclosed that the relationship between appellant and Ms. Geiger was that of "boyfriend and girlfriend" and that appellant had stayed at Ms. Geiger's apartment. Prescriptions and medicine bottles bearing appellant's name were found in the apartment. On the rights form appellant executed before being interviewed by the police, he recorded his address as 701 North 8th Street.

Evidence was also admitted showing that appellant had listed his address as 715 North "G" Street on transaction records that appellant had filled out and signed at a pawn shop on November 21, 1992, and February 1, 1993. Also, a computer printout from the pawn shop was introduced showing appellant's pawning activity over a three-month period. The printout shows appellant's address as 715 North "G" Street. The trial court also heard the testimony of the officers who had interviewed appellant. One officer testified that appellant said that "he remembered working at his house" on the day of the murder and that afterwards he laid down on the bed in his room and went to sleep. The officer stated that he had not seen appellant asleep in Ms. Geiger's apartment at the time of the search, and he agreed that, if appellant had been telling the truth, he was sleeping in a room in another residence.

The protection of the Fourth Amendment guarantees the right of people to be secure against unreasonable searches and seizures. *Bernal v. State*, 48 Ark. App. 175, 892 S.W.2d 537 (1995). The rights secured by the Fourth Amendment are personal in nature. *Littlepage v. State*, 324 Ark. 361, 863 S.W.2d 276 (1993). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Bernal v. State*, *supra*. A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by a search of a

third person's premises or property. *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992). The pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996). It is well settled that a proponent of a motion to suppress bears the burden of establishing that his Fourth Amendment rights have been violated. *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995). This court will not reach the constitutionality of a search where a defendant has failed to show that he had a legitimate expectation of privacy in the object of the search. *Littlepage v. State, supra.*

Based on the foregoing evidence introduced at the hearing, we hold that appellant failed to establish a legitimate expectation of privacy in Ms. Geiger's residence. The evidence suggests that appellant lived in the house on "G" Street and that he may have occasionally stayed with Ms. Geiger in her apartment. However, the mere fact that he frequently stayed there does not in and of itself give rise to a reasonable expectation of privacy. *Davasher v. State, supra.* Appellant did not own the premises, and absent from the record is any indication that appellant maintained control over Ms. Geiger's apartment. *Id.* We are aware of the Supreme Court's opinion in *Minnesota v. Olson*, 459 U.S. 91 (1990), where the Court pronounced a *per se* rule that an accused's status as an overnight guest is, alone, enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable. *See also Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994). Even so, there was no showing that appellant had been an overnight guest at the time the search occurred. *See Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994). Considering the totality of the circumstances, we cannot say that the trial court's decision is clearly against the preponderance of the evidence.

Appellant next challenges the trial court's ruling permitting the State to elicit testimony from Bruce Garner regarding a conversation he had with appellant. Over appellant's objection, Mr. Garner testified that he, appellant, and John Murry were drinking beer one night three weeks before the murder. He said they were

all fairly intoxicated and started talking about how easy it was to get away with committing crimes, especially the crime of murder. Mr. Garner testified that appellant commented that "all you really had to do was not let there be any witnesses, destroy the weapon, and whatever evidence there was, and just never admit to anything and you'd get away with it." Garner added that, to get rid of the weapon, appellant said to "take the shortest route to the river and throw it in." Appellant contends that this testimony was not relevant and that any probative value it may have had was outweighed by the danger of unfair prejudice.

Rule 401 of the Arkansas Rules of Evidence 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. Evidentiary matters regarding the admissibility of evidence are left to the sound discretion of the trial court and rulings in this regard will not be reversed absent an abuse of discretion. *Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995). Rule 403 allows a trial court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. This weighing is also a matter left to the trial court's sound discretion and will not be reversed absent a showing of manifest abuse. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

The statements attributed to appellant bear a close relation to the facts surrounding the murder. There were no witnesses; the murder weapon was never located; and the evidence demonstrated that appellant was evasive in his responses to questioning by the police. In this respect, the testimony is not unlike that at issue in *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993). There, the appellant was convicted of murdering his wife whose torso was found in a cooler floating in a lake. The court found no abuse of discretion when the trial court admitted the testimony of the appellant's ex-wife, who testified that appellant had threatened to kill her and had told her that he would cut her body into pieces so that she would never be found. It was held that the testimony was admissible under Rule 404(b) to show intent, plan and identity. The conversation in this case was said to have occurred only

three weeks before the murder. Given the distinct correlation between the statements made by appellant and the evidence presented at trial, we can find no abuse of discretion in the trial court's rulings that the testimony was relevant and that its probative value exceeded any danger of unfair prejudice.

Appellant's remaining argument is that the trial court erred in denying his request for a brief recess to allow the testimony of an expert witness who was in transit. We agree.

Appellant's clothing, which appeared to be bloodstained, was sent to the State Crime Lab for testing. Edward Vollman, a serologist there, testified at trial on behalf of the defense that there was human blood on appellant's shirt. He stated that he had performed other tests on the shirt but that the results were inconclusive. He could not determine the type of the blood because there was an insufficient amount of material for testing. He also identified human blood on appellant's sweater. He could not state that the blood found on these articles of clothing belonged to either appellant or Ms. Geiger. At the direction of the Fort Smith Police Department, he submitted samples of what little blood remained on the clothes to the lab of the Federal Bureau of Investigation in Washington, D.C., for DNA testing.

After the State rested its case, appellant advised the court that in addition to other witnesses he intended to call a Mr. Dedmon who apparently was not in attendance. The deputy prosecuting attorney noted that it was his understanding that Mr. Dedmon was coming from Washington, D.C.; that he had made a great effort to be at trial; and that the State had no objection to any ruling the court might make regarding this witness. The prosecution also offered to enter into a stipulation, if necessary. At 9:48 a.m., appellant's counsel informed the court that Mr. Dedmon had not yet arrived, and he requested a brief recess. The court remarked that the testimony of this witness would be cumulative. However, the deputy prosecutor advised the court that the DNA testing revealed that the identifiable blood from the samples came from the appellant, and not Ms. Geiger. The court then stated its preference that the parties agree to a stipulation of the witness's testimony rather than cause a delay of trial. Ten minutes later, appellant's counsel stated that Mr. Dedmon's plane was on time

and was due to arrive at 11:00 a.m., and he again moved for a continuance. The trial court denied the motion after counsel eschewed the prosecution's offer to stipulate the witness's proposed testimony. Mr. Dedmon's report was admitted into evidence, and appellant made a proffer of Mr. Dedmon's testimony that the blood on appellant's shirt was not that of the victim, but that it had characteristics of appellant's blood.

At 11:40 a.m., the State had presented testimony in rebuttal, the jury had been instructed, and the attorneys had made their closing arguments. The court sent the jury to lunch for an hour before beginning its deliberations. At 11:50, appellant's counsel informed the court that Mr. Dedmon had arrived and was in the courtroom. Counsel asked the court to either permit the witness to testify or grant a mistrial. The trial court declined to reconsider its ruling.

It is well settled that a motion for a continuance is addressed to the sound discretion of the trial court, and a decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995). The appellant bears the burden of proving that the trial court's denial of a motion for continuance was an abuse of discretion, and that burden entails a showing of prejudice. *Id.*

Motions for continuance are governed in part by Rule 27.3 of the Arkansas Rules of Criminal Procedure, which provides:

> The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

The supreme court has outlined several factors to be considered by a trial court in deciding a continuance motion:

> (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true.

Hill v. State, 321 Ark. 354, 902 S.W.2d 229 (1995).

Here, the appellant was accused of first-degree murder. The case mounted by the State was built entirely on circumstantial evidence. The State elicited testimony concerning the copious amount of blood on the victim and the furnishings in her apartment. It was also stressed that appellant's clothes had bloodstains on them at the time of his arrest. It was thus crucial for the defense to dispel any notion that the victim was the source of this blood. We are also in agreement with appellant that under these circumstances a bare stipulation is not a genuine substitute for the live testimony of a witness who is prepared to give pivotal testimony. In sum, we cannot say that no prejudice resulted from the trial court's ruling. We also perceive no lack of diligence on the part of appellant, and the delay requested was only for a short period of time. We thus conclude that the trial court abused its discretion by refusing appellant's request for a brief recess.

We are not unmindful of the State's contention that appellant failed to meet the statutory requirement of filing an affidavit showing what facts the affiant believes the witness will prove and that the affiant believes these facts to be true. The supreme court has consistently interpreted Ark. Code Ann. § 16-63-402(a) (1987) as mandating an affidavit to justify a continuance due to a missing witness when the State objects to the continuance. *Wilson v. State, supra.* Here, however, the State did not object to a continuance; therefore, appellant's failure to submit an affidavit is not fatal to his argument.

We need also mention appellant's argument that the trial court's ruling denied him the right to call witnesses as guaranteed by the Sixth Amendment. Since we have found error in the trial court's decision on other grounds, we do not consider the merits of appellant's constitutional argument. *Foreman v. State*, 321 Ark. 167, 901 S.W.2d 802 (1995).

Reversed and remanded.

PITTMAN and CRABTREE, JJ., agree.

Billy ALLEN *v.* Steve ROUTON, Municipal Court Judge; The State of Arkansas; and Gary Mitchusson, Deputy Prosecuting Attorney

CA 96-692 943 S.W.2d 605

Court of Appeals of Arkansas
Division IV
Opinion delivered April 23, 1997
[Petition for rehearing denied May 14, 1997.]

Heather Patrice Hogrobrooks, for appellant.

No response.

WENDELL L. GRIFFEN, Judge. Billy Allen has appealed from the decision of the St. Francis Circuit Court that denied his petition for writ of certiorari based on allegations that his conviction in the Forrest City Municipal Court on the charge of theft was unconstitutional because he was denied counsel before the municipal court. We hold that appellant has failed to comply with Supreme Court Rule 4-2(a)(6) regarding abstracting of the record, and that the abstract submitted by appellant is flagrantly deficient. Accordingly, we affirm the trial court judgment due to noncompliance with the Rule. We are also directing that a copy of our opinion be forwarded to the Supreme Court Committee on Professional Conduct for such action as it may deem warranted due to the persistent failure by, Heather Patrice Hogrobrooks, counsel for appellant, to comply with the abstracting requirement of our rules.

The record shows that appellant was charged with theft of property, a Class A misdemeanor, based on the allegation by Ossie Pitts that appellant stole a 1984 Oldsmobile car from Pitts's front yard and stripped it. He was convicted in the municipal court on the charge, and was sentenced to pay a $500 fine, pay restitution of

$2,000 at the rate of $150 per month beginning September 1, 1995, and serve one year in jail. The jail sentence was suspended.

Appellant did not file a direct appeal from the municipal court conviction. Instead, he filed a petition for writ of certiorari and for writ of prohibition in the circuit court after the time for filing an appeal had expired. His circuit court contention was that the municipal court lacked jurisdiction to adjudicate his guilt or innocence because the value of the allegedly stolen vehicle exceeded $500, and that his right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution was denied when he was not told that he could have counsel appointed. The circuit court held that the municipal court had jurisdiction over appellant's misdemeanor charge, and that the $500 fine and requirement that appellant pay restitution of $2,000 was proper. However, it held that the municipal court lacked the power to impose the one-year jail sentence and then suspend its execution. The circuit court specifically declined to address appellant's claim that his right to counsel pursuant to the Sixth Amendment was denied, finding that a deputy prosecuting attorney had no obligation to provide appellant with counsel.

Although appellant urges us to reverse the circuit court decision on the merits, we are unable to do so because of the grossly deficient abstract that appellant has filed. Rule 4-2(a)(6) provides that the appellant's abstract shall consist of an impartial condensation, without comment or emphasis, of 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. Rule 4-2(b) states that deficiencies in the appellant's abstract will be handled by either preparation of a supplemental abstract by the appellee, or by the appellate court addressing the deficiency *sua sponte* when the case is submitted on its merits. If the appellate court finds the abstract to be flagrantly deficient, or to cause an unreasonable or unjust delay in the disposition of the appeal, the judgment or decree may be affirmed for noncompliance with the Rule. Where the appellate court considers summary affirmance unduly harsh, it may allow the attorney for appellant time to revise the brief, at his or her cost, to conform with the abstracting rule. *Id.*

In *Davis v. State*, 325 Ark. 36, 924 S.W.2d 452 (1996), the supreme court summarily affirmed a conviction and sentence to thirty-three (33) years' imprisonment arising from two counts of possession of a controlled substance with intent to deliver. Although that appeal challenged the conviction for violation of the speedy trial guarantee, the substance of appellant's motion to dismiss for lack of a speedy trial was not abstracted. The trial court's ruling on the motion to dismiss was not abstracted. The appellant in *Davis* also failed to abstract the grounds that had been asserted in motions for continuances that he made, and failed to abstract the trial court's orders on the continuance motions. He failed to abstract the hearing on the speedy trial motion, the substance of a motion for reconsideration, or the trial court's ruling on the motion for reconsideration. The *Davis* case also involved failure to abstract the jury verdict, judgment and commitment order, or notice of appeal. The supreme court summarily affirmed the conviction because of the abstracting deficiencies.

In *Rosser v. Columbia Mut. Ins. Co.*, 55 Ark. App. 77, 928 S.W.2d 813 (1996), we affirmed a summary judgment for the appellee on its merits despite the flagrantly deficient abstract filed by the appellant. However, we granted the appellee's motion for costs associated with preparing a supplemental abstract, and we ordered counsel for the appellant to pay an attorney's fee to counsel for the appellee. In *Rosser*, the appellant failed to abstract the complaint or any other pleading, including the summary judgment pleadings that resulted in the order from which she appealed. She also failed to abstract the trial court order that granted summary judgment. We specifically observed that the abstracting defects were so flagrant that it would have been impossible to render a decision on the merits but for the supplemental abstract in the appellee's brief because it would have been impossible to understand the basis of the appeal or review the order on which it was based. *Id.*

In *C.H. v. State*, 51 Ark. App. 153, 912 S.W.2d 942 (1995), our court rendered an *en banc* decision that affirmed a judgment from the St. Francis County Chancery Court, Juvenile Division, involving the conviction of the appellant for theft of property. The appellant contended that the conviction was not supported by sufficient evidence, and that the trial court had erred by denying his motion to dismiss the delinquency petition. In addressing

appellant's claim that the chancellor erred by denying his motion to dismiss the delinquency petition, Judge Pittman wrote for the majority, "We cannot tell from the abstract on what basis appellant moved to dismiss. It is well established that we decline to go to the trial transcript to reverse a case, and that the abstract constitutes the record on appeal." *Id.* at 155, 912 S.W.2d at 943; *citing Midgett v. State*, 316 Ark. 553, 873 S.W.2d 165 (1994); *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993).

We cite *Davis*, *Rosser*, and *C.H.* because the attorney for the appellants in those cases represented and prepared the brief for the appellant in this appeal. At oral argument on this appeal, counsel for appellant was referred to some of the abstracting deficiencies in her client's brief; she contended that the abstracting requirement is an unfair imposition upon poor litigants and is unnecessary for resolution of substantive issues. Aside from demonstrating a blatant disregard for the purpose served by the abstracting requirement, counsel's argument is baseless. Even *pro se* litigants are required to comply with court rules, including our rules concerning abstracts. *See Bryant v. Lockhart*, 288 Ark. 302, 705 S.W.2d 9 (1986); *see also Pennington v. Lockhart*, 297 Ark. 475, 763 S.W.2d 78 (1989). Moreover, it is well settled that where nothing is abstracted, summary affirmance for noncompliance with the abstracting requirement is authorized by Rule 4-2(b)(2). *See Dixon v. State*, 314 Ark. 379, 863 S.W.2d 282 (1993); *Haynes v. State*, 313 Ark. 407, 855 S.W.2d 313 (1993); *Bohannon v. Arkansas State Bd. of Nursing*, 320 Ark. 169, 895 S.W.2d 923 (1995). To decide an appeal, the court must, at minimum, know what the trial court ruled before it can possibly determine any error. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993). It is unreasonable to expect each member of the appellate court to take turns reading a single record in order to understand what an appeal involves.

In the case before us, counsel for appellant has filed a brief that failed to abstract the decision rendered by the circuit court, failed to abstract the disposition rendered by the municipal court, failed to abstract the affidavit for the arrest warrant issued for appellant's arrest on the theft charge, and failed to abstract the petition for writ of certiorari or prohibition and the response filed by the State. In other words, none of the pertinent pleadings, documents, and other matters that bear on the appeal have been

abstracted in any fashion. Counsel clearly violated the abstracting requirement in this case. These are the same defects that resulted in summary affirmance in *Davis*, affirmance on the merits but with imposition of costs and attorney's fees in *Rosser*, and our inability to review the appellant's challenge to a chancellor's denial of his dismissal motion in *C.H.*. We will not disregard the abstracting requirement of Rule 4-2 for one category of litigants even if counsel for appellant believes that we should.

We also will not ignore the plain consequences of counsel's persistent refusal to comply with the abstracting requirements on the litigants who have entrusted advocacy of their cases to her. Because the State did not file a brief in this case, the flagrantly deficient abstract that counsel for appellant filed in support of her client's plea for reversal of the trial court's judgment is the only record we can reference to reverse. Counsel has known of the consequences of failing to meet the abstracting requirement at least since 1995, when we decided *C.H. v. State*. If counsel seeks to change the abstracting requirement there are legitimate ways for her to pursue that end without selling her clients short in the only appeal they will be able to assert for relief from trial court decisions. Her blatant refusal to comply with the abstracting rule to the detriment of her clients is a flagrant abuse of the trust that her clients have shown her, not to mention a patent attempt to shift the duty to represent her clients to the appellate judges whom she apparently believes should comb trial court records to uncover reversible error that her clients have trusted her to identify and bring before us in proper fashion.

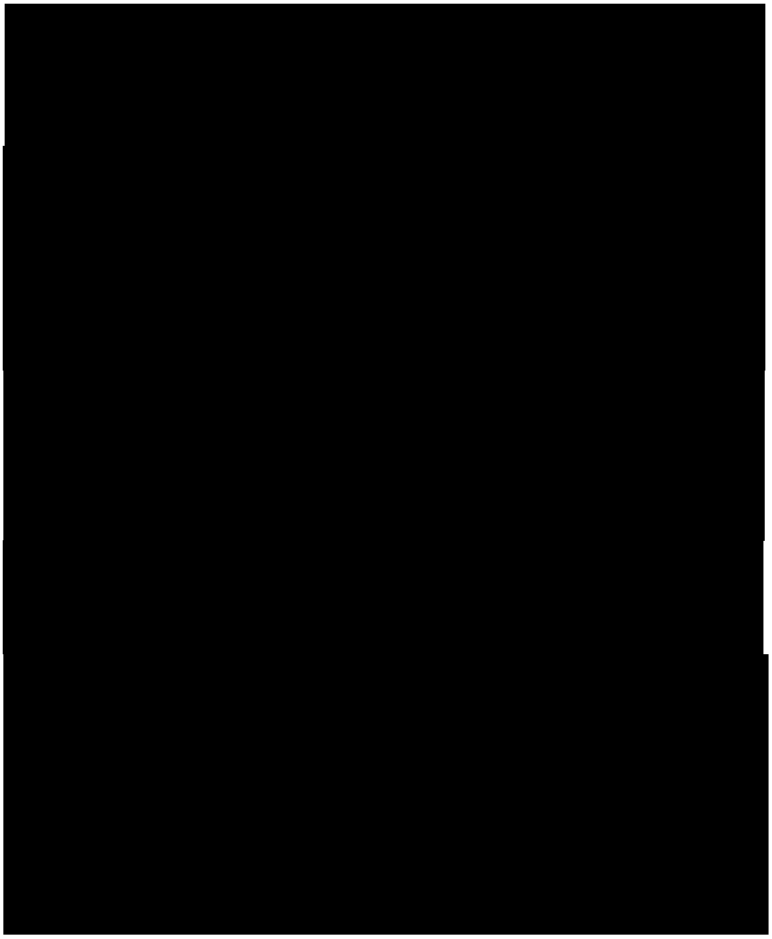
The judgment below is hereby affirmed. We also direct the clerk to forward a copy of this opinion to the Supreme Court Committee on Professional Conduct, the regulatory agency that oversees the professional conduct of attorneys.

JENNINGS and BIRD, JJ., agree.

Lori GOLDEN *v.* Edward GOLDEN, Jr.

CA 96-478 942 S.W.2d 282

Court of Appeals of Arkansas
Division II
Opinion delivered April 23, 1997
[Petition for rehearing denied May 21, 1997.]



Griffin, Rainwater & Draper, by: *Sandra Coody Bradshaw*, for appellant.

Bridewell & Bridewell, by: *Laurie A. Bridewell*, for appellee.

WENDELL L. GRIFFEN, Judge. This appeal and cross-appeal involve challenges to a chancellor's order granting visitation rights to a stepfather (appellee) over the objection of the natural mother (appellant), and permitting paternity-test results to be obtained and entered into evidence to prove that appellee did not father the child. Appellee also contends on his cross-appeal that the chancellor erred by ruling that he was required to prove that appellant was an unfit mother after the paternity-test results were received into evidence, and by refusing to find that appellant was estopped to deny that he was the father of the child. We find no reversible error as to the appeal or the cross-appeal. Therefore, we affirm.

Appellant Lori Golden and appellee Edward Golden, Jr., dated from November 1992 until late December 1992, and resumed the relationship in February 1993. During their separation, appellant dated and had sexual intercourse with another man. On July 19, 1993, appellant and appellee were married, and appellant was pregnant at the time of the marriage. The child, Edward Golden, III, was born in October 1993, two weeks premature. Appellee was identified as father of the child on the birth certificate, on health records and in applications for social services.

Appellee Edward Golden filed for divorce in November 1994, alleging in his complaint that the child was born of the marriage. Appellee obtained a restraining order preventing appellant from leaving the state with the minor child. In her answer to the

divorce complaint appellant admitted that the child was born of the marriage. After a temporary hearing the chancellor awarded joint custody of the child to the parties.

In December 1994, the parties reconciled and lived together until April 1995 when appellant abruptly left appellee and took the child with her to California. Appellee obtained an emergency order granting custody of the child to him. On the strength of the court order, appellee went to California and brought the child back to Arkansas. Appellant then retained counsel and filed a motion for paternity testing, alleging that appellee was not the child's father. The results of the paternity test, filed of record on July 20, 1995, excluded appellee as the biological father.

Appellant then filed a motion to dismiss all child custody and visitation issues from the divorce action, based on the paternity-test results. Appellee objected to the admissibility of the paternity test, asserted that he stood *in loco parentis* to the child, and argued that public policy prevented appellant from bastardizing the child. Appellee also asserted that he relied on appellant's representations that he was the father of the child, and that appellant should be estopped from challenging the paternity of the child. The chancellor overruled appellee's objection to the admissibility of the paternity test. The court awarded custody of the child to appellant and allowed testimony on the issue of appellee's rights to visitation.

Following the hearing, the chancellor found that appellee stood *in loco parentis* to the child and found that it was in the child's best interest to award appellee five weeks of visitation per year, as well as phone visitation. Appellant appeals from that judgment, asserting that the chancellor erred in denying appellant's motion to dismiss all issues regarding custody and visitation with the child, and that the chancellor erred in finding that appellee stood *in loco parentis* to the child and was entitled to visitation. Appellee filed a cross-appeal, arguing that the chancellor erred in ordering paternity testing pursuant to Ark. Code Ann. § 9-10-104 (Repl. 1991), that the chancellor erred in refusing to find appellant/cross-appellee estopped to deny appellee/cross-appellant's paternity of a minor child born during the parties' marriage, and that the chan-

cellor erred in requiring that appellee/cross-appellant prove the natural mother unfit in order to prevail and receive custody of the minor child to whom appellee/cross-appellant stood *in loco parentis*.

Appellant's Appeal

Appellant argues that the trial court erred in refusing to dismiss the custody and visitation issues from the divorce proceeding once the paternity testing excluded appellee as Edward III's biological father. Chancery cases are reviewed *de novo*, but a chancellor's findings will not be disturbed unless they are clearly against the preponderance of the evidence. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996).

The chancellor did not err in denying the motion to dismiss. We have previously addressed the issue of stepparent visitation. In *Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989), we considered whether a stepfather should be granted visitation rights with his stepson. When the parties married, the wife had a child outside the marriage. The parties later had a child during the marriage. *Id.* When the parties divorced, the chancellor found that it was in the best interest of the children for the older child to be placed with his natural mother, and for the child of the marriage to be placed with the husband, or his natural father. *Id.* The court also found that it would be in the best interest of the older child for the stepfather to be granted visitation. *Id.* We held that the circumstances in that case justified the order dividing custody and granting visitation rights to the stepfather. *Id.* at 350, 775 S.W.2d at 517.

The supreme court has also addressed the issue of whether a stepparent may be granted custody of a child. In *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), the supreme court recognized that while there is a preference for the natural parent in custody matters, a stepparent may be awarded custody of a minor child in certain circumstances. These holdings show that the chancellor's decision to deny the motion to dismiss was not clearly erroneous.

Appellant also contends that the chancellor erred in finding that appellant stood *in loco parentis* to the minor child. We find no error in the chancellor's finding. 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. *Schwarz*, *supra* (citing *Clark v. Reiss*, 38 Ark. App. 150, 831 S.W.2d 622 (1992)). *"In loco parentis"* is defined as "in the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 787 (6th ed. 1990). The supreme court has held that a stepmother stands *in loco parentis* to the minor child when the two live in the same home as mother and daughter. *Moon Distrib. v. White*, 245 Ark. 627, 434 S.W.2d 56 (1968) (citing *Dodd v. United States*, 76 F.Supp. 991 (W.D.Ark. 1948) and *Miller v. United States*, 123 F.2d 715 (8th Cir. 1942)).

The circumstances in this case warrant a finding of *in loco parentis*. Appellee lived in the same household with Edward III as his father, from October 1993 until November 1994, and from December 1994 until April 1995. Appellee believed that he was the father of the minor child, and both appellant and appellee represented appellee as the father of Edward III. During the pending divorce of the parties, appellant and appellee were granted joint custody of Edward III by the chancellor, and appellee later obtained legal custody by emergency order of Edward III when appellant left the state with the child. Appellee, at all relevant times during the marriage of the parties, was the only father the child ever knew. In *Baker v. Durham*, 95 Ark. 355, 129 S.W. 789 (1910), a case that determined whether a natural parent would be deprived of custody, the court stated:

> There may be other exceptional cases where the father, by reason of indifference to the welfare of his child and the lack of proper affection for it, has voluntarily relinquished these parental obligations, privileges and pleasures to other hands for so long that the court will refuse to disturb the associations and environments which his own conduct has produced, and will leave in status quo those whom he has thus permitted to stand *in loco parentis*.

Id., 95 Ark. at 358, 129 S.W. at 791.

Appellant cited *Hendershot v. Hendershot*, 30 Ark. App. 184, 785 S.W.2d 34 (1990), in arguing that this court has specifically rejected the doctrine of *in loco parentis*. That argument is inaccurate. In *Nelson v. Shelly*, 268 Ark. 760, 600 S.W.2d 411 (Ark. App. 1980), we held that where the appellants had physical custody of the minor child for a period of time exceeding one year, where appellants were the only parents the child had any knowledge of, and where the natural mother gave the appellants written consent to adopt the minor child, the appellants stood *in loco parentis* to the child. We have recognized the doctrine of *in loco parentis* in past precedent and reacknowledge its validity today. The chancellor's finding that appellee stood *in loco parentis* to Edward III is affirmed.

Appellee's Cross Appeal

Appellee/cross-appellant raises as his first assignment of error that the chancellor erred in ordering paternity testing pursuant to Ark. Code Ann. § 9-10-104 (Repl. 1991) under the circumstances of this case. Appellee cited *Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 123 (1987), in arguing that there is a strong presumption in Arkansas that a child born during the marriage is the legitimate child of the parties to that marriage. This citation of the law is correct; however, this presumption is rebuttable only by the strongest type of conclusive evidence. *Id.* The paternity test conducted in this case satisfied that requirement. Arkansas Code Annotated § 9-10-104 states:
Petitions for paternity establishment may be filed by:

> (1) A biological mother;
>
> (2) A putative father;
>
> (3) A person for whom paternity is not presumed or established by court order; or
>
> (4) The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration.

There is no provision in this statute that prevented the chancellor from ordering the paternity testing in this case. In *Richardson v. Richardson*, 252 Ark. 244, 478 S.W.2d 423 (1972), the trial court

ordered a paternity test during a divorce hearing between the parties. The chancellor found, from the results of the test, that the husband was not the father of the child, thus bastardizing the child. *Id.* The supreme court upheld the use of paternity testing even though the child was born during the marriage. *Id.* The trial court did not err in ordering the paternity testing.

Appellee also argues that the chancellor erred in refusing to find appellant estopped to deny appellee's paternity of a minor child born during the marriage. He contends that the doctrine of *res judicata* should bar relitigation of the paternity issue and should prevent appellant from denying the paternity of a child born during the marriage. Under 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 her privies on the same claim or cause of action. *Scallion v. Whiteaker*, 44 Ark. App. 124, 868 S.W.2d 89 (1993). The doctrine of collateral estoppel, or issue preclusion, bars the relitigation of issues of law or fact actually litigated by the parties in the first suit. *Id.*

Appellee's argument is not persuasive because there has been only one action in this case: the divorce action in which the issue of paternity was raised. In Arkansas, the parents of the minor child are bound by the doctrine of *res judicata* when the issue of paternity has been litigated in a prior action between them. *Id.* The trial court correctly found that appellant was not estopped from challenging the paternity of the minor child.

Finally, appellee contends that the trial court erred in requiring him to prove appellant unfit in order to prevail on the custody issue, where he stands *in loco parentis* to the minor child. We have consistently held that in child custody cases, the paramount consideration is the welfare and best interest of the child. Ark. Code Ann. § 9-13-101 (Repl. 1993); *McKee v. Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983). We also recognize that there is a preference for the parent above all other custodians. *McKee, supra*; *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). In *Baker v. Durham, supra*, the supreme court stated:

> [A]s between the parent and the grandparent, or anyone else, the law prefers the former unless the parent is incompetent or unfit, because of his or her poverty or depravity, to provide the physical comforts and moral training essential to the life and well being of the child. It must be an exceptional case where the evidence shows such lack of financial ability or such delinquencies in character on the part of the [parent] as to imperil the present and future welfare of his child before a court of chancery will deprive him of the duty and privilege of maintaining and educating his child, and of the pleasure of his companionship. *See Wofford v. Clark*, 82 Ark. 461, 102 S.W. 216 (1907).

Id., 95 Ark. at 358, 129 S.W. at 791 (*quoted in McKee, supra.*) In *Stamps v. Rollins, supra*, a stepfather sought custody of his five-year-old stepson. The court held that the preference for the natural parent in custody matters must prevail, unless it is established that the natural parent is unfit. *Id.* (citing *Goins v. Edens*, 239 Ark. 718, 394 S.W.2d 124 (1965); *Hancock v. Hancock*, 198 Ark. 652, 130 S.W.2d 1 (1939); *Loewe v. Shook*, 171 Ark. 475, 284 S.W. 726 (1926)). The chancellor's ruling on this issue is not clearly erroneous.

Affirmed.

ROBBINS, C.J., and ROAF, J., agree.

Lori HUNT *v.* DIRECTOR, Employment Security Department

E 95-97 942 S.W.2d 873

Court of Appeals of Arkansas
Division I
Opinion delivered April 30, 1997

Easley, Hicky, Cline & Hudson, by: *Preston G. Hickey*, for appellant.

Phyllis Edwards, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Lori Hunt appeals the decision of the Board of Review, which allowed the Employment Security Division to recoup overpayments previously made to her. She applied for and was awarded unemploy-

ment compensation benefits for a period of twenty-four (24) weeks. Incorrect reports of income by appellant while she was receiving benefits resulted in an overpayment to her. Fraudulent misreporting was attributed to appellant.

She appealed the determination of fraud and the amount of overpayment to the Appeal Tribunal, and after affirmation, to the Board of Review. The Board of Review determined (1) that the finding of fraud was final as it had not been timely appealed, and (2) that the Arkansas Employment Security Department's calculation of overpayment was correct. This appeal resulted.

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

The record reveals that appellant was employed by the Daggett Law Firm in Marianna, Arkansas, but was terminated in June 1992. Upon termination, she qualified for and began drawing unemployment benefits. During the period of benefits, she obtained variable employment that reduced the amount of unemployment benefits to which she was entitled. Appellant admits that some weeks she unintentionally reported net income instead of gross income. Appellant asserts that she overreported income during some benefit periods to make up for underreporting errors. The record reflects that she did not go to the local employment security office to clear up misreportings. The variations in income resulted in an actual benefit overpay of $548.00, according to her computation. Appellant agrees that she owes monies, but she denies that appellee correctly calculated the amount owed. Appellant asserts that by her calculation she owes $548.00 in actual benefit overpay, whereas appellee found that she owes $1,365.00, the total weekly benefits she received during fraudulent report periods.

The appeal before us is confined only to the issue of whether overpayment is due; the fraud determination is not properly before us. On September 8, 1994, appellant was mailed a determination that she had been disqualified based upon a finding of fraud. On September 22, 1994, a notice of fraud overpayment determination was mailed. Each notice letter included the standard appeal time limit of twenty days. Appellant's notice of appeal was filed on October 10, 1994. Therefore, notice of appeal was timely filed as to the overpayment determination, but not as to the fraud determination. The Board of Review stated in its opinion: "The controlling issue of fact in this overpayment matter is whether the claimant received the benefits at issue." Appellant admits she received all her benefit checks. The Board affirmed the lower tribunal in finding that appellant did receive the unemployment benefits during the period she had fraudulently reported income.

Appellant believes that the applicable statute should be construed to only require repayment of the actual amount of overpayment after calculating unreported income. Appellee maintains that the Board of Review was correct and that the statutes in Title 11, Chapter 10, read together, require that a finding of fraud disqualifies appellant from receiving *any* benefits during that period. Appellee refers us to Ark. Code Ann. § 11-10-519(2)(A) (Repl. 1996), which provides that a claimant shall be disqualified from benefits for any week as to which the claimant has willfully made false representations. Also pertinent to this case, and cited by both parties, is Ark. Code Ann. § 11-10-532(a)(1) (Repl. 1996), the statute on recovery of benefits, which states:

> If the Director of the Arkansas Employment Security Department finds that any person has made a false statement or misrepresentation of a material fact knowing it to be false or has knowingly failed to disclose a material fact and as a result of either action has received ANY AMOUNT as benefits under this chapter to which he was not entitled, then the person shall be liable to repay THE AMOUNT to the fund, or in lieu of requiring repayment, the director may recover THE AMOUNT by deductions from any future benefits payable to the person under this chapter. (Emphasis added).

Reading these two statutes together, the Board of Review determined that since it was undisputed that appellant had received benefits, she was bound to return those benefits in their entirety. Her disqualification based upon fraud compelled this determination. It is beyond the scope of this appeal for appellant to argue whether her misrepresentations were intentional or not.

We agree that the sum due was the total benefits she received while disqualified. Appellant cites no legal authority other than the text of Ark. Code Ann. § 11-10-532 (Repl. 1996) to persuade us otherwise. The interpretation advanced by appellant would provide no deterrent to fraudulent reports. Furthermore, such an interpretation would create a disharmony within a chapter of our statutes dealing with employment security law. This result would be undesirable and inappropriate.

Affirmed.

STROUD and CRABTREE, JJ., agree.

Marty Ryan LEACH *v.* Amy Varner LEACH

CA 96-930 942 S.W.2d 286

Court of Appeals of Arkansas
Division I
Opinion delivered April 30, 1997

Jack W. Barker, for appellant.

Jeffery C. Rogers, for appellee.

JOHN B. ROBBINS, Chief Judge. In the divorce proceeding between appellant and appellee, the chancellor held that no legal relationship existed between appellant, Marty Ryan Leach, and the daughter of appellee, Amy Varner Leach. The effect of his ruling illegitimized the firstborn child of the marriage. The chancellor ruled that because of this finding, appellant could not be considered for custody of the child and granted custody to the natural mother, appellee. This appeal resulted.

The record reflects that the parties were married on November 15, 1990, well into appellee's pregnancy with the child at issue. Neither appellant nor appellee assert that appellant is the natural father; they knew she was pregnant by another man, but they married, and the child was born of the marriage in January 1991. Appellant had his name placed on her birth certificate, and he continually represented himself as her father. The parties agreed not to raise the issue of paternity with regard to this child. However, appellant never legally adopted this child. Appellee

gave birth to another child, a son, in September 1993, who was appellant's biological child. In September 1995, divorce proceedings were filed, and in a subsequent temporary relief hearing the appellant was granted temporary custody of both children and possession of the marital home. Appellee was granted visitation privileges at that time.

A final hearing was held on December 11, 1995, wherein testimony was taken from both parties. Both parties sought custody of the children. Appellant testified that he claimed the girl as his own. At the time of the hearing, she was four years old. Appellant stated that he had never alleged that anyone else was the father of this child. He knew of no paternity tests ever being conducted. Appellant's name was put on the birth certificate, and the child bears appellant's surname. Appellee testified that she and appellant had reached an agreement that appellant would be the father of the child and that they would never mention in the future that she was not his biological child.

At the conclusion of taking testimony, the chancellor brought up the issue of jurisdiction over custody of the elder child. Counsel for the parties responded that they had not intended to make paternity an issue in this case, but the chancellor said:

> My problem, my question is, whether or not this Court has the jurisdiction, [it] would be the subject matter jurisdiction, which I must raise, whether it's raised or not by the pleadings, to grant custody to Mr. Leach when the record is clear, it's undisputed, that he is not the father of this child.

After taking under advisement all issues except the granting of divorce, the chancellor issued a letter opinion which merged into the divorce decree. In it he determined that no legal relationship existed between the firstborn child and appellant, based upon the fact that "both parties agree he is not the natural father," and that although he had treated her as his own since birth, he had not adopted her and established a legal relationship. He stressed that both parties were fit parents; however, the best interests of the children dictated that they should not be separated, necessitating a conclusion that appellee be awarded custody. Appellant father was

granted visitation of both children and ordered to pay support only for his biological child.

The chancellor reasoned that Arkansas statutory law requires that custody of an illegitimate child of an *unmarried* woman must be in such woman unless a court of competent jurisdiction places custody in another. Ark. Code Ann. § 9-10-113 (Repl. 1993). Upon this statute, the chancellor felt compelled to give appellee custody of the children. However, as the emphasized terms of the statute make clear, this mandatory grant of custody is not required as to a *married* woman. We need not reach the issue of correct or incorrect application of that statute.

It is apparent to this court that the chancellor erroneously determined that the elder child was illegitimate, although neither party raised the issue. At issue is a child born within the bonds of marriage, and this state has always held sacred the legitimacy of children:

> Marriage is still considered an honorable institution; children born during marriage should be deemed legitimate, and legal efforts to declare such children illegitimate are not and should not be made easy. Belief in that principle is so great that we have created a legal presumption to protect it. This presumption, that a child born during marriage is the legitimate child of the parties to that marriage, is one of the strongest presumptions recognized by the law.

Thomas v. Pacheco, 293 Ark. 564, 567-568, 740 S.W.2d 123, 125 (1987).

Act 657 of 1989, codified at Ark. Code Ann. § 16-43-901 (Repl. 1993), abolished Lord Mansfield's Rule. The commonlaw rule, articulated in 1777, states the declarations of husband and wife cannot be admitted to bastardize a child born after marriage. The statute now permits a mother, her husband, and a putative father to testify about the paternity of a child. However, the strong presumption of the legitimacy of a child born of marriage continues to be one of the most powerful presumptions in Arkansas law. Only upon clear and convincing evidence may the court find this presumption overcome. This statute also provides:

> The court shall consider foremost the interest of the child in making any determination hereunder and consider only testimony and evidence which will serve the best interest of the child in its findings pursuant to this section.

Id. at subsection (g)(2). Illegitimizing the elder child was not in her best interest, nor was it a goal of either of her parents.

We recognize that appellate review is performed *de novo*, and we reverse only if the decision is clearly contrary to the preponderance of the evidence. *Johns v. Johns*, 53 Ark. App. 90, 918 S.W.2d 728 (1996). Furthermore, special deference is shown to rulings regarding child custody because of the special care required and the unique opportunity to evaluate evidence and judge credibility of witnesses. *Id.* Upon the facts of this case we must reverse and remand so that the chancellor may reevaluate the evidence and witnesses with regard to the custody, visitation, and support issues. Custody and visitation should be determined solely on consideration of the best interest of the children.

Reversed and remanded.

STROUD and CRABTREE, JJ., agree.

Leah HIGHTOWER *v.* NEWARK PUBLIC SCHOOL SYSTEM

CA 96-596 943 S.W.2d 608

Court of Appeals of Arkansas
Division IV
Opinion delivered April 30, 1997

J.T. Skinner, for appellant.

Richard S. Smith, Public Employees Claims Div., Arkansas Workers' Compensation Comm'n, for appellee.

SAM BIRD, Judge. Appellant, Leah Hightower, appeals a decision of the Workers' Compensation Commission that held that, under the provisions of Act 796 of 1993, codified as Ark. Code Ann. § 11-9-102 (Repl. 1996), appellant was not entitled to compensation for an injury sustained when she fell on ice in her employer's parking lot. Appellant argues that the Commission erred in finding that appellant was not engaged in any activity to carry out the employer's purpose or to advance the employer's interest when the accident occurred; therefore, she was not entitled to an award of benefits.

On appeal, we must affirm if the Commission's finding is supported by substantial evidence; even when a preponderance of the evidence might indicate a contrary result, we affirm if reasonable minds could reach the Commission's conclusion. *Bemberg Iron Works v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

In 1993, the Arkansas Legislature passed Act 796 of 1993 and provided that it applied to all injuries occurring after July 1, 1993. The Act requires that, rather than applying the terms of the Act liberally and resolving all doubts in favor of the claimant (as previous law had required), the evidence is to be weighed impartially, without giving the benefit of the doubt to

any party, including the claimant, and it requires the courts to construe the provisions of the Act strictly. The Act also added a new definition to our workers' compensation statute: "Compensable injury" does not include injury that was inflicted upon the employee at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(5)(B)(iii) (Repl. 1996).

Appellant was employed as a teacher at a preschool day-care center in Oil Trough, Arkansas. On March 9, 1994, the school and day-care center were closed because of ice and snow. The day-care center was to be open the following day, and appellant was ordered to report to work at her usual time, 7:30 a.m., on March 10. Appellant testified that when she arrived at the employer's parking lot, which was gravel, it was a sheet of ice. She said she proceeded cautiously; nevertheless, her feet slipped out from under her. She was able to catch herself on a nearby car to keep from falling to the ground, but she was jerked. Appellant continued into the building, bent over to sign in, and when she raised up she felt severe back pain.

Appellant was sent home for bed rest, but when she did not immediately improve she was advised by her employer to seek medical care. Appellant went to the emergency room, where she was prescribed medication and told to take five days of bed rest. When she was not better after the bed rest she went to her family doctor. He ordered thirteen physical-therapy sessions. Appellant missed only two weeks of work.

The administrative law judge found that, pursuant to Act 796 of 1993, appellant was not entitled to compensation for this injury because, at the time of her injury, she was not performing "employment services." The Commission affirmed and reasoned that, although the Act does not define "employment services," the Commission had previously held that an employee was performing "employment services" when he/she was engaging in an activity that carried out the employer's purpose or advanced the employer's interests. The Commission only cited one of its own cases, then held that "[S]trictly construing the provisions of the amended law as mandated by Ark. Code Ann. § 11-9-704(c)(3) (Cumm. Supp. [sic] 1993), we find that the employment services

exception to the definition of compensable injury under the amended law has eliminated the premises exception to the going and coming rule."

The going-and-coming rule ordinarily denied compensation to an employee while he was traveling between his home and his job, reasoning that employees having fixed hours and places of work are generally not considered to be in the course of their employment while traveling to and from work. *Wright v. Ben M. Hogan Co.*, 250 Ark. 960, 468 S.W.2d 233 (1971); *Howard v. A.P. & L. Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987).

The premises exception to the going-and-coming rule provided that, although an employee at the time of injury had not reached the place where his job duties were discharged, his injury was sustained within the course of his employment if the employee was injured while on the employer's premises or on nearby property either under the employer's control or so situated as to be regarded as actually or constructively a part of the employer's premises. *Wentworth v. Sparks Regional Med. Ctr.*, 49 Ark. App. 10, 894 S.W.2d 956 (1995); *City of Sherwood v. Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). Under prior statutes (pre-Act 796 of 1993) appellant's injury would have been compensable under the premises exception to the going-and-coming rule that allowed compensation where an employee was injured while on or in close proximity to the employer's premises, and there was a causal connection between the claimant's injury and the employment, or the condition of the place, means, or appliance furnished or controlled by the employer. *Wentworth, supra.*

In the instant case, appellant contends that the premises exception should be applied because she had reported to work pursuant to the directions of her employer, she slipped on ice in her employer's parking lot, and moments later, when she bent over to sign in, as required by her employer, she felt severe pain in her back. She argues that her injury was caused by the condition of her employer's premises.

In support of her argument appellant cites *Davis v. Chemical Constr. Co.*, 232 Ark. 50, 334 S.W.2d 697 (1960); *Bales v. Service Club No. 1, Camp Chaffee*, 208 Ark. 692, 187 S.W.2d

321 (1945); *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995); *Wentworth v. Sparks Regional Medical Ctr., supra* (1995); *Woodard v. White Spot Cafe*, 30 Ark. App. 221, 785 S.W.2d 54 (1990); and *City of Sherwood v. Lowe; supra* (1982). Only *Wentworth* and *Lepard* were decided after Act 796 was enacted. However, both Lepard and Wentworth's injuries were sustained in 1992. As stated above, § 41 of Act 796 of 1993 states that "the provisions of this act shall apply only to injuries which occur after July 1, 1993."

The language of Ark. Code Ann. § 11-9-102(5)(B)(iii) excludes from being compensable injuries that occur "at a time when employment services were not being performed." This provision seems clearly aimed at eliminating the premises exception to the going-and-coming rule since, under a strict construction of Ark. Code Ann. § 11-9-102(5)(B)(iii), merely walking to and from one's car, even on the employer's premises, does not qualify as performing "employment services." Therefore, the Commission's decision that appellant was not entitled to compensation for her injury is supported by substantial evidence and is affirmed.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Luke SKRABLE *v.* ST. VINCENT INFIRMARY

CA 96-743 943 S.W.2d 236

Court of Appeals of Arkansas
Division II
Opinion delivered April 30, 1997

Floyd A. Healy, for appellant.

Jack. Lyon & Jones, P.A., by: *Stephen W. Jones* and *Gary D. Jiles*, for appellee.

JUDITH ROGERS, Judge. The appellant, Luke Skrable, appeals from the trial court's decision granting appellee, St. Vincent Infirmary's, motion for summary judgment on appellant's claim for wrongful discharge. On appeal, appellant contends that the trial court's decision was based on an incorrect analysis and misapplication of the public policy exception to the at-will-employment doctrine. We disagree and affirm.

Appellant was hired by appellee in 1993. In May of 1994, he was made an account executive in appellee's Life Line Program, which is a system designed to help elderly persons and others in obtaining assistance in the event of an emergency. Appellant's duties included selling Life Line Program units throughout the state and insuring that the units were in good working condition. Appellee terminated appellant's employment effective May 10, 1995.

Appellant subsequently brought this suit against appellee for wrongful discharge. By his complaint, appellant did not dispute that his contract of employment was terminable at will, but he contended that he was wrongfully discharged for a reason that was contrary to public policy. He alleged that he was fired after he had threatened to inform the Arkansas Department of Human Services [hereinafter "DHS"] of problems with the Life Line Program and of appellee's failure to take corrective action. Appellee denied that there were any problems with the Life Line Program and denied that appellant's threat of exposure played any role in its decision to terminate appellant. Appellee later moved for summary judgment contending that, even if this had been a reason for appellant's termination, the firing of appellant did not offend public policy. Appellee maintained that its relationship with DHS was contractual and that appellant had failed to identify any specific constitutional or statutory provision that it had allegedly violated in its operation of the Life Line Program. The trial court granted appellee's motion for summary judgment, ruling that appellant had not shown that appellee's business practices violated any law or other defined public policy of this state. On appeal,

appellant contends that the trial court erred in its interpretation and application of the public policy exception.

Summary judgment should be granted only when a review of the pleadings, depositions and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Johnson v. Harrywell*, 47 Ark. App. 61, 885 S.W.2d 25 (1994). We review all proof in the light most favorable to the party opposing the motion, resolving all doubts and inferences against the moving party. *Equity Fire & Casualty Co. v. Needham*, 323 Ark. 22, 912 S.W.2d 926 (1996). Where the operative facts are undisputed, this court simply determines on appeal whether the appellee was entitled to summary judgment as a matter of law. *American States Ins. Co. v. Southern Guar. Ins. Co.*, 53 Ark. App. 84, 919 S.W.2d 221 (1996). While it would be for a jury to determine the reason for the plaintiff's termination, the question of whether the reason asserted by the plaintiff was in violation of a well-established public policy of the state is ordinarily a question of law for the court. *Koenighan v. Schilling Motors, Inc.*, 35 Ark. 94, 811 S.W.2d 342 (1991). For the purposes of this opinion, we will assume that appellant was fired for the reason asserted by him in his complaint.

It is the general rule that when the term of employment in a contract is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship at will and without cause. *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 155 (1994). Generally, employment is held only by mutual consent, and at common law the right of the employer to terminate the employment is unconditional and absolute. *Marine Services Unlimted, Inc. v. Rakes*, 323 Ark. 757, 918 S.W.2d 132 (1996).

In *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), the supreme court recognized the public policy exception to the at-will-employment doctrine. The court said:

> Following our lead in *Counce, supra*, we acknowledge that an employer should not have an absolute and unfettered right to terminate an employee for an act done for the good of the public.

> Therefore, we hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. This is a limited exception to the employment-at-will doctrine. It is not meant to protect merely proprietary interests. *Wagner, supra.*

Id. at 249, 743 S.W.2d at 385. In *Sterling*, the employee alleged that he was fired because the employer believed that he had reported its use of false information in contract negotiations with a federal agency. It was said that providing false and inaccurate data to the agency was a violation of federal law for which the employer had paid $1,075,000 in a settlement with the government. In finding that appellee had a claim for wrongful discharge, the court noted that a state's public policy is found in its constitution and statutes, and it referred to Ark. Code Ann. § 5-53-112 (Repl. 1993), which provides:

> (1) A person commits the offense of retaliation against a witness, informant, or juror if he harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of witness, informant, or juror.
>
> (2) Retaliation against witnesses, informants, or jurors is a class A misdemeanor.

The court concluded that this statute illustrated that there was an established public policy favoring citizen informants and crime fighters and that the public policy of this state is contravened if an employer discharges an employee for reporting a violation of state or federal law.

The appellant here contends, citing the statute referred to in *Sterling, supra*, that public policy favors whistle blowers, and argues that, like the employee in *Sterling*, his claim comes within the ambit of the public policy exception because he was fired in retaliation for threatening to report problems with the Life Line Program to DHS. We agree, however, with the trial court that the termination of an employee who divulges or threatens to expose mere deficiencies in an employer's performance of its contractual obligations does not offend public policy. As was said by the court in *Sterling*, the public policy exception is limited and narrow in scope. We thus cannot conclude that it embraces the

claim of an employee who is fired for threatening to undermine an employer's private, contractual relationships. To be sure, appellee provides what can be considered a vital service to the customers who subscribe to its program. However, appellant did not, and has not, represented that appellee was violating any law in its operation of the program. As found by the trial court, this distinguishes this case from that of *Sterling*. We hold that the trial court did not err in ruling that appellant did not have a claim for wrongful discharge and that appellee was entitled to judgment as a matter of law.

Affirmed.

COOPER and MEADS, JJ., agree.

AMERICAN UNDERWRITERS INSURANCE COMPANY
v. Gail L. TURNER

CA 96-351 944 S.W.2d 129

Court of Appeals of Arkansas
Division II
Opinion delivered April 30, 1997

Brazil, Adlong, Murphy & Osment, by: *Amy Brazil* and *William Clay Brazil*, for appellant.

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

WENDELL L. GRIFFEN, Judge. In this appeal, American Underwriters Insurance Company challenges the trial court's decision that it was not entitled to subrogation according to its insurance contract with Gail Turner for the costs of medical expenses paid under Turner's first-party coverage, despite the fact that Turner settled a tort claim against a third party for $25,000. Appellant also challenges the trial court's decision awarding $13,941.73 for statutory penalty, interest, court costs, and attorney's fees after it was held to have paid underinsured motorist benefits in an untimely manner. We hold that appellant was not entitled to subrogation. Therefore, we affirm the trial court's subrogation decision. However, we reverse the award of a statutory penalty, interest, costs, and attorney's fee.

Appellee, Gail Turner, was injured in a motor vehicle accident caused by a third party. Appellee had automobile insurance with appellant, American Underwriters Insurance Company. Her policy included a medical benefits provision, a subrogation agreement, and underinsured motorists coverage. As a result of the accident, appellee sustained losses of approximately $56,000.00.

Appellant, pursuant to the medical benefits provision, paid $6,523.45 for appellee's medical bills. Appellee settled with the third-party tortfeasor for $25,000, which was the full liability policy limit. Of this amount, $18,221.55 was paid directly to appellee, and $6,778.45 was placed in an interest bearing account pending the resolution of appellant's subrogation claim. Appellant claimed that it was entitled to subrogation for the medical benefits paid to appellee.

Appellee demanded $25,000 from appellant under the underinsured motorist coverage. Initially appellant claimed that appellee did not have that coverage, but it eventually refused to pay until it received proof of the nature and extent of her injuries, proof of payment by the third-party tortfeasor, and proof of appellee's inability to collect from the third-party tortfeasor damages over and above her liability coverage. Two days before trial, after receiving the requested information, appellant paid appellee $25,000 under her underinsured motorist coverage.

After trial on the subrogation issue, the court found that appellant was not entitled to subrogation, and that it had breached its duty to timely pay benefits. As a result of appellant's failure to timely pay benefits, the trial court awarded appellee $13,941.73 in penalty, interest, attorney fees, and costs.

Appellant first contends that the trial court erred by not allowing subrogation for the money paid under the medical benefits provision. Pursuant to the medical benefits provision, appellant paid $6,523.45 for appellee's medical bills. Appellee settled with the third-party tortfeasor for $25,000, of which $18,221.55 was paid directly to appellee and $6,778.45 was placed in an interest bearing account pending the resolution of appellant's subrogation claim. Appellee sustained losses of approximately $56,000.

While the general rule is that an insurer is not entitled to subrogation unless the insured has been made whole for her loss, the insurer should not be precluded from employing its right of subrogation when the insured has been fully compensated and is in a position where the insured will recover twice for some of her damages. *Shelter Mut. Ins. Co. v. Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992). In accordance with the general rule, the insurer is not entitled to subrogation, even if there is an express subrogation agreement, when the insured has not been fully compensated and is not in a position to recover twice for her damages. This is the law as set out in *Franklin v. Healthsource of Arkansas*, 328 Ark. 163, 942 S.W.2d 837 (1997).

In *Higginbotham v. Arkansas Blue Cross and Blue Shield*, 312 Ark. 199, 849 S.W.2d 464 (1993), the Arkansas Supreme Court held that where the insurance policy clearly and unambiguously provides the insurer with the right of subrogation to any benefits or services of any kind furnished to the insured for a physical injury caused by a third party to the full extent of the value of those benefits, the insurer is entitled to subrogation even before the insured is made whole. *Id.* *Healthsource* overrules *Higginbotham* to the extent that an insurer is allowed subrogation pursuant to an express subrogation agreement before the insured is made whole. Accordingly, even though the insurance policy in the instant case contains an express subrogation agreement, the appellant is not entitled to subrogation: the appellee did not have a double recovery because she did not recover an amount above her loss.

Next, appellant contends that the trial court erred by awarding $8,333.33 in attorney fees, a $3,000 penalty, $80.75 in court costs, and $2,527.65 in interest to appellee pursuant to Ark. Code Ann. § 23-79-208 (Repl. 1992), which states:

> In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life, health, accident, medical, hospital, or surgical benefit insurance company and fraternal benefits society or farmers' mutual aid association liable therefor shall fail to pay the losses within the time specified in the policy, after demand made therefor, the person, firm, corporation, or association shall be liable to pay the holder of the policy or his assigns, 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.

The trial court assessed these costs after finding that appellant breached its duty to timely pay benefits. Unless this finding was clearly erroneous, we cannot reverse that decision. *See, USAble Life v. Fow*, 307 Ark. 379, 820 S.W.2d 453 (1991).

Appellant argues that the imposed charges were not justified because it never denied the claim and promptly paid the claim once the appellee gave it adequate information regarding damages suffered by the appellee. Appellant concedes that initially its claim adjuster indicated to appellee and her attorney that there was no underinsured coverage. However, upon discovering that appellee was, in fact, entitled to underinsured coverage by operation of law, appellant requested certain information from appellee concerning her damages. The requested information included medical expenses, lost income, medical reports, doctors and hospital notes, and verification of settlement with the third party. Appellee did not respond to appellant's request until seven days before trial. Appellant then paid appellee pursuant to the underinsured motorist coverage provision approximately three days before trial.

Pursuant to the insurance policy, appellant had the authority to require appellee to verify her claim for damages in order to receive benefits. Appellant did not deny appellee's claim for underinsured benefits, but rather, requested verification by the appellee of her claim. Once this information was provided, appellant promptly paid benefits to appellee. Accordingly, the trial court's decision to award an attorney's fee and court costs and impose a penalty and interest was clearly erroneous.
Therefore, we reverse that award.

Affirmed in part; reversed in part.

ROBBINS, C.J., and ROAF, J., agree.

Mary JORDAN *v.* J.C. PENNEY COMPANY

CA 96-1034 944 S.W.2d 547

Court of Appeals of Arkansas
Division I
Opinion delivered April 30, 1997

[redacted]

Denver L. Thornton, for appellant.

Robert H. Montgomery, for appellee

TERRY CRABTREE, Judge. Appellant Mary Jordan appeals from the decision of the Workers' Compensation Commission, which adopted the decision of the Administrative Law Judge, denying her claim for benefits. We reverse.

Appellant is a sixty-one-year-old high-school graduate who worked as a sales clerk for J.C. Penney for seventeen years. She seeks benefits for an injury that occurred on September 14, 1993, based on her testimony that as she reached into a jewelry case while helping a customer, she felt an immediate severe pain in her back. She became faint and ill and was carried to her home where she stayed for a week on pain medication until she could see Dr. Wilbur Giles in Little Rock. Dr. Giles performed an MRI and then a surgical procedure called a lumbar laminectomy, removing a large ruptured disc from the lumbar region.

Appellee contends that appellant did not sustain an accidental injury in the course of her employment and that she is therefore not entitled to benefits.

The Administrative Law Judge heard testimony from appellant and from her supervisor, Mr. Clayton Alexander. Additionally, appellant's medical records were introduced. Despite her testimony to the contrary, the Administrative Law Judge found that appellant did not suffer a specific-incident type injury in the course of her employment, *see* Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996), and denied appellant all benefits. The Commission adopted the ALJ's decision.

The only question for this court to review is whether the decision of the Commission denying benefits to appellant is supported by substantial evidence. Based on the abstracted testimony

and medical evidence, we find it is not and reverse and remand to the Commission for an award of benefits consistent with this opinion.

This court reviews decisions of the Workers' Compensation Commission to see if they are supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether this court might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. If reasonable minds could reach the result shown by the Commission's decision, we must affirm the decision. *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

To make this court's review process a meaningful one, the Commission has the duty to translate the evidence on all issues before it into findings of fact. *Sanyo Manufacturing Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). Despite this stringent standard of review, we have recognized:

> Those standards 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 where convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission.

Wade v. Mr. C. Cavenaugh's, 25 Ark. App. 237, 242, 756 S.W.2d 923, 925 (1988) (citing *Boyd v. General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987)).

With the above standard of review in mind, this court assesses the evidence to see if reasonable persons could reach the same conclusion. Here, the evidence is limited to the testimony of two individuals and the appellant's medical records.

Only two witnesses testified before the ALJ — the claimant/appellant and her supervisor, Mr. Clayton Alexander.

The appellant related in great detail the onset of her injury. She recounted a specific time, place, and incident — 2:30 p.m. on September 14, 1993, at the J.C. Penney store where she had been employed for seventeen years, while bending to remove a piece of jewelry from a case to show a customer. The only other witness, Mr. Alexander, corroborated appellant's story: "[s]he looked very pale and weak . . . she was weak, like I said." Further, Mr. Alexander admitted that he did not see the incident and, therefore, could not possibly testify that it did not occur the way appellant said it did. Mr. Alexander testified:

> Q. Was there any doubt in your mind that she was in bad condition when she left the store, health wise?
>
> A. Yes, I was quite concerned because, like I say, she was pale and weak looking.
>
> Q. Had she been waiting on a customer, do you know?
>
> A. I couldn't say because I was in the office and received the call.

Appellee did attack appellant's credibility indirectly on cross-examination with questions about appellant's prior back injury from an auto accident and with questions on appellant's proximity to retirement. Also, the cross-examination pointed out the differing accounts of the injury in the medical records.

Based on this limited testimony, the ALJ made the following finding: "Although the claimant testified as to an identifiable time and place there was no specific incident which was related to her employment." The ALJ translated this perceived deficiency in the evidence into the finding that, "The claimant has failed to prove by a preponderance of the evidence that her back condition arose from her employment with the respondent." These conclusions are not supported by the testimonial evidence in the record. In fact, they cannot even be inferred from the evidence in the record. While we recognize that the testimony of a party is never considered uncontroverted, *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 307, 879 S.W.2d 457, 460 (1994), the Commission is not entitled to arbitrarily disregard the testimony of any witness. *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 252, 832 S.W.2d 505, 507 (1992) (citing *Wade*, *supra*).

The only other evidence of record is the medical reports submitted to the Commission. These records are never mentioned in the ALJ's decision, or in the Commission's adoption of the ALJ's decision. Further, these records specifically corroborate appellant's contention and directly contradict the conclusion of the Commission. In a letter report from Dr. Giles to Dr. Bryant dated September 21, 1993, appellant's treating physician stated:

> She had previously undergone a lumbar laminectomy in Spring, 1993. She had gone back to work and had been asymptomatic with no difficulties until the onset of the present symptoms. This appears to be a new injury and not related to her previous problems.
>
> Her MRI scan shows a large disc at 4-5 on the right with marked root compression.
>
> On physical examination she has limitation in flexion, extension and rotation with paralumbar spasm. She has a positive straight leg raising at 60 degrees on the right with accentuation of dorsiflexion and some mild toe weakness.
>
> I am admitting her to the Baptist Hospital for a lumbar laminectomy.

There is no conflicting medical evidence in the record.

Based on the only evidence in the record — both testimonial and medical documentation — it is impossible for us to imagine how fair-minded persons with the same cold record before them could agree that appellant did not suffer a compensable specific-incident injury in the course of her employment. Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996). While the Commission is the finder of fact, and judging the credibility of witnesses is exclusively within the Commission's province, *see Kuhn v. Majestic Hotel*, 324 Ark. 21, 24, 918 S.W.2d 158, 160 (1996), the court cannot presume for the Commission adequate findings of fact to support the Commission's decision when no basis in the record supports such action. Instead, the ALJ chose to base his decision on the lack of a specific incident. This is not based on the facts in the record, and it is contradictory to his own finding of a specific time and place for the injury. For our review process to be mean-

ingful, such a decision not based on substantial evidence must be reversed. See *Wade*, *supra*, and *Boyd*, *supra*.

Based on the medical evidence of appellant's injury, the appellant's account of the injury, and the Commission's inconsistent findings of fact, we find that fair-minded persons could not come to the conclusion of the Commission in denying benefits for appellant's injury. Therefore, the decision is reversed and remanded for an award of benefits consistent with this opinion.

Reversed and remanded.

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

ESTATE OF James SABBS *v.* Bernice COLE

CA 96-461 944 S.W.2d 123

Court of Appeals of Arkansas
Division III and IV
Opinion delivered April 30, 1997

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

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

MARGARET MEADS, Judge. This is an appeal from an order of the Pulaski County Chancery Court, that dismissed appellants' amended complaint to quiet title. Appellants, Paris Sabbs and Betty Frazier, are the co-administrators of the estate of James Sabbs. Appellee Bernice Cole is the decedent's oldest daughter.

In an amended complaint, appellants alleged that at the time of his death, the decedent James Sabbs possessed certain property on Valentine Road, North Little Rock, and other property located in Lonoke County, and that appellee's claim of ownership of these properties is invalid.

At trial, appellant Paris Sabbs contended the Valentine Road property was an asset of the estate. He testified that the reason his father put the deed in appellee's name was to protect the property from an impending third marriage; that if the marriage did not work out the deed would be put back in his name; and if he died appellee would share the property with her siblings. He said he first discovered a problem with removing appellee's name from the deed around 1987, and he was present in 1992 when his father requested the property be changed back to his name, but appellee refused.

He testified further that his father kept up the premises, paid for repairs, paid the property taxes and insurance, and always acted like the owner. He also testified that he did not consider his father to need assistance in taking care of his business affairs, and he was

happy his father was able to look after his own affairs. He said his father told him he did not sue appellee when she refused to remove her name from the deed, because he believed she would eventually do the right thing and deed the property back to him or share the property with her siblings upon his death.

Appellant Betty Sabbs Frazier testified that she saw the deed in 1992 with appellee's name on it and asked her father why he had done this. He said he thought appellee would deed it back to him, and he trusted her. She said she asked him if he wanted her to get legal help and he said, "No."

Irma Aaron, who had a courtship with James Sabbs, testified that he told her that he put the property in appellee's name so nobody would take his property, but they weren't getting along, and he had asked for the property back.

The decedent's nephew testified that he lived with the decedent for six months in 1989, paid rent to him, and was not aware of any dispute between him and appellee. He said the decedent never mentioned any problem in regard to the property, but he had damaged the property to make it hard on the children. He also testified that his uncle took care of his affairs "real good," and he never saw anyone exert any influence on him or cause him to do something he did not want to do.

Elouise Garrett, who married James Sabbs in January 1973 and subsequently divorced him, testified that he told her appellee owned the Valentine Road property and that he had given her a deed. She said that during the time she was married to him, appellee visited her father practically every weekend, and he never indicated he did not want appellee to have the property. She further testified she was not aware of any dispute between appellee and her father concerning the property, and he told her he had deeded the house to appellee and "it was hers."

Appellee testified that her father deeded her the property on Valentine Road. She said he called her at work, told her he had something he wanted to give her, and he would come by and pick her up. When he arrived, he said he was giving her his property on Valentine Road because she would not share in any of his other

property. They went to a law office where the deed was already prepared, and he signed it. Later the deed was mailed to appellee by certified mail, and she recorded it. Appellee testified that she held the recorded deed for awhile and later gave it to her father because he was executor of her will and the documents would be together. Her father returned the deed to her in 1985, and she returned it to him in 1990 when she married Aldolphus Cole. The deed and appellee's will were in the decedent's safe deposit box when he died.

Appellee testified her father did not request that she deed the property back to him; did not discuss it with her in the presence of her brothers and sisters; and that her father was present when appellee Paris Sabbs asked her to return the deed. She said her father did not agree with Paris's request and denied that her father asked her to remove her name from the deed.

Appellee testified further that the agreement with her father was that he could continue to live there, maintain the property, and collect the rent as long as he lived, and she considered him to have a life estate. She testified further that she has maintained insurance on the property, paid the real estate taxes, and collected the rents. Appellee admitted not claiming the property as an asset when she tried to obtain a bank loan and not listing it as an asset when she was divorced.

Documentary evidence included appellee's 1989-1992 Federal Income Tax Schedule A, which showed no rental income or depreciation deduction on the property; real estate tax receipts for 1989-1992 reflecting that appellee paid the property tax; application for property insurance listing the deceased and appellee as the insureds on the Valentine Road property; a declarations page from the policy addressed to appellee; the decedent's 1988 income-tax return showing he declared the rents as income; and lists of expenses of the decedent allegedly for repairs to the property.

In an order entered January 8, 1996, the chancellor found that the witnesses gave conflicting testimony regarding the decedent's statements; that she did not place much weight on alleged statements made by the deceased to the witnesses; that Irma Aaron and Elouise Garrett were credible witnesses; that the most telling

testimony was that of the decedent's nephew; and that neither Paris Sabbs nor appellee were credible witnesses. The chancellor considered it significant that the decedent took no action, after a discussion regarding the property, to set aside the conveyance. Most important no attempt was made to reclaim the property, and there was nothing in writing to show that the decedent intended a disposition which conflicted with the deed. The chancellor held further that although appellee was not particularly credible, it appeared that she and her father had an agreement that he would live on the property during his lifetime, as she had testified, because that is, in fact, what happened.

The chancellor held that appellants failed to prove the decedent intended a different disposition of his property than the recorded deed and dismissed the complaint.

On appeal, appellants argue the trial court erred in dismissing the complaint. Specifically, appellants contend that the decedent neither intended nor completed delivery of the deed to the Valentine Road property, and that title was not transferred because he retained possession and control of the property, retained the rental income, and paid taxes on the property. Appellants also argue that the decedent did not make a gift of the Lonoke property to appellee.

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). Although we hear chancery cases de novo, the test on review is not whether there is clear and convincing evidence to support the trial judge's findings, but whether we can say the judge was clearly wrong; whether the findings of the trial judge are clearly erroneous. *Akin v. First National Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988). In addition, where the pivotal issue is credibility of interested parties whose testimony is in direct conflict, we defer to the chancellor's judgment. *Rector-Phillips-Morse,*

Inc. v. Huntsman Farms, Inc., 267 Ark. 767, 590 S.W.2d 317 (Ark. App. 1979). Finally, when a deed reserves a life estate in the grantor, there is no requirement that the instrument pass beyond the grantor's control and dominion, and the fact that the deed is found among the effects of the grantor at his death raises no presumption against delivery, and the grantor's retention of possession and control over the property conveyed is not inconsistent with delivery. *Grimmett v. Estate of Beasley*, 29 Ark. App. 88, 777 S.W.2d 588 (1989).

Here, the chancellor heard conflicting testimony of several witnesses. The chancellor found Elouise Garrett and Irma Aaron to be credible witnesses. Ms. Garrett testified that she was not aware of any dispute between appellee and her father, and Ms. Aaron testified that the decedent voluntarily executed the deed giving the property to appellee, and although he said he wanted it back, she never saw appellee "over there for him to ask her." The chancellor also relied on the testimony of appellant's nephew that the decedent did not mention any problems with the property or appellee.

Moreover, there is no evidence that the decedent was of unsound mind. Indeed, Paris Sabbs testified that the decedent was able to take care of his own business affairs. Further, there was evidence that the deed was prepared by an attorney, signed by the decedent, and mailed to appellee by certified mail. Although the deed was found in the decedent's safe-deposit box and did not specifically reserve a life estate in the decedent, the chancellor found there was an agreement that the decedent would live on the property during his lifetime. We think this is analagous to a life estate, and as we have already stated, in the case of a life estate there is no requirement that a deed pass beyond the grantor's control, and the grantor's retention of possession and control over the property is not inconsistent with delivery. Moreover, Ms. Garrett testified the decedent told her appellee owned the property and that he gave her a deed, and Ms. Aaron said he voluntarily executed the deed.

Finally, there is evidence that appellee paid the 1989-1992 property taxes and was listed as a co-insured on the property, and

given appellee's testimony that her father gave her the property, we do not think it can be seriously contended that appellee refused the gift of the property.

Recognizing that the testimony was in dispute, but giving deference to the chancellor's opportunity to judge the credibility of the interested parties, we cannot say the chancellor erred in dismissing appellants' complaint as to the Valentine Road property.

One other matter remains for our discussion. Appellants also alleged that the decedent owned certain lands in Lonoke County; on appeal they argue that the decedent did not make a gift of this property to appellee and that it should be included in the estate for distribution to his heirs. Suffice it to say, if the effect of a decree is to reach and operate upon the land itself, then it is a proceeding *in rem* and a local action and must be brought in the county where the land is situated. *Dowdle v. Byrd*, 201 Ark. 775, 147 S.W.2d 343 (1941).

Affirmed.

STROUD, ROGERS, and BIRD, JJ., agree.

PITTMAN, J., dissents.

COOPER, J., not participating.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent because I disagree with the result reached by the prevailing judges.

In the order of dismissal the judge stated:

> This case is a good example of the reason for the hearsay rule. Assuming the veracity of the sworn witnesses (which will be discussed later), most gave conflicting testimony regarding statements made by the deceased. In many instances, it appeared to the court that the deceased was less than candid, telling the witnesses whatever was expedient. The hearsay rule assumes that since the declarant is not under oath, he may not be making truthful statements. Therefore, the statements should be excluded. Each side freely allowed testimony about statements given by the deceased. However, the court has not placed much

> weight on alleged statements made by the deceased to the witnesses.
>
> * * * *
>
> It is clear that the deceased's children were fighting over the property. That fact does not mean the deceased intend [sic] any other result for the property than the conveyance to defendant. Both parties agree that a discussion occurred between the deceased, Paris Sabbs and the defendant [appellee] in 1992. The account is simply different. Neither the plaintiff, Paris Sabbs, nor the defendant, Bernice Cole presented as credible witnesses, and they both had vested interests in the outcome of the trial. The significant thing to the court is that the deceased took no action after his discussion until his death in 1993 to set aside the conveyance. Even if he had intended another result, his failure to act after that discussion, at the very least, indicates an acquiescence to the deposition [disposition]. His failure to act cannot now be transferred to representatives of his estate when he clearly had the opportunity to act and chose not to.
>
> * * * *
>
> The deceased deeded the Valentine property to the defendant on September 8, 1972, and filed the deed of record. The plaintiff continually argues that the defendant did not prove that she owned the property. The burden of proof is not on the defendant, since she is the record title holder.

The Arkansas Dead Man's Statute was repealed when the Revised Uniform Rules of Evidence were adopted in 1976. Since its repeal, courts determine the admissibility and proof of the deceased's words and dealings on the basis of its relevance and reliability, just as the admissibility of all unprivileged evidence is determined. The chancellor's comment that the decedent's statements should be excluded as hearsay is incorrect.

I believe the chancellor's focus on the 1993 discussion is misplaced. The focus should have been on Sabbs's intent to make the gift at the time of the grant as the delivery of a deed is not valid unless the grantor intended to pass title immediately. *Johnson v. Ramsey*, 307 Ark. 4, 817 S.W.2d 200 (1991).

Additional factors that evidence that appellee did not receive the property as a gift are as follows:

After the deed was recorded, it was returned to the residence of James Sabbs. Appellee did not list the property as an asset in a mortgage application for her current residence nor designate the property as an asset in her 1978 divorce. Appellee did not claim any appreciation for the property nor report any rental income from the property on her income tax returns. The property was insured in the names of appellee and her father. Appellee testified that she received the rent from the property; however, the only rental receipts in the record that were signed by the appellee were dated after Mr. Sabbs's death. Although appellee testified that the rental income was for her personal use, she testified that she never withdrew monies from the joint account in which the rental income was deposited. Appellee could only produce 1991 and 1992 real estate tax receipts and 1989 through 1992 income tax returns showing payment of real estate taxes.

An asserted gift, whether *causa mortis* or *inter vivos*, must be established by evidence which is "clear and convincing." *Boling v. Gibson*, 266 Ark. 310, 584 S.W.2d 14 (1979); *Smith v. Clark*, 219 Ark. 751, 244 S.W.2d 776 (1952); *Lehman v. Broyles*, 155 Ark. 593, 245 S.W. 24 (1922); *Lowe v. Hart*, 93 Ark. 548, 125 S.W. 1030 (1910). The required elements for an effective *inter vivos* gift, which must be proven by clear and convincing evidence, are that the donor knew and understood the effect of his act and intended that effect; that the donor made actual delivery to the donee; that the donor intended to pass title immediately; and the donee accepted the gift. *O'Flarity v. O'Flarity*, 42 Ark. App. 5, 852 S.W.2d 150 (1993).

In *Bennett v. Miles*, 212 Ark. 273, 205 S.W.2d 451 (1947), we said:

> In the more recent case of *Baugh v. Howze*, 211 Ark. 222, 199 S.W.2d 940 [(1947)], we said: "To constitute a valid gift *inter vivos*, certain essential elements must be present, these include actual delivery of the subject-matter of the gift to the donee or to some one as agent or trustee for the donee, with a clear intent to make an immediate present and final gift beyond recall, and at the

> same time unconditionally releasing all future dominion and control by the donor over the property so delivered."

When these well-settled rules are applied to the facts of this case, I find that two of the essential elements necessary to a valid gift are absent in that Sabbs did not give the deed to appellee with the intention at the time of passing title to her and that appellee did not accept the gift as her own, but only as agent for Sabbs, or as a trustee, and therefore, there was no valid gift *inter vivos.*

The existence of a confidential relationship between the parties raises a rebuttable presumption that the gift was obtained by undue influence or other improper means. The burden is on the alleged donee to rebut this presumption and to establish that the claimed gift was fairly and properly made to him. *Mohr v. Hampton*, 238 Ark. 393, 382 S.W.2d 6 (1964); *Burns v. Lucich*, 6 Ark. App. 37, 638 S.W.2d 263 (1982).

I do not believe the appellee has met the burden of proof necessary to establish the asserted gift *inter vivos* by the required standard of clear and convincing evidence. I believe that the chancellor's decision is clearly against the preponderance of the evidence and should be reversed.

Charlotte Nancy BENN *v.* Richard K. BENN

CA 96-868 944 S.W.2d 555

Court of Appeals of Arkansas
Division III
Opinion delivered May 7, 1997

[redacted]

Robert S. Blatt and *Phillip J. Taylor*, for appellant.

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

JOHN B. ROBBINS, Chief Judge. Appellant Charlotte Nancy Benn appeals the termination of appellee Richard Benn's obligation to pay her alimony. Appellee cross-appeals the finding of the chancellor that he owes back alimony. The history of the case reveals that the parties were divorced in January 1981. The property settlement agreement entered by the parties and incorporated into the divorce decree provided that appellee would pay $600.00 per month in alimony to appellant. This was later reduced by a 1984 order to $500.00 per month.

On May 2, 1995, appellant filed a motion for contempt, alleging that appellee had failed to pay any alimony since the most recent judgment for arrears of February 12, 1986. Appellee countered with a motion to terminate alimony. In the chancellor's order of December 28, 1995, he terminated the alimony obligation but found that appellant was entitled to $33,931.50 in back alimony. In accordance with the five-year statute of limitations, he awarded judgment for unpaid alimony accrued since May 2, 1990, a date five years prior to May 2, 1995, when she filed her motion for contempt. Both parties now seek relief from this court. We affirm the judgment for arrearage, but reverse as to the termination of alimony.

Bethell v. Bethell, 268 Ark. 409, 597 S.W.2d 576 (1980), is cited by appellee as authority for estopping appellant from seeking past due alimony. The opinion in that case states

that, as a general rule, an ex-spouse is entitled to all past due alimony not barred by the five-year statute of limitations, unless the ex-spouse is barred by inequitable action in seeking judgment for the arrearage. Waiver or estoppel may be established if an ex-wife sits upon her rights to recover an arrearage for such a long period of time that her ex-husband acts in reliance upon that nonaction. *Id.* There is no evidence in the record, though, that any consideration was given by appellee or that any reliance was placed on appellant's failure, or, more appropriately, inability, to pursue back alimony for such a period of time. In *Bethell* and the other cases cited therein, it is important to note that there had been an agreement between the ex-spouses to accept a reduction in alimony or support for some period of time. Such is not the case in the Benns' situation.

Another case, *Cunningham v. Cunningham*, 297 Ark. 377, 761 S.W.2d 941 (1988), is more on point with the case before us. It states that the mere fact one delays pursuing rights to obtain a judgment on past due support does not prevent one from seeking a judgment. In the case at bar, there was no agreement between the parties to reduce or terminate appellant's right to alimony. The delay, per appellant's testimony, was simply the result of frustration by another state's laws. Appellee's reliance on *Bethell* is misplaced.

Appellant testified that she did not sit on her rights, but had tried to execute on her 1986 judgment for unpaid alimony. She could not recover on the judgment in Texas, however, because Texas, appellee's home state at the time, did not allow garnishment of wages. She renewed efforts to retrieve back alimony in May 1995 after learning that appellee had returned to Arkansas. The chancellor's order reflects this testimony:

> [T]here is testimony that the Plaintiff was out of work for a period of time; lived in another state for a time due to employment; and, that Defendant endeavored to pursue her claim for alimony in the State of Texas where Plaintiff lived and worked, and was hampered by non-resident employers of the Plaintiff relative to garnishments. That, however, Plaintiff made no payments of alimony during this period of time pursuant to the parties' agreement, or this Court's Order.

This directly contradicts appellee's argument that appellant should be estopped to recover accrued alimony for sitting on her rights for years until such time as appellee inherited monies. Indeed, the record reflects that appellant had no less than three judgments against appellee since the time they were divorced, including the July 1986 judgment, which was still unsatisfied at the time of the hearing. Thus, as to the judgment for arrears, we affirm.

Appellant contends that the chancellor erred in terminating future alimony, arguing that there was not a sufficient change of circumstances upon which the chancellor could terminate alimony. We agree. It is well settled that the burden of showing a change of circumstances is on the party seeking a modification. *Bracken v. Bracken*, 302 Ark. 103, 787 S.W.2d 678 (1990). The primary factors to be considered in changing an award of alimony are the needs of one party and the ability of the other party to pay. *Id.* Of course, each case is to be judged upon its own facts. Discretion is vested in the chancellor, and the appellate court will not reverse absent an abuse of discretion. *Id.* From a review of the evidence before the chancellor, we find that there was an insufficient showing of a change in circumstances to warrant a termination of alimony.

The record reveals that appellant was unemployed at the time of the hearing due to breast cancer surgery and pending chemotherapy and radiation treatment. She also testified that profits from her interior decorating business had declined substantially, primarily due to increased competition. Appellee testified that he inherited over $250,000.00 in 1995 and that he was gainfully employed at the time of the hearing, making twice the money he was earning in 1984 when alimony was reduced.

In support of a change of circumstances, appellee asserted that he remarried in 1981, taking on a dependent wife and stepchildren, and that the parties' younger child had reached majority. Appellee testified that he was hospitalized for eight days at one point, and that his current wife had heart problems which necessitated two hospitalizations, though no evidence or testimony was elicited showing the dates of these events or their cost to appellee. Appellee testified that he had a zero or negative

worth until his mother died in February 1995, and that his total income for 1994 was $75,753.00. Appellee testified that he guessed he earned about $35,000.00 in 1984, the year his alimony was reduced to $500.00 per month.

Appellant argues in response that appellee used his remarriage, the majority of the parties' children, and a period of unemployment as circumstances that entitled him to the 1984 ruling that reduced his alimony obligation. Only those changes in circumstances occurring after the 1984 modification could support a further modification. Appellant argues that the changes in circumstances that gave rise to the 1984 modification cannot again be used to terminate alimony. *See Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980). Appellee has not presented evidence of any changes that have occurred since the January 1984 order that have worsened his circumstances. In fact, he appears in better financial shape, especially considering his inheritance of $263,517.35, subject to only $7,243.69 in inheritance taxes, and steady employment. Conversely, appellant is in worse financial condition after sending the parties' daughter through college, experiencing reduced earnings in her interior design business, and suffering a current bout with breast cancer. This court can see no change in circumstances that would justify termination of alimony.

In the portion of his order terminating alimony, the chancellor stated:

> [I]t is this Court's considered opinion that it is in the best interest and welfare of these parties, and what is left of any family relationship, as well as based on the numerous changes of circumstances of each party that the alimony ordered paid by the Plaintiff to the Defendant herein should be fully and finally terminated, cancelled, and held for naught upon entry of this Order. . .so that all claims of either party against the other are hereby determined and concluded. . . .

We find no material change in circumstance since the 1984 modification that would support a termination of alimony. We review chancery cases *de novo* and reverse only upon a finding that the chancellor's decision is clearly erroneous. We find that it was clearly against the preponderance of the evidence to terminate ali-

mony and reverse that portion of the chancellor's order of December 28, 1995, which did so.

Reversed on appeal and affirmed on cross-appeal.

JENNINGS and ROGERS, JJ., agree.

Teresa SPAINHOUR *v.* DOVER SCHOOL DISTRICT

CA 96-519 943 S.W.2d 610

Court of Appeals of Arkansas
Divisions III & IV
Opinion delivered May 7, 1997

Raochell Law Firm, by: *Travis N. Creed*, for appellant.

David H. McCormick, for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal is from a judgment of the Pope County Circuit Court dismissing with prejudice appellant Teresa Spainhour's appeal from a decision of the Dover School Board not to renew Spainhour's teaching contract for the 1994-1995 school year. Spainhour argues that the board's decision failed to comply with either the notice requirements of the Teacher Fair Dismissal Act (Ark. Code Ann. § 6-17-1501, *et seq.* (Repl. 1993)) or the school district's reduction- in-force policy.

The facts are not in serious dispute. In March of 1988, appellant began working for appellee, the Dover School District, as a migrant clerk and a Chapter One aide. Appellant was certified to teach grades one through six. She became a full-time teacher in the fall of 1988 and worked as a Chapter One High School Teacher and as the coordinator for the Coordinated Compensatory Vocational Educational Program (CCVE). Both programs were partially funded on a yearly basis with federal monies.

In April of 1994, appellant received a letter from Dr. Richard Paul, appellee's superintendent, advising her that he would recommend to the board at its next meeting that her teaching contract for the 1994-1995 year not be renewed. This letter was the last of five letters that began in June of 1993 advising appellant of possible cuts in federal funds that could eliminate her program.

On May 9, 1994, the school board held a regular meeting and adopted the superintendent's recommendation to eliminate the Chapter One program. Appellant was not present at this meeting. As a result of the board's decision to terminate the Chapter One program due to cuts in federal funding, appellant's position was eliminated, and her contract was not renewed.

On May 12, 1994, appellant, pursuant to Ark. Code Ann. § 6-17-1509, requested a hearing before the board. The board scheduled a hearing for May 18, 1994. Appellant and her representative appeared and presented evidence concerning the elimination of the Chapter One program and the application of the reduction-in-force policy. At the beginning of the hearing, appellant's counsel polled the board members to determine whether they would be open to the information that would be presented and whether they could be fair and impartial without any preconceived ideas concerning the elimination of the Chapter One program. The board members stated that the purpose of the hearing was to reconsider their previous decision, that they unanimously agreed to be open to the information presented, and that they would be fair and impartial without preconceived ideas concerning the elimination of the Chapter One program. Thereafter, Dr. Paul testified regarding the financial condition of the school district and the basis for his earlier recommendation. Appellant then presented evidence concerning the performance of the Chapter One program and information about her funding source. She also testified regarding her interpretation of the reduction-in-force policy and its provision regarding seniority. After the superintendent's rebuttal and closing arguments, the board retired into executive session and deliberated for fifty-five minutes before returning to open session and voting not to renew appellant's contract.

Spainhour appealed the board's decision to the circuit court claiming that the nonrenewal of her contract was in violation of the Arkansas Teacher Fair Dismissal Act and the district's personnel policies. Testimony was taken from various witnesses regarding the financial condition of the district, and the application of the staff reduction-in-force policy. After reviewing the board's May 18 proceedings and all of the testimony and exhibits introduced at trial, the court found that the action of the Dover Public School District in not renewing appellant's teaching contract was not in violation of the Arkansas Teacher Fair Dismissal Act. We find no error and affirm.

Arkansas Code Annotated § 6-17-1509(a) and (b) provide in part that a teacher who receives a notice of recommended termination or nonrenewal may file a written request with the board of directors of the district for a hearing within thirty days after the written notice of proposed termination or nonrenewal is received by the teacher.

Appellant first argues that notwithstanding the school board's statement that it would reconsider its May 9 decision without any preconceived ideas, this case should be reversed because the board violated the Arkansas Fair Teacher Dismissal Act when it did not renew the contract of appellant on May 9 prior to providing proper notice and an opportunity to be heard as required by law.

Appellant correctly argues that since 1989 the General Assembly has required strict compliance with the Teacher Fair Dismissal Act. Arkansas Code Annotated § 6-17-1503 reads as follows:

> A nonrenewal, termination, suspension, or other disciplinary action by a school district shall be void unless the school district strictly complies with all provisions of this subchapter and the school district's applicable personnel policies.

Failure to strictly comply with the Act renders action by the school district void. *Lester v. Mount Vernon-Enola School District*, 323 Ark. 728, 917 S.W.2d 540 (1996); *Western Grove School District v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994).

In *Murray v. Altheimer-Sherrill Public Schools*, 294 Ark. 403, 743 S.W.2d 789 (1988), the board rescinded its vote made in an earlier hearing regarding whether Murray's teaching contract should be renewed for the reasons stated in the superintendent's recommendation. The board president opened the meeting with an admonition that that was the only issue before the board and that only information pertinent to that issue would be allowed. The board president cautioned the board: "[You] should not vote based on any preconceived notions, indeed, if you have any, but should make your decision solely on what has been brought before you and will be brought before you during this hearing." 294 Ark. at 408, 743 S.W.2d at 791. At the conclusion of the hearing, the board again voted not to renew Murray's teaching contract. The circuit court upheld that decision. The supreme court held that this cautionary instruction, coupled with the board's formal rescission of its original vote, cured any error resulting from the earlier hearing and stated that "we presume that the board members are fair-minded and resolve matters presented to them on an impartial basis." It held that the trial court's conclusions that the board substantially complied with the notice and hearing provisions of the Act were not clearly erroneous.

Although Murray was decided when the law required only "substantial" compliance with the Act, we find it controlling and dispositive in the case before us. We find that the board's May 18 hearing afforded appellant all of her rights under the Act and that the actions of the board strictly complied with the Act.

Appellant's final argument concerns the school district's failure to adhere to and strictly comply with the applicable provisions of its reduction-in-force policy as required by law. Ark. Code Ann. § 6-17-1503. The staff reduction-in-force policy states in part: "When it is necessary to reduce the number of permanent employees, consideration will be given to the following factors: (1) Performance, (2) Ability and Skill, and (3) Seniority. . . ." Seniority is defined in the policy as "that period of time an employee has worked for the Dover School District." The policy further states:

> Should two or more employees have equal ability, skill, and performance, seniority shall govern which employee shall be retained. Should there be a difference in performance, ability,

> and skill between two or more employees sufficiently great in the judgment of the supervisor to outweigh seniority, performance, ability and skill shall govern.

In the Spring of 1994, the district's funds available for the Chapter One programs were reduced. Dr. Paul testified that the reduction in funding required that he request that the principals evaluate the high school and elementary Chapter One programs and to report their findings to him. After receiving their reports, it was determined that the most significant gains were in the elementary level. Based on the reports, Dr. Paul testified that he made a decision to recommend to the board at its regular meeting on May 9, 1994, that the high school Chapter One program be eliminated. Appellant interprets the reduction-in-force policy to mean that because she held a teaching certificate for the elementary level and had been employed longer than three of the elementary teachers, she should have been retained on the basis of seniority without regard to the position held by those three teachers. Dr. Paul testified that appellant's six years of experience in the district was at the high school level. He stated that in his opinion, when a comparison was made with those elementary teachers over whom appellant held seniority, the elementary teachers possessed more skills and ability than appellant and that although appellant's experience at the high school level had been acceptable, it did not follow that she could successfully transfer those skills to the elementary level where she had never taught during the normal school year. Dr. Paul testified that at the high school level, appellant taught in a one- on-one computer-generated laboratory focusing on areas of individual needs. He stated that this was totally different from an elementary teacher who was responsible for establishing reading groups, diagnosing reading skills, teaching math, science, social studies, health, and art, and dealing with the daily demands that would occur with twenty-five students. Appellant presented no evidence of the abilities and skills of the three teachers with whom she sought comparison.

The determination not to renew a teacher's contract is a matter within the school board's discretion, and the circuit court cannot substitute its opinion for that of the board in the absence of an abuse of discretion. *Murray v. Altheimer-Sherrill Public Schools,*

supra. It is not the appellate court's function to substitute its judgment for that of the circuit court or the school board; the appellate court will reverse only if it finds on review of the trial court's decision that the court's findings are clearly erroneous. *Id.*

■■ A trial court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to assess the credibility of the witnesses. *Tovey v. City of Jacksonville*, 305 Ark. 401, 808 S.W.2d 740 (1991). Here the testimony was conflicting, and we cannot determine that the circuit court erred in its determination that the school board did not violate the Teacher Fair Dismissal Act or misapply the personnel policy. *Whitfield v. Little Rock Public Schools*, 25 Ark. App. 207, 756 S.W.2d 125 (1988).

Affirmed.

COOPER and BIRD, JJ., agree.

ROGERS, STROUD, and MEADS, JJ., dissent.

MARGARET MEADS, Judge, dissenting. I disagree with the prevailing opinion in this case because I believe it completely disregards the strict compliance requirement of the Teacher Fair Dismissal Act as well as precedent established by our supreme court in *Western Grove School District v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994).

Under present law, the Teacher Fair Dismissal Act requires notice of recommended nonrenewal to a teacher, Ark. Code Ann. § 6-17-1506 (Repl. 1996), and authorizes a teacher so notified to request in writing a hearing before the school board on the nonrenewal, Ark. Code Ann. § 6-17-1509(a) (Repl. 1996). The Arkansas Supreme Court has held that notice and a hearing must be afforded to the teacher before the board's decision on nonrenewal, *Green Forest Public School v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985). The question in *Green Forest* was whether the board substantially complied with the notice requirement by conducting a hearing on a teacher's nonrenewal *after* the board had met and decided against renewing his contract, and the court held it did not.

After the decision in *Green Forest*, the General Assembly amended the Teacher Fair Dismissal Act with Act 625 of 1989, which provides:

> A nonrenewal, termination, suspension, or other disciplinary action by a school district shall be void unless the school district strictly complies with all provisions of this subchapter and the school district's applicable personnel policies.

Ark. Code Ann. § 6-17-1503 (Repl. 1996). Thus, under current law, a teacher must be notified of a nonrenewal recommendation *prior* to board action and, absent strict compliance, a school district's action to nonrenew shall be void.

In this case, the Dover School Superintendent sent a letter dated April 12, 1994, to appellant notifying her that he would recommend to the school board, at its regular meeting on May 9, 1994, that her contract not be renewed for the 1994-95 school year. The school board met on May 9 and voted in favor of the Superintendent's recommendation to eliminate both the high school Chapter One program which appellant taught, and appellant's position. By letter dated May 12, 1994, appellant requested a hearing before the school board, unaware of the board's May 9 action. She was granted a hearing on May 18. At the conclusion of the May 18 hearing, the board again voted not to renew appellant's contract.

The prevailing members of this court believe that by polling the board members at the beginning of the May 18 hearing and verifying that they could be fair and impartial, before listening to appellant, her counsel, and her evidence, strict compliance has been achieved. I disagree. I believe that the board's impartiality was tainted by its original decision-making process when it met again on May 18, heard the Superintendent's recommendation and reasoning, and acted thereon. I agree completely with the supreme court's logic in *Western Grove School District v. Terry*, 318 Ark. 316, 322, 885 S.W.2d 300, 302 (1994): "After a board has made its decision, the teacher is confronted with the much more daunting task of reversing formed opinions and formal action by the board members. The prejudice to the teacher under such circumstances is obvious and real."

Because the Dover School District failed to strictly comply with the notice provision of the Teacher Fair Dismissal Act, its action to nonrenew appellant's contract should have been held void and her contract reinstated. I would reverse and remand this case.

I respectfully dissent.

ROGERS and STROUD, JJ., agree.

Paul Herbert WEDIN *v.* Irene Anne WEDIN

CA 96-236 944 S.W.2d 847

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 7, 1997

[Petition for rehearing denied June 18, 1997.]

Street, Seay & Caldwell, P.L.L.C., by: *Theresa L. Caldwell*, for appellant.

Deborah A. Knox, for appellee.

JOHN E. JENNINGS, Judge. Paul and Irene Wedin were married in 1963 and separated in July 1993. In September 1993 appellant filed suit for divorce in Baxter County Chancery Court. On October 14 the parties signed a property settlement agreement. The agreement provided: "Appellant will further divide with appellee any inheritance of personal property he may receive in the future from the Estate of Lucretta Wedin."

Lucretta Wedin, appellant's mother, died on October 25, 1993. On November 3, 1993, appellant was granted a divorce and the property settlement agreement signed by the parties was approved.

In January 1995 the appellee filed a petition in chancery to enforce the terms of the property settlement agreement and the trial court held a hearing focusing on the parties' differing interpretations of the clause at issue. It was shown that Lucretta Wedin had, on August 6, 1993, executed a trust agreement through which she placed virtually all her assets in an *inter vivos* trust. In the trust indenture she named herself as a trustee. Appellant and his sister, Jacqueline Cathers-Collision, were named co-trustees and were the sole beneficiaries of the trust. Lucretta Wedin's will, also dated August 6, 1993, left all her property to the trust. At her death the value of her property subject to probate was $600.00.

The appellee testified that during settlement discussions appellant told her that he was going to give her half of what he got from his mother. Appellant told her that the estate was valued at approximately $600,000.00 and that there would be about $190,000.00 in estate taxes payable. She testified that she had worked as a secretary in a law office but did not seek legal advice about the terms of the property settlement agreement. She testified that she was aware that some of Lucretta Wedin's property was in trust and understood that that property was included in appellant's inheritance.

Appellant testified that he did tell the appellee that he was going to split everything he got from his mother with her. He conceded that he told her that the total would be approximately $600,000.00 and that she would receive one-half of his one-half share. He received a little more than $200,000.00. He testified that appellee was aware that the trust existed.

He also testified however that he intended the clause to mean that appellee would receive only a share of the property he received through his mother's will. He further testified that he did not tell the appellee that the trust property would not be included and that if she had a misunderstanding about the agreement, he did nothing to correct it. At the time of the hearing appellant had

paid appellee some $23,000.00 but took the position that this was a gift and that he was obligated to pay no more than half of the $600.00 he received through his mother's will.

The chancellor found that the phrase "The Estate of Lucretta Wedin" was ambiguous. The chancellor also found that appellant stood in a confidential relationship to the appellee. Relying on our decision in *Undem v. First National Bank*, 46 Ark. App. 158, 879 S.W.2d 451 (1994), the chancellor held that appellant was estopped to argue that the trust assets were not included in his agreement.

On appeal to this court appellant contends that the chancellor erred in holding that the language of the clause in question was ambiguous, erred in finding that appellant had a duty to advise the appellee as to the meaning of the clause, and erred in effectively granting reformation of the agreement. We find no error and affirm. Chancery cases are reviewed de novo on appeal. *Lyons v. Lyons*, 13 Ark. App. 63, 679 S.W.2d 811 (1984). We do not reverse the findings of the chancellor unless they are clearly against a preponderance of the evidence. *Kunz v. Jarnigan*, 25 Ark. App. 221, 756 S.W.2d 913 (1988). If the chancellor reached the right result, we will affirm even if we disagree with the court's reasoning. *Durham v. Arkansas Dep't of Human Services*, 322 Ark. 789, 912 S.W.2d 412 (1995).

Appellant contends that the clause in the property settlement agreement is unambiguous. While he does not argue that the word "estate" is unambiguous, he contends that the word "inheritance" is. He relies on BLACK'S LAW DICTIONARY, which defines "inheritance" as "property which descends to an heir on the intestate death of another."

The initial determination of the existence of an ambiguity rests with the court. *C. & A. Constr. Co. v. Benning Constr. Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974). If an ambiguity exists, then the true intention of the parties must be determined and the meaning of the term becomes a question of fact. *See C. & A. Constr. Co., supra; Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988). BLACK'S LAW DICTIONARY defines "estate" as "the degree, quantity, nature, and extent of interest which a per-

son has in real and personal property." BLACK'S LAW DICTIONARY 490 (5th ed. 1979). The standard dictionary definitions are similar: "1. A landed property, usually of considerable size. 2. The whole of one's possessions, esp. all of the property and debts left by a dead person. 3. *Law.* The nature and extent of an owner's rights with respect to his property." AMERICAN HERITAGE DICTIONARY 466 (2nd College ed. 1982). It has been said that "the word 'estate' does not impart a legal entity." *Hansen v. Stanton*, 177 Wash. 257, 31 P.2d 903 (1934).

Similarly, the word "inherit" is not unambiguous. While *Black's* gives as a definition, "to take by inheritance; to take as heir on death of an ancestor," it notes that the word is also used in its popular sense as the equivalent of to take or receive. BLACK'S LAW DICTIONARY 704 (5th ed. 1979). The AMERICAN HERITAGE DICTIONARY defines inherit as: "1. To come into possession of; possess. 2. To receive (property) from an ancestor or another person by legal succession or will."

When we consider the prior discussions of the parties it is reasonably clear that they meant that appellant would share with the appellee that which he received from his mother's property after her death.

We would reach the same conclusion under section 201 of the RESTATEMENT (SECOND) OF CONTRACTS:

> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) That party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party.

Under our view of the case it is not necessary to consider the question of estoppel or the chancellor's application of the principles stated in our decision in *Undem v. First National Bank, supra.* Finally, we do not agree that either the chancellor's holding, or our own, amounts to a reformation of the parties' agreement. The chancellor's holding was that appellant was estopped from

contesting the appellee's interpretation of their agreement. Our holding is that the appellee's interpretation conforms to the intention of the parties, as manifested by their words and actions.

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

ROBBINS, C.J., BIRD, and ROAF, JJ., agree.

GRIFFEN and NEAL, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I cannot join the majority in affirming the chancellor's decree that held the appellant ex-husband was estopped from asserting that he was not obligated to pay his ex-wife half of the sums that he received from a revocable trust that his mother established before the parties divorced. Having also considered the law and the parties' arguments, I am firmly convinced that the chancellor's decree was clearly erroneous and that we should reverse. Therefore I dissent from the majority position and opinion.

Although the chancellor bottomed his ruling on *Undem v. First Nat'l Bank*, 46 Ark. App. 158, 879 S.W.2d 451 (1994), he explicitly relied upon a supposed "relationship of trust and confidence" between the parties in concluding that appellant misled appellee when his attorney submitted a property settlement agreement in which appellant agreed to "equally divide with Wife *any inheritance of personal property he may receive in the future from the Estate of Lucretta Wedin.*" (Emphasis added.) The chancellor concluded that appellee (the wife) relied on appellant's prior oral promises to give her half of whatever he got from his mother and that appellant had a duty to explain that the actual language of the property settlement agreement prepared by his attorney and forwarded to appellee after the divorce action was filed was different from his earlier promise. One can understand the chancellor's disapproval of what he considered appellant's failure to be forthright. However, that disapproval of the failure to be forthright neither justifies nor demands a finding that the parties shared a "relationship of trust and confidence" when all the relevant facts indicate otherwise. It also should not blind us to the plain rules of law

concerning contracts, division of property, and *inter vivos* gifts that compel reversal.

Contrary to the view that a relationship of trust and confidence existed between appellant and appellee when the property settlement agreement was prepared, submitted to appellee, and executed, the agreement plainly reads that on October 19, 1993, the parties were separated and were contemplating a divorce action in Baxter County, that their differences were irreconcilable, and that each had either retained or been afforded the opportunity to retain legal counsel in connection with drafting the agreement. Those facts have never been disputed by appellee who admitted that she had the opportunity to consult counsel in connection with the property settlement agreement. Appellee declined to consult counsel or even discuss the agreement with any of the twelve lawyers in the law firm where she worked.

Moreover, the language that appellee relies upon is clearly different from a promise to give her half of whatever appellant may have received from his mother because it is limited to half of the personal property inherited from his mother's estate. When the agreement was submitted to appellee by appellant's attorney, appellee knew that appellant's mother had created a trust and named appellant as a beneficiary; however, she made no effort to obtain a copy of the trust documents before signing the property settlement agreement. She did not inquire as to what property was in the trust and did not consult counsel concerning any impact that the trust had on the property settlement agreement. She knew that appellant had retained legal counsel and knew that she had already rejected the language of a previous property settlement agreement draft because she considered it different from what appellant had orally promised her. She knew that appellant's lawyer did not represent her, nor consult with her, that appellant had left her in Texas, moved to Arkansas, and did not intend to reconcile with her. In short, there was no plausible reason for appellee or any other person of ordinary insight to believe that the property settlement agreement that appellee received from appellant's lawyer in contemplation of their divorce action arose from anything remotely like a "relationship of trust and confidence."

The chancellor's decision is tantamount to an award of damages for the tort of deceit. However, appellee is not entitled to tort damages merely because her contract (the property settlement agreement) differs from what appellant promised, especially when she failed to exercise the reasonable diligence expected of anyone negotiating a contract for what she thought amounted to more than $100,000 by ascertaining whether the plainly different language of the proposed agreement was consistent with the oral promise that appellant made before his lawyer prepared the agreement. Even under a deceit theory, appellee's prospect for recovery would have been problematic because of the requirement that any reliance on her part be reasonable under the circumstances. *Medlock v. Burden*, 321 Ark. 269, 900 S.W.2d 552 (1995) (citing *Roach v. Concord Boat Corp.*, 317 Ark. 474, 880 S.W.2d 305 (1994)); *Godwin v. Hampton*, 11 Ark. App. 205, 669 S.W.2d 12 (1984). Of course, the chancellor's decision permits appellee to avoid these questions by construing the parties to have been in a confidential and trusting relationship when the evidence plainly shows that they were not.

Although I do not read the majority opinion to hold that divorcing parties enjoy a "relationship of trust and confidence" as a matter of law so that their oral promises to each other are actionable upon breach, I see no difference between that unsound proposition and the result reached by affirming the decree in this case. The majority purports to buttress its decision by reading the words "from the Estate of Lucretta Wedin" in the executed property settlement agreement to be ambiguous. The flaw in that reasoning is that even the appellee recognizes that the chancellor did not find the language ambiguous. The appellee has vigorously challenged the appellant's contention that the chancellor found the language in Paragraph 9 of the Joint Stipulation and Property Settlement Agreement ambiguous. Instead, appellee maintains that she was defrauded and that the appellant's allegedly deceptive conduct justified holding that he was estopped from relying upon the wording of the agreement. I do not understand how the majority is better situated to find an ambiguity in an agreement when the party who challenges that agreement does not find it ambiguous. I also do not understand how the majority is able to affirm the chancellor's

decision holding appellant estopped from relying upon the agreement due to a purported ambiguity that the chancellor has not found and which the party who contests the agreement does not assert.

Of course, it has long been the law in Arkansas that the initial determination of whether an ambiguity exists in a contract rests with the court as a matter of law. If the court finds that a contract term is ambiguous as a matter of law, then parol evidence is admissible and the meaning of the disputed term becomes a question of fact for the fact finder. *C. & A. Constr. Co., Inc. v. Benning Constr. Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974). When a technical term is used in a contract in a sense other than the ordinary meaning of the word, testimony is admissible to explain the meaning of the term and the question may be submitted to the trier of fact to determine in what sense the term was used. *Les-Bil, Inc. v. General Waterworks Corp.*, 256 Ark. 905, 511 S.W.2d 166 (1974). Although the chancellor in this case did not find the term "from the Estate of Lucretta Wedin" in the property settlement agreement ambiguous, he did observe that the term "estate" is used in a general sense to describe an interest in property so that when the agreement referred to "the Estate of Lucretta Wedin" at paragraph 9 it could have contemplated her property generally, her trust estate only, her probated estate only, or both her trust and probated estate. However, appellee has never contended that she was misled by the language of the agreement or that she signed it in the mistaken belief that it conformed to what appellant had orally promised. Her sole contention is that appellant failed to inform her that he changed his mind about what he would give her and, therefore, willfully induced her to sign an agreement that she would not have otherwise signed. That contention is bottomed upon the alleged "relationship of trust and confidence" mentioned previously, not an alleged ambiguity concerning the meaning of the term "the Estate of Lucretta Wedin."

If there was no relationship of trust and confidence between the parties, then the effect of the chancellor's decision and its affirmance is to reform the property settlement agreement. Again, the established rules of contract law applicable to property settlement agreements in divorce proceedings bar the way that the

majority seeks to travel. The supreme court stated the standard used for determining whether a party is entitled to reformation of a written contract in *McIntyre v. McIntyre*, 241 Ark. 623, 410 S.W.2d 117 (1966):

> We have consistently held that reformation of a contractual agreement will not be granted except upon clear, unequivocal and decisive evidence. [citations omitted] In *Corey v. The Mercantile Insurance Company of America*, 205 Ark. 546, 169 S.W.2d 655 (1943), we quoted the applicable rule with approval, as follows: "To entitle a party to reform a written instrument upon the grounds of mistake, it is essential that the mistake be mutual and common to both parties; in other words, it must be found from the testimony that the instrument as written does not express the contract of either of the parties. It is also necessary to prove such mutual mistake by testimony which is clear and decisive before a court of equity will add to or change by reformation the solemn terms of a written instrument."

Id. at 626-27, 410 S.W.2d at 119. Here there is no proof that a mutual mistake occurred. As appellee has observed in her brief, neither party contends that there was a mistake, and she did not ask that the property settlement agreement be reformed.

It is self-evident that the parties enjoyed no "relationship of trust and confidence" so as to justify a holding that appellee was justified in blindly trusting whatever agreement that appellant's attorney tendered for her signature. It is equally plain that appellee has not contended that the written agreement contains ambiguous language upon which she relied believing it to be consistent with appellant's oral promise to her before the agreement was prepared. The only remaining basis for affirming the chancellor's decision is to reform the agreement to mean what neither party contends that they ever thought it meant. That is nothing short of imposing upon the parties a property disposition that one party (appellant) clearly does not want, and the other party (appellee) has not won through negotiation despite having every opportunity to try to do so.

No matter what our view may be about appellant's decision to abandon his original position toward appellee, the fact remains that appellant had the right to change his mind about what he

wanted to give appellee in the property settlement. She had the right to disagree with his changed position and reject the property settlement agreement that reflected that changed position. But appellee has no right to acknowledge that the agreement she signed was not misleading, acknowledge that neither party mistakenly executed it, and acknowledge that she refused to seek any advice about what it meant, yet be awarded a property settlement that she refused to negotiate and which nobody else has ever determined she otherwise has the right to obtain.

Despite appellee's disappointment about appellant's change of mind, she has no right to receive *anything* that appellant obtained by inheritance from his mother in a property settlement agreement terminating their marriage, and appellant had no duty to give her anything that his mother gave him. Ark. Code Ann. § 9-12-315 (Repl. 1993) prescribes how property is divided. Subsection (a)(1)(A) provides that all *marital property* shall be divided one-half to each party unless the court finds that division to be inequitable. Subsection (b)(1) states that "marital property" means all property acquired by either spouse subsequent to the marriage *except* property acquired prior to marriage, or by gift, or by bequest, or by devise, or by descent. Whether the property that appellant received upon his mother's death passed to him by operation of her Will (by bequest), by virtue of the trust she created (by gift or bequest), or as her heir (by descent), Arkansas law plainly holds that it was not marital property to be divided with appellee upon divorce. Appellant was *not* obligated to share it with appellee, and no court is authorized to take it from him to satisfy a property settlement. Perhaps this explains why appellee has not attempted to have the property settlement agreement declared void and has not asked the chancellor to divide the *marital* property according to the statute.

The majority has cited no authority for the proposition that property obtained by a spouse from his parent by gift, bequest, or descent must be shared with the other spouse when they divorce. There was no proof that appellant ever put the property that he obtained after his mother died in a joint account with appellee. Therefore, we have no basis for holding that appellee had a *right* to anything.

Appellee argues that we should endorse her contention because appellant gave her $23,400. Had the parties remained married and appellant gave appellee that amount, what law holds that she would be entitled to recover another part of appellant's inheritance? Appellee has cited none. Neither does the majority.

When did we abandon the test for *inter vivos* gifts that has existed in Arkansas for most of this century? According to our law, the essential elements of an *inter vivos* gift include (1) actual delivery of the subject matter by the donor to the donee or the donee's agent, (2) clear intent to make an immediate, present, and final gift beyond recall, (3) knowledge and understanding on the part of the donor regarding the effect of his act, and (4) actual acceptance of the property by the donee. *O'Flarity v. O'Flarity*, 42 Ark. App. 5, 852 S.W.2d 150 (1993). Here appellant did not make an immediate and unconditional gift to appellee. He did not make actual delivery of half of what he received from his mother. Appellee did not accept half of what appellant received from his mother because he never gave it to her. None of the well-settled elements for an *inter vivos* gift have been proven by clear and convincing evidence or otherwise.

If voiding the agreement is warranted, we should reverse and remand so that appellee can negotiate an agreement or receive an equitable property settlement pursuant to Ark. Code Ann. § 9-12-315. Absent grounds for voiding the agreement, (and I have found none), we should not impose a property settlement upon appellant by judicial fiat merely because we dislike his failure to be forthright about changing his mind, or because he changed his mind after talking with his lawyer. Appellant had the right to change his mind and the right *not* to give appellee any part of what he inherited from his mother; thus, appellee has *not* been wronged by the change of mind, only disappointed. Until now the law has not treated disappointment as fraudulent concealment, deceit, or misrepresentation. Until now appellate courts have not disregarded the plain language of Ark. Code Ann. § 9-12-315 merely to soothe the disappointment of a divorced party. Until now we have not ignored the legal requirements for *inter vivos* gifts simply because a putative donee is displeased that a putati ve

donor changed his mind. This case is not the place to begin doing so.

I would reverse.

Melissa MAY *v.* Jerry Glenn MAY

CA 96-913 944 S.W.2d 550

Court of Appeals of Arkansas
Division III
Opinion delivered May 7, 1997

Sloan, Rubens & Peeples, by: *James A. Davis, Jr.*, for appellant.

Durrett & Coleman, by: *Gerald A. Coleman*, for appellee.

JUDITH ROGERS, Judge. Appellant brings this appeal from the trial court's denial of her petition to register a foreign judgment based on a finding that the Texas court that rendered the judgment did not have personal jurisdiction over appellee. For reversal, appellant contends that appellee was bound by the Texas court's finding of personal jurisdiction and that the trial court erred by permitting appellee to collaterally attack the judgment on that ground in this proceeding. We agree and reverse.

Appellant, Melissa May, is the daughter of appellee, Jerry Glenn May. On August 30, 1994, appellant obtained a default judgment against appellee in the District Court of Cameron County, Texas, in the total amount of $28,951.43, representing unpaid child support, prejudgment interest, and attorney's fees. On May 16, 1995, appellant petitioned the Circuit Court of Crittenden County, Arkansas, for registration of the Texas judgment. Appellee objected to appellant's petition, arguing that the Texas court had no personal jurisdiction over him. After a hearing, the trial court agreed with appellee's argument and entered an order dismissing appellant's petition.

The Uniform Enforcement of Foreign Judgments Act, codified in Arkansas at Ark. Code. Ann. §§ 16-66-601 to -608 (Supp. 1995), provides a summary procedure in which a party in whose favor a judgment has been rendered may enforce that judgment promptly in any jurisdiction where the judgment debtor can be found. The Uniform Act requires only that the foreign judgment be regular on its face and duly authenticated to be subject to registration. *Butler Fence Co. v. Acme Fence & Iron*, 42 Ark. App. 30, 852 S.W.2d 826 (1993). Under the Full Faith and Credit Clause of the United States Constitution, a foreign judg-

ment is as conclusive on collateral attack as a domestic judgment would be, except for the defenses of fraud in the procurement or want of jurisdiction in the rendering court. *Strick Lease, Inc. v. Juels*, 30 Ark. App. 15, 780 S.W.2d 594 (1989). Foreign judgments entered by default are equally protected against collateral attack, unless the previously stated defenses can be established. *Butler Fence Co. v. Acme Fence & Iron, supra.*

Appellant's argument in this appeal is based on appellee's testimony at the hearing and the supreme court's decision in *Monark Boat Co. v. Fischer*, 292 Ark. 544, 732 S.W.2d 123 (1987). It was appellee's testimony that, when he learned of the judgment, he hired an attorney and filed a motion for a new trial in which he contested the Texas court's assertion of personal jurisdiction over him. He said that the Texas court denied his motion based on a finding that the court did have personal jurisdiction and that he chose not to appeal that decision because of the expense. Certified copies of appellee's motion for a new trial and the order denying it were introduced into evidence.

In *Monark Boat Co. v. Fischer, supra*, the issue before the court was whether a party, against whom a foreign judgment had been rendered and who had contested the matter of personal jurisdiction in the foreign court, may assert the lack of personal jurisdiction of the rendering court when the judgment is sought to be registered in Arkansas. The court answered the question negatively, saying:

> When the appellant appeared in the Ohio court to contest the matter of whether that court had personal jurisdiction of it, it subjected itself to the jurisdiction of that court to determine that issue. The decision of the Ohio court that it had jurisdiction of the appellant was binding on the appellant, and while it could have appealed that decision, it could not collaterally attack it in a collateral proceeding, such as the one before us now, because of the doctrine of *res judicata.*

Id. at 547, 732 S.W.2d at 125.

The appellee in this case contested personal jurisdiction in the Texas court and did not appeal that adverse determination. Therefore, under the decision in *Monark*, the Texas court's finding

that it had personal jurisdiction is *res judicata* and is not subject to collateral attack in this proceeding. Although the appellant referred the trial court to the supreme court's decision in *Monark*, the court did not abide by it. Consequently, we reverse the trial court's decision and remand for the trial court to enter an order accepting registration of the Texas judgment.

Reversed and remanded.

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

William Gerald BLOCKER *v.* Teresa BLOCKER

CA 96-972 944 S.W.2d 552

Court of Appeals of Arkansas
Division IV
Opinion delivered May 7, 1997

Donald C. Donner, for appellant.

William P. Anderson, for appellee.

WENDELL L. GRIFFEN, Judge. William Blocker appeals the ruling of the Washington County Chancery Court granting appellee Teresa Blocker custody of the parties' minor child. For reversal, appellant argues that the chancellor erred by refusing to rule that the act of "child snatching" tolls the running of the six-month period required to attain "home state" status under Ark. Code Ann. § 9-13-203(a)(1) (Repl. 1993); that a child-custody action filed in South Carolina was a "simultaneous proceeding" and the chancellor erred in failing to communicate with the South Carolina court to determine whether Arkansas was an inconvenient forum; and that the chancellor erred in finding that Arkansas was not an inconvenient forum under the provisions of Ark. Code Ann. § 9-13-207 (Repl. 1993). We find no error and affirm.

Appellant and appellee were married in February 1986, and lived in South Carolina with their four-year-old child. In January 1995, appellee left South Carolina with the minor child, came to Arkansas, and filed an order of protection alleging physical abuse by appellant that was later withdrawn. While appellant asserts that he made efforts to locate his wife and child, no documents were filed with the South Carolina courts to preserve his custodial rights. Appellee filed for divorce in Washington County, and appellant was served with the summons and complaint on December 14, 1995. Appellant contends he first learned that his family was in Arkansas when he was served, but testified at trial that he suspected that appellee went to Arkansas to live with family. Appellant filed an answer to the complaint on January 5, 1996. A month after being served, appellant filed a child-custody action in South Carolina.

Appellant then filed a motion in Washington County requesting that the Arkansas court decline child-custody jurisdiction pursuant to Ark. Code Ann. § 9-13-207, on the basis that the state of Arkansas is an inconvenient forum under the Uniform Child Custody Jurisdiction Act (UCCJA), and that South Carolina had a closer connection with the child, and that substantial evidence concerning the child's welfare was more accessible in South Carolina. The chancellor denied the motion and appellant's request that the chancellor communicate with the South Carolina court to determine which forum was the "home state"

of the child under the UCCJA. Appellant then withdrew his answer, and made an entry of appearance and waiver of corroboration of the grounds for divorce. The chancellor granted appellee an uncontested divorce, and after a hearing, found that it was in the best interest of the child to be placed with appellee.

Addressing appellant's first issue on appeal, we note that appellant's argument regarding the home state of the child was significantly different at the trial level. There appellant argued that appellee absconded with the parties' minor child in violation of the UCCJA and Parental Kidnapping Prevention Act (PKPA), and that appellee acted in bad faith. Appellant contended below that as a result of appellee's conduct, Arkansas should not be the home state of the child for purposes of making a child-custody determination. However, appellant never raised below whether the act of child-snatching tolls the running of the six-month period for purposes of determining a child's home state under the UCCJA. It is a basic rule of appellate procedure that a party cannot change arguments on appeal. *Ball v. Foehner*, 326 Ark. 409, 931 S.W.2d 142 (1996) (citing *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996)). The tolling argument was not properly reserved for appellate review, and therefore cannot be addressed.

We do note, however, that the chancellor did not err in finding that Arkansas is the home state of the child. Appellant sought involvement from the South Carolina courts more than a year after appellee and the minor child left South Carolina, and several months after the initiation of the Arkansas divorce and custody proceeding, thus allowing South Carolina to lose jurisdiction:

> One of the main purposes of home state jurisdiction under the PKPA and UCCJA is protection of a parent who remains in the home state after the other parent has taken the child out of state. In order for the protection to apply, the parent remaining in the home state must act promptly to obtain home state jurisdiction. If, for example, a mother and father separate and one of them takes the child out of state, the parent who remains is entitled to have the case heard in the courts of the home state if the remaining parent commences an action for custody within six months of the departure. The physical absence of the child and the other

> parent does not deprive the home state court of subject matter jurisdiction. If, however, the parent delays filing for more than six months, the state in which the parent remains would no longer be the home state of the child, and the child may have acquired a new home state that would have jurisdictional priority.

Jeff Atkinson, Modern Child Custody Practice § 3.12 at 129-30 (1986) (citing 28 U.S.C. §1738A(c); 9 U.L.A. 122 (Master ed. 1979); U.C.C.J.A. § 3(a)(1); and the Commissioner's Note to U.C.C.J.A. § 3(a)(1). The chancellor's finding that Arkansas was the "home state" was not clearly erroneous.

Second, appellant asserts that the chancellor erred in failing to communicate with the South Carolina court to determine whether the Arkansas forum was inconvenient for purposes of the UCCJA. The applicable statute, Ark. Code Ann. § 9-13-206 (Repl. 1993) provides, in part:

> (a) A court of this state shall not exercise its jurisdiction under this subchapter [under the UCCJA] if *at the time of filing the petition* a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this subchapter . . . .
>
> (c) If the court is informed *during the course of the proceeding* that a proceeding concerning the custody of the child is pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending, to the end that the issue may be litigated in the more appropriate forum and that information be exchanged . . . .

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. *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996). There is no merit to appellant's argument that the chancellor should have communicated with the South Carolina court because the South Carolina action had not been filed when appellee filed this action. In *Leinen v. Arkansas Dep't of Human Servs.*, 47 Ark. App. 156, 886 S.W.2d 895 (1994), at the time that a juvenile proceeding was filed in Garland County, Arkansas, the divorce action in another state had not

been commenced. We held that Ark. Code Ann. § 9-13-206 did not apply because there was no "simultaneous proceeding." *Id.* *Leinen* dictates that we affirm the chancellor on this issue.

Appellant's last assignment of error asserts that the chancellor abused his discretion in finding that Arkansas was not an inconvenient forum under Ark. Code Ann. § 9-13-207 (Repl. 1993). A court that has jurisdiction to make an initial or modification decree *may* decline to exercise its jurisdiction if it finds that it is an inconvenient forum to make the custody determination and that another court is a "more appropriate" forum. *Id.* The record reveals that appellee and the minor child resided in Arkansas approximately seven months prior to the filing of the divorce and child-custody determination. Since the chancellor found that Arkansas was the home state of the child, and where there were witnesses located in Arkansas as well as South Carolina, appellant has not proven that the chancellor abused his discretion by retaining jurisdiction.

Affirmed.

ROGERS and BIRD, JJ., agree.

STATE of Arkansas, Office of Child Support Enforcement, Stephanie Blue, Assignor *v.* Edward FLOWERS

CA 96-954 944 S.W.2d 558

Court of Appeals of Arkansas
Division IV
Opinion delivered May 7, 1997

Allison McCoy, for appellant.

Larry Dunklin, for appellee.

WENDELL L. GRIFFEN, Judge. Pulaski County Child Support Enforcement Unit (PCCSEU) appeals a ruling by the Pulaski County Chancery Court dismissing a paternity action filed on behalf of assignor Stephanie Blue with prejudice. We modify the chancellor's decision to dismiss the paternity action without prejudice, and affirm the trial court's ruling as modified.

PCCSEU filed a complaint for paternity on behalf of Blue in December 1992, and appellee, Edward Flowers, subsequently signed an agreed order for blood testing. Appellee appeared for HLA blood testing on March 2, 1993, at Roche Biomedical Laboratories, but Blue and the minor child failed to appear. PCCSEU closed Blue's case in May 1993. The chancellor entered an order

dismissing appellant's complaint without prejudice due to lack of prosecution pursuant to Ark. R. Civ. P. 41 in September 1994.

Appellant refiled its complaint for paternity against appellee in July 1995, and appellee again signed an agreed order for paternity testing. The parties were ordered to appear for DNA testing on October 13, 1995. Appellee again appeared for the test; however, Blue and the minor child failed to appear for the October 13, 1995, testing date, and a third scheduled date of November 28, 1995.

A hearing was scheduled for March 27, 1996, and appellee was served with notice of the hearing on January 25, 1996. A subpoena was issued for Blue, but she was not served and did not appear. Appellee appeared for the March 1996 hearing with counsel. Upon motion of the appellee, the chancellor dismissed appellant's complaint with prejudice. It is from this ruling that PCCSEU appeals.

On appeal, chancery courts are tried *de novo* on the record, and a chancellor's findings will not be reversed unless they are clearly erroneous or clearly against the preponderance of the evidence. *Adair v. Adair*, 54 Ark. App. 9, 923 S.W.2d 286 (1996). Appellant argues that Ark. R. Civ. P. 41 cannot bar a minor child's right to continued support from a putative father. Arkansas Code Annotated § 9-10-102 (Supp. 1995) states, in part, that the Rules of Civil Procedure apply to actions for paternity, and there is no statute of limitations that restricts when a paternity action may be brought. Arkansas Rule of Civil Procedure 41(b) provides that when an action has been previously dismissed without prejudice, a subsequent dismissal operates as an adjudication on the merits. Appellant cites the controlling case of *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995), in arguing that protection of the minor child's right to continuing support outweighs the application of Arkansas Rule of Civil Procedure 41. *Id.*

In *Davis*, the father of a minor child appealed the trial court's denial of his motion to dismiss pursuant to Ark. R. Civ. P. 41 because the court had previously dismissed the same paternity action with prejudice. *Id.* The Office of Child Support Enforce-

ment had initiated three actions for paternity and support relating to the same minor child against the putative father. In affirming the actions of the Washington County Chancery Court, the supreme court held that in balancing the application of Rule 41 against the public policy that a minor's right to support cannot be permanently settled by a parent, the scales tip heavily in favor of protecting the minor's well-guarded right to continued support as the welfare of the child is paramount. *Id.* at 356, 908 S.W.2d at 652 (citing *Muncrief v. Green*, 251 Ark. 580, 473 S.W.2d 907 (1971) and *Storey v. Ward*, 258 Ark. 24, 523 S.W.2d 387 (1975)). The chancellor's ruling granting the motion to dismiss would have served to bastardize the minor child, contravening state public policy. *Storey, supra.*

In this case the chancellor made a finding that Blue had been uncooperative, and that appellee had been most cooperative throughout the proceedings. Because the dismissal with prejudice is void under the holding in *Davis*, it does not bar future proceedings. Therefore, we modify the chancellor's ruling to dismiss appellant's paternity action without prejudice, and affirm.

Affirmed as modified.

JENNINGS and BIRD, JJ., agree.

Donnie Wayne LOFTON *v.* STATE of Arkansas

CA CR 96-188 944 S.W.2d 131

Court of Appeals of Arkansas
Division II and III
Opinion delivered May 7, 1997

Jan Thornton, for appellant.

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

ANDREE LAYTON ROAF, Judge. Donnie Wayne Lofton was convicted in a jury trial of manslaughter for causing the death of the twenty-one-month-old son of his live-in girlfriend, and was sentenced to ten years' imprisonment. He raises two points on appeal. He first argues that the trial court erred in denying his motion for directed verdict. He also contends that Judge Sam Pope should have recused and not presided over his trial because Judge Pope had been the prosecuting attorney during the initial investigation into the death of the child. We are unable to reach the merits of Lofton's first point because his motion for directed verdict addressed only the charge of first-degree murder. We further hold that Judge Pope did not abuse his discretion in declining to recuse, and affirm the conviction.

On November 13, 1994, twenty-one-month-old Christopher Chase Fleming received a blunt trauma injury to his head that resulted in his death two days later. A jury determined that the injury was caused by Lofton, in whose trailer the child had been living along with his mother and brother. The source of the injury as well as the exact time it occurred was controverted at trial.

A warrant for the arrest of Lofton was authorized by Judge Sam Pope and issued on January 24, 1995. Lofton was arrested on January 25, 1995, and released on $25,000 bond set by Judge Pope on February 1, 1995. The information charging Lofton with first-degree murder was filed May 18, 1995. The case was tried before Judge Pope on July 20, 1995. Pope had been the prosecutor until December 31, 1994, and his office had been involved in the early investigation into the child's death. The judge set June 30th as a deadline for filing pretrial motions so that they could be heard on July 3rd. After initial jury orientation on July 18th, but before jury selection, Lofton moved to have Judge Pope recuse due to his former office's involvement with the case during the time before he became circuit judge. The judge heard and denied the motion, stating in essence that it was offered too late, and that he recalled no direct involvement in the investigation and could be fair in the case.

At trial, the State produced the victim's five-year-old brother as an eyewitness. After the court determined his competency to testify, he stated that he observed Lofton throw Christopher on the couch and that the child hit his head on the wooden arm, causing him to cry for a long time. Expert medical testimony indicated that the fatal injury was consistent with hitting a smooth surface like the wooden arm on the couch.

Lofton adduced testimony that Christopher had fallen from a porch at his grandmother's home several days previously. Christopher's mother, Kinda Fleming, stated that Lofton told her that Christopher had fallen from his porch while she was away at a video rental store on the day the fatal injury allegedly occurred. The time of the injury was brought into question by Fleming's statements to emergency medical personnel that the child had been fine all day up to and including when Lofton had put him to bed. Fleming indicated that she became aware of a problem only after she awoke to the sound of Christopher's labored breathing, and found he had an elevated temperature. Expert medical testimony indicated that the injury would have caused the child severe distress for several hours before he was brought to the emergency room.

Lofton moved for a directed verdict on the charge of first-degree murder at the close of the State's case, and for a directed verdict on the charges of first- and second-degree murder at the close of all the evidence. The motions were denied, and he was convicted of manslaughter and given a ten-year sentence.

1. Directed verdict

Lofton argues that the trial court erred in denying his motion for a directed verdict at the end of the State's evidence and at the end of all the evidence. However, the State asserts correctly that because Lofton's motion for a directed verdict at the close of the State's case addressed only first-degree murder, he has not preserved the issue of whether there was sufficient evidence to convict him of manslaughter. In *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996), the supreme court held that in order to preserve for appeal the issue of sufficiency of the evidence, the defendant must have addressed the lesser-included offense he was convicted of by name or by the culpability required. Because Lofton failed to challenge the sufficiency of the evidence for manslaughter at the close of the State's case and at the end of all the evidence, his argument on this point is procedurally barred.

2. Recusal

Lofton also contends that the trial court erred when it denied his motion asking that the court recuse. As an initial matter, the State asserts that this argument is not preserved for appeal because the motion for recusal was untimely. Although the motion was filed well after the deadline set by the trial court for the filing of pretrial motions and only two days before Lofton's scheduled trial date, the trial court heard the motion on its merits before denying it.

In Arkansas, the state constitution provides the grounds for the disqualification a judge: "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, . . . or in which he may have been of counsel . . . ." Ark. Const. art. 7, § 20. While disqualification of a judge may be waived, ignorance of the grounds for disqualification cannot con-

stitute such a waiver, and if a party discovers the grounds after the trial has been completed, it is grounds for reversal on appeal. *See Byler v. State*, 210 Ark. 790, 197 S.W.2d 748 (1946). Consequently, we cannot conclude that the motion was not properly before the trial court or that the trial court's ruling on it was not properly preserved for review.

As to the merits, Lofton cites Canon 3E(1) of the Code of Judicial Conduct as authority for his assertion that Judge Pope should have disqualified himself from the proceeding. It states in pertinent part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . .
>
> (b) the judge served as a lawyer in the matter of controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.

Arkansas Code of Judicial Conduct, Canon 3E(1).

Lofton contends that because Judge Pope's term as the elected prosecutor coincided with the pendency of the investigation from November 13 to December 31, 1994, he became privy to certain information received in the prosecutor's office during this period. Lofton submits that four documents are evidence of the personal involvement by Judge Pope in the investigation into Christopher's death: 1) a notice of child maltreatment form issued by ADHS dated November 14, 1994, and addressed to Sam Pope; 2) investigation notes prepared by Bill Setterman dated November 17, 1994, indicating that Setterman told Chief Deputy Prosecuting Attorney Joe Wray that Lofton had lived with two other women whose small babies died; 3) a request from Setterman to "Sam or Joe" dated November 21, 1994, for a subpoena duces tecum to Ashley Memorial Hospital for all records of Christopher and the two other infants who died; and 4) a subpoena issued by Joe Wray on December 16, 1994, to G and W Family Clinic for treatment records of Christopher since his birth.

Lofton further notes that Judge Pope granted the arrest warrant on January 24, 1995, after Municipal Judge Reid Harrod failed to find probable cause and suggests that, while it is not evidence of actual bias, this act puts into question Judge Pope's impartiality. The State contends in response to Lofton's arguments that the prosecutor's office merely received the four documents listed by Lofton, and that they are not evidence of Judge Pope's personal involvement in the investigation. Moreover, the State contends that no "case" existed against Lofton until he was arrested on January 25, 1995, and consequently, Judge Pope did not serve as a lawyer in the prosecution of Lofton.

We do not agree with Lofton's argument that Canon 3E(1) of the Arkansas Code of Judicial Conduct provides the basis for reversal of his conviction. Judge Pope denied any involvement in the investigation into Christopher's death, and even if his deputy, Joe Wray, was directly involved during the relevant period, the commentary to Section 3E(1) states:

> A lawyer in a governmental agency does not ordinarily have an association with other lawyers employed by the agency within the meaning of Section 3E(1)(b) . . . A judge formerly employed by a governmental agency, however, *should* disqualify himself . . . in a proceeding if the judge's impartiality might reasonably be questionable because of such association.

Moreover, the preamble to the Code of Judicial Conduct states that the Code should be applied "consistent with constitutional requirements, statutes . . . [and] decisional law" and "construed so as not to impinge on the essential independence of judges in making judicial decisions." Significantly, the preamble further provides:

> The Code is designed to provide guidance to judges and to provide for a structure for regulatory conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

We thus turn to the decisional law involving former prosecuting attorneys who have later served as trial judges in pro-

ceedings in which their impartiality has been questioned. We first observe that in construing Canon 3E(I), Arkansas appellate courts have stated that there is a presumption of impartiality, and the party seeking disqualification has the burden of proving otherwise. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996); *Gentry v. State*, 47 Ark. App. 117, 886 S.W.2d 885 (1994). Furthermore, the decision to recuse is within the trial court's discretion and will not be reversed absent abuse. *Turner, supra.* An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court. *Turner, supra.* In *Turner*, the supreme court stated:

> We initially observe on this point that there was no showing by Turner that he was treated unfairly in the trial of this matter. In fact, in Turner's reply brief, his counsel admitted that Turner was treated fairly at trial.

Id. at 244, 926 S.W.2d at 847.

Although *Turner* involved a trial judge who had prosecuted the appellant for other crimes before taking the bench, Lofton has likewise not alleged actual bias in his brief or asserted that he was treated unfairly by Judge Pope in the trial of his case.

Furthermore, we have not discovered any decisions which suggest that Judge Pope's recusal was mandated in this case. In *Fisher v. State*, 206 Ark. 177, 174 S.W.2d 446 (1943), the supreme court held that a trial judge who signs the information or criminal indictment as prosecuting attorney has been "of counsel," and is disqualified to preside in the trial of the case under the Arkansas Constitution. However, Lofton was not arrested and the information was not filed against him while Judge Pope served as prosecutor and we do not find that he had been "of counsel" in Lofton's case under the holding of *Fisher.*

In *Jordan v. State*, 274 Ark. 572, 626 S.W.2d 947 (1982), the supreme court held that a trial judge who formerly prosecuted a defendant on three of four felony convictions used to enhance punishment is not disqualified under Ark. Const. art. 7, § 20, because the prohibition against his presiding in a case in which he was "of counsel" relates to the case being tried. However, Jordan also alleged actual bias, and the court stated that the fundamental issue was whether under the circumstances the

judge's impartiality might reasonably be questioned, pursuant to Canon 3 of the Code of Judicial Conduct, and held that there was no objective intimation of bias or prejudice in the proceedings. Here, Lofton argues that Judge Pope based his refusal to recuse on "time constraints" and states that it can be assumed that Judge Pope's caseload was heavy and that his docket was full. Although Lofton questions Judge Pope's authorization of the arrest warrant, he acknowledges that he could not show that Judge Pope was biased or prejudiced in any way at the hearing on his recusal motion, and states that his concern is with the "appearance of impropriety or conflict of interest." Lofton does not argue actual bias, and, as in *Jordan*, we do not find any objective intimation of bias or prejudice. Moreover, in *Jordan*, the court stated that it regarded the appellant's allegation of the "appearance of bias" as subjective.

We conclude that Judge Pope's recusal was not mandated by either Canon 3E of the Code of Judicial Conduct or Ark. Const. art. 7, § 20, and that the decision to recuse was within the discretion of the trial court in this instance. As Lofton has not alleged that Judge Pope was biased or unfair in the proceedings, we cannot say that his refusal to recuse was an abuse of discretion.

Affirmed.

ROBBINS, C.J., and PITTMAN, ROGERS, and MEADS, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting.

> *The proper administration of the law requires not only that judges refrain from actual bias, but also that they avoid all appearances of impropriety.*

City of Jacksonville v. Venhaus, 302 Ark. 204, 788 S.W.2d 478 (1990) (citing Bolden v. State, 262 Ark. 718, 561 S.W.2d 281 (1978).

> *Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety . . . . The test for appearance of impropriety is whether the conduct would create in reasonable minds*

> *a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.*
>
> *Commentary to Canon 2, Section A, Arkansas Code of Judicial Conduct.*

Although I agree with the majority that we cannot reach the merits of Lofton's first point because his motion for directed verdict only dealt with the charge of first-degree murder, and while I do not question the sufficiency of the evidence to convict appellant of manslaughter, I respectfully disagree with the decision affirming Judge Pope's failure to recuse. The decision to affirm ignores a cardinal principle of justice: that the decision-maker avoid even the appearance of impropriety. Indeed, our decision essentially renders the requirement that a judge disqualify in a proceeding in which his impartiality *might reasonably be questioned* to mean that even when impartiality might reasonably be questioned, a refusal to recuse based on these facts is not an abuse of discretion. This reasoning ignores the realities of our trial process. It also disregards the power imbalance facing the litigant who reasonably questions the impartiality of a trial judge before trial, but lacks proof of actual bias or prejudice. Finally, I cannot reconcile the result in contrast to the standard practice of dismissing prospective jurors from jury service in trials "for cause" upon similar proof.

The law does not guarantee perfect trials, meaning trials without legal errors. However, the law guarantees to each person a trial before a decision-maker whose impartiality is beyond reasonable dispute. That is the obvious purpose of the provision in the Arkansas Constitution that prohibits judges from presiding "in the trial of any cause in the event of which he may be interested, . . . or in which he may have been of counsel . . . ." Ark. Const. art. 7, § 20. The Arkansas Code of Judicial Conduct and its canons also apply to judicial conduct in criminal cases. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). Canon Two of the Code states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." This high regard for impartiality is also why Canon 3E(1) of the Code of Judicial Conduct provides that a judge *shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.* The preamble to the Code states that when "shall" is used in the

text, it is intended to impose binding obligations that can result in disciplinary action if violated. Whether one refers to such ancient legal codes as the writings of Moses, those of ancient philosophers, or more recent authorities on legal ethics, avoidance of the appearance of impropriety is central to every justice system in the history of human civilization. The idea that judges should avoid even the appearance of partiality or favoritism is so deeply rooted in our sense of justice that we do not require proof of actual bias or prejudice toward litigants as the sole basis for disqualifying jurors or judges. Rather, disqualification is mandated if reasonable questions may be asserted concerning the impartiality of a judge or prospective juror.

The majority decision disregards this basic aspect of justice by emphasizing the fact that Lofton has not shown that the trial judge demonstrated actual bias or prejudice. That fact does not address the real issue. Justice demands that the trial system be trustworthy, even if it is not otherwise perfect. Judges may err on legal rulings even when there are no reasons to question their impartiality, and judges whose impartiality might reasonably be questioned may conduct trials without actually manifesting bias or prejudice. The issue is not whether a judge whose partiality might reasonably be questioned has been shown to be biased or prejudiced in a proceeding; rather, the issue is whether a judge whose partiality might reasonably be questioned should even conduct the proceeding in the first place.

There were substantial reasons to question the impartiality of the trial judge in Lofton's case. This homicide case involved the death of a twenty-one-month-old boy from a blow to his head allegedly caused when Lofton threw the boy onto a couch where the boy's head struck a wooden arm. The trial judge was prosecuting attorney in Ashley County when the infant died. After the injury occurred, the notice of child maltreatment issued by the Arkansas Department of Human Services was addressed to "Sam Pope, Prosecuting Attorney." The medical examiner addressed a letter to Pope, in his capacity as prosecuting attorney, concerning the cause of death. On or about November 21, 1994, an investigator submitted a request to "Sam or Joe" (Pope's chief deputy prosecuting attorney), for a subpoena *duces tecum* so that records

could be obtained related to the death of the boy in this case as well as two other infants who had died while Lofton had lived with their mothers. The subpoena *duces tecum* was issued by Joe D. Wray, Chief Deputy Prosecuting Attorney, under Pope's name, to obtain the medical records for the victim in this case. Even if Pope lacked actual knowledge about the results of these inquiries, the facts plainly show that investigative issues and information were addressed to him in his official capacity as prosecuting attorney, and that his chief subordinate acted on it.

One must then consider whether these factors might reasonably cause one to question the impartiality of a person in Judge Pope's position. If a layperson had been involved in a similar situation, there is no doubt that he or she would have been disqualified from jury service in this case without any requirement that actual bias or prejudice be shown. Indeed, virtually every jury trial in Arkansas begins with the trial judge asking the prospective members of the jury whether they are acquainted with the facts of the case to be decided and whether they have a current or previous relationship with one of the parties. Although mere general knowledge that a crime allegedly occurred does not disqualify one from serving as trier of fact, the majority has not cited one case where a former prosecutor has been upheld in serving as judge or juror *in the same case* that his office investigated before he assumed judicial office. Nobody suggests that an employee from the prosecutor's office who changed jobs between the time of the investigation and the trial would have been deemed an impartial observer so as to qualify as a juror at Lofton's trial.

The State argues that Judge Pope was not personally involved in the investigation merely because the prosecutor's office received the previously-mentioned documents, and that there was no case against Lofton until his arrest on January 25, 1995, twenty-five days after Judge Pope's tenure as prosecuting attorney ended. The "no case" argument is unpersuasive. The police and prosecuting attorney's office were investigating Christopher Fleming's injury as a possible crime beginning as early as November 14, 1994 (the day after he sustained the head injury and one day before he died), based on the notice of child maltreatment that was addressed to "Sam Pope, Prosecuting Attorney," from the Department of

Human Services. Within a week after Christopher died, the investigation had widened to include an effort to subpoena the medical records related to two other children who died while Lofton lived with their mothers. The prosecutor's office was clearly pursuing leads that it considered incriminating against Lofton while Judge Pope was prosecuting attorney.

The office of prosecuting attorney involves the proprietary duty of assisting in the investigation and prosecution of suspected criminal activity. Homicide cases receive top priority, and the normally intense investigative and prosecutorial focus of that office in homicide cases is heightened even more for cases involving suspected child abuse. This case attracted considerable notoriety in Ashley County, as one might reasonably expect. One might also reasonably expect that even a prosecuting attorney whose tenure was about to end would not have been ignorant or disinterested about the fatality, the growing investigation, and the role of his office in it. That reasonable expectation is confirmed by the fact that investigative inquiries were routed to Pope as prosecuting attorney and acted upon by his chief deputy. These factors would cause one to reasonably question the impartiality of the former prosecutor who became judge to preside over the trial of the person accused of killing a child by throwing him onto a piece of furniture.

It is certainly true that the Code of Judicial Conduct should not be applied in ways that unreasonably impinge on the ability of judges to serve with independence from unwarranted influences, and that the Code is not intended or designed to serve as a basis for civil liability or criminal prosecution. I also recognize that the Code does not further its essential purpose if trial lawyers are permitted to invoke it to gain a tactical advantage or "judge-shop." These realities do not justify appellate courts in disregarding the plain language of a rule that mandates a judge's recusal in a proceeding where his impartiality might reasonably be questioned and treating the failure to recuse as something other than an abuse of discretion. The State has not shown that Judge Pope's recusal would have been tactically advantageous to the defense, and the record does not justify that conclusion.

The abuse-of-discretion standard applied to trial judge rulings on motions for recusal serves a valuable purpose. Yet the goal of protecting the independence of judges from unreasonable challenges is not advanced by using the standard to shield judges from the very kind of conduct that would disqualify a layperson from serving on a jury, and that the Code of Judicial Conduct defines as mandating recusal. Trial judges possess great power, including power to issue search warrants, issue arrest warrants, impose bail conditions, and decide pre-trial disputes about the evidence that prosecutors hope to present to show guilt even before trial occurs. Even when a case is tried to a jury, the trial judge decides evidentiary issues that are often reviewed only on the abuse-of-discretion standard.

Where reasonable questions arise about the impartiality of a trial judge, the concerned litigant faces a particularly difficult problem. Only the judge in question can hear and grant a motion to recuse. However, an unfavorable ruling on a recusal motion is not ordinarily subject to interlocutory appeal. Therefore, the accused person who reasonably questions the impartiality of a trial judge based on clear proof that the trial judge served as prosecutor during the investigation of the matter over which he now presides must, under this decision, make a motion to recuse, and then have the former prosecutor preside over the trial of the very proof that his former office assembled under his supervision. The judge whose impartiality might reasonably have been questioned based on previous association with the prosecution in the case is the same person who will determine the fitness of prospective jurors, some of whom may deserve disqualification for having relationships equal to the relationship that the judge had. Where there are challenges to the proof, the accused must wonder how the judge can be impartial about the fruit of his former employment. If the accused challenges the trial judge on the ground of bias or prejudice, he does so knowing that the same person whose impartiality warranted questioning before trial will not likely view a direct allegation of favoritism or prejudice during the trial as an impartial observer. Throughout the trial, everyone will know that the former prosecutor, *now* judge, will be responsible for significant judgment calls ranging from whether to direct a deadlocked jury to

continue deliberations or declare a mistrial, whether to accept a jury recommendation on sentencing, whether to grant defense motions for directed verdict or new trial, and whether to permit post-conviction release pending appeal. The issue is not whether the former prosecutor will make accurate legal rulings as trial judge; the issue is whether having the former prosecutor preside over the case at all is fair given these realities.

It is unfortunate that we do not recognize the inherent unfairness in holding that one party to a trial must accept as judge a person who headed the agency that investigated and now prosecutes the very case that he will be required to defend. It is unrealistic to believe that the average citizen will not question why appellate judges are unwilling to declare unfair what our own ethical code calls improper, and what we recognize as just cause for excusing laypersons from jury service. If Lofton had been tried by a different judge with the same result, no one could question the fairness of the process, even if they disagreed with the outcome. Regrettably, our decision will do nothing to encourage judges to recuse in similar future situations, and does nothing to remove the suspicion that whatever one thinks about the outcome in this tragic case, the process was unfair.

I respectfully dissent.

BOARD of COMMISSIONERS of Little Rock Municipal Water Works *v.* Grady N. ROLLINS and Jeane Rollins, His Wife; Ewald J. Graf and Carol Graf, His Wife; H. Grady Miller, Jr., and Mary Ann Miller, His Wife; and James Lee Eubanks

CA 96-49 945 S.W.2d 384

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 14, 1997

Gill Law Firm, a professional association, by: *John P. Gill* and *C. Tad Bohannon*, for appellant.

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Christopher O. Parker*, for appellees.

SAM BIRD, Judge. As part of a project to preserve water quality in Lake Maumelle, the Board of Commissioners of Little Rock Municipal Water Works (LRMWW) filed an application for condemnation of 26.7 acres within the Lake Maumelle watershed. Lake Maumelle is used to supply drinking water for residents of Little Rock. The property was owned by Grady N. Rollins and Jeane Rollins, his wife; Ewald Graf and Carol Graf, his wife; H.

Grady Miller, Jr., and Mary Ann Miller, his wife; and James Lee Eubanks.

LRMWW filed its application for condemnation on July 23, 1993, alleging that it was proceeding pursuant to Ark. Code Ann. §§ 18-15-301 — 410 (1985). With its application, LRMWW tendered to the clerk of the court a check for $133,500, the amount that it estimated to be the fair market value of the property. However, the check was not accepted by the clerk and, upon inquiry by the appellees' attorney, the appellees were informed that there were no funds on deposit. Pursuant to an order of the court entered on January 25, 1994, the clerk accepted LRMWW's check into the court's registry, but neither the appellees nor their attorney were provided with a copy of the order or given notice that the deposit had been accepted. Therefore, the funds were not withdrawn by the appellees.

The appellees answered the condemnation application, alleging that LRMWW did not have the authority to condemn the property, that the Circuit Court of Pulaski County lacked jurisdiction, that the taking was unnecessary and unconstitutional, and that the property was valued at more than $133,500.

On December 1, 1994, the condemnation application went to trial. Both parties retained appraisers who testified as expert witnesses about the value of the land. Appellees' expert valued the land at $10,000 per acre. LRMWW's expert valued the land at $4,500 an acre. One of the owners valued the land at $12,000 an acre. The court refused to permit cross-examination of the appellees' expert witness about alleged mistakes made by her in prior appraisals of other tracts of land that were not used by the expert in determining the value of the subject land, and about which she had not testified on direct. The jury valued the property as of July 23, 1993, at $5,900 an acre and awarded the appellees $157,530.

On December 20, 1994, LRMWW deposited an additional $24,030, which was the difference between their initial deposit of $133,500, and the jury award of $157,530. The appellees filed a motion seeking interest on the amount of the jury's verdict, and the court awarded appellees interest at the rate of eight percent per

annum on $157,530 from July 23, 1993, to December 1, 1994, and on $24,030 from December 1, 1994, to December 20, 1994.

LRMWW argues three points for reversal. First, it alleges that the trial court erred in determining that July 23, 1993, was the date of taking of the property. Second, it asserts that the trial court erred in awarding appellees interest. Finally, it alleges that the trial court erred when it limited the appellant's cross-examination of the appellees'expert witness.

We find no error and affirm.

I. Date of Taking and Determination of Interest

The first two points will be discussed together since they are related. Appellees contend that the date of taking of the land by LRMWW was the date the application for condemnation was filed, July 23, 1993, and that they are entitled to receive interest on the amount of the jury's verdict from that date until the judgment is paid. On the other hand, LRMWW contends that since it did not request an order of entry at the time it filed its application and since the appellees continued to have possession, use, and enjoyment of the land up until judgment was entered (by which date appellant had already paid the full amount of the jury's verdict into the registry of the court), it is not liable for the payment of any interest. In short, LRMWW argues that the date of taking is the date that final judgment was entered (June 13, 1995), whereas the appellees argue that the date of taking is the date the condemnation action was commenced (July 23, 1993).

It is well settled that in condemnation proceedings, interest shall be paid for the period between the date of taking and the final payment of the money due. *Arkansas State Highway Comm'n v. Stupenti*, 222 Ark. 9, 257 S.W.2d 37 (1953). Interest is designed to give a property owner the full value of the land as if the property owner was paid the full value at the time of taking. *Wilson v. City of Fayetteville*, 310 Ark. 154, 835 S.W.2d 837 (1992). Therefore, it is necessary to determine the date of taking in order to determine how much, if any, interest is due.

The determination of the date of taking is a fact issue and the trial court's finding should not be reversed unless it is clearly against the preponderance of the evidence. *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997); Ark. R. Civ. P. 52(a). The judge made a factual finding that July 23, 1993, was the date of taking and that the jury should value the property as of that date. In addition, in ruling on an objection by appellant, the judge barred any evidence as to sales that occurred after July 23, 1993.

Under Arkansas law, the date of taking may be established by different methods, depending upon the circumstances of the case. It may be determined by the date entry is made upon the land, *Stupenti, supra*; it may coincide with the date of valuation of the property, *Arkansas State Highway Comm'n v. Choate*, 256 Ark. 45, 505 S.W.2d 731 (1974); it may be determined by the date of the Order of Entry, *Greig v. Crawford County*, 256 Ark. 202, 506 S.W.2d 523 (1974); or the date of taking might be determined to be the date the petition is filed, *United States v. Herring*, 750 F.2d 669 (8th Cir. 1984); *Newgrass v. Railway Co.*, 54 Ark. 140, 15 S.W. 188 (1891). The Arkansas Supreme Court has stated that when there is "any invasion of private property by lawful authority for a public use and the property is damaged thereby, there is a taking within the meaning of our law, and, where the damage is such as to deprive the owner of the beneficial use of his property, he may require that its value be paid to him." *Keith v. Drainage Dist. No. 7 of Poinsett County*, 183 Ark. 384, 392, 36 S.W.2d 59, 62 (1931).

The date of taking is frequently determined by the date of entry upon the land, and interest is awarded from that date. *Stupenti, supra*. This rule is most often applied when the Arkansas State Highway Commission enters upon the land to make improvements and the date of entry becomes the date of taking. *Stupenti, supra*; *Arkansas State Highway Comm'n v. Security Savings Ass'n*, 19 Ark. App. 133, 718 S.W.2d 456 (1986). The date of entry was determinative in these cases because the property owners were deprived of the land when the State entered upon the land to begin highway construction or road improvements. *Stupenti, supra*.

Appellant contends this rule should apply in the case at bar; therefore, they argue, appellees are not entitled to interest because they were not deprived of the possession or use of their land before the judgment was entered. Appellant argues that if the appellees are not deprived of the use of their land, then they are not entitled to interest. *Arkansas State Highway Comm'n v. Vick*, 284 Ark. 372, 682 S.W.2d 731 (1985); *Housing Authority of Little Rock v. Rochelle*, 249 Ark. 524, 459 S.W.2d 794 (1970). Appellant cites *Arkansas State Highway Comm'n v. Security Savings Ass'n*, *supra*, for the rule that interest is due to a landowner only if the landowner is deprived of the use of property before the judgment was entered.

However, the facts in this case distinguish it from these condemnation proceedings in which entry is made immediately upon the land. In the case at bar, the land was undeveloped and was taken not for the purpose of construction, but for the purpose of preserving the land in its natural state. LRMWW was not going to engage in construction, develop or change the land. While it may or may not be true that the appellees continued to have the use and enjoyment of the property after the filing of the application for condemnation, it is certainly true that from the time that the application was filed, the appellees' rights to use and enjoy the land were no greater than the rights of the public in general. Clearly, after appellant's application was filed, the appellees did not have the right to use the property in any manner that was inconsistent with the purposes for which it was being taken by LRMWW. It is equally clear that from and after the filing of its condemnation application, LRMWW became the beneficial owner of the property, with the only issue remaining unresolved being how much it would be required to pay. For all intents and purposes, appellees' beneficial use of the property was lost when appellant filed its application, notwithstanding that appellees still could, if they wanted to, look at and walk on the property.

The provisions of Ark. Code Ann. §§ 18-15-301 — 410 contemplate that the condemning authority will have the need to enter upon the land for the purposes of commencing construction or otherwise advancing its purpose for taking the land. However, when, as here, there is no need for the condemning authority to

enter upon the land to accomplish its objective (to preserve the land for the protection of the public water supply), that purpose is accomplished when the application for condemnation is filed.

If the land is valued as of July 23, 1993, but the owners are stripped of the privileges of ownership and deprived of the purchase price, without payment of interest, for almost two years, then the owners would receive less than full value for their land, and less than just compensation within the meaning of Ark. Const. art. 2, § 22. Therefore, the date-of-entry standard is inapplicable in this case, and the issue becomes when is the date of taking of a piece of property that will not be changed from its natural state and upon which entry will not be made. We find that in this case, even though no physical entry was made upon the land, the property was appropriated for public use on the date the condemnation application was filed and the date the valuation of the property was made.

Our holding is consistent with the holding of the Arkansas Supreme Court in *Newgrass*, *supra*, where the court recognized that many ways exist for determining the date of taking and that states have adopted various rules. In *Newgrass*, the court adopted the rule that the date of taking is determined from the date the petition was filed and not from the date of entry. When adopting this rule, the court stated that it "had the advantage of fixing a certain and definite time with reference to which the estimate must be made. Besides the corporation has the right to acquire the land; when it filed its petition, it declares its purpose to appropriate it and to render just compensation to the owner." *Id.* at 144, 15 S.W. at 189.

In the case at bar, even though no actual entry was made upon the land, the date of taking is determined from the date the petition was filed, which is the same date that was used to determine the value of the land. The appellees were deprived of the beneficial use of their land from the date the petition was filed and the date the land was valued, and they are entitled to interest from that date. The judge's factual finding that July 23, 1993, was the date of taking is not clearly erroneous.

There is another reason we believe that the trial court was correct in awarding interest in this case. The application for condemnation was filed on July 23, 1993, and a check for the estimated value of the property was tendered with the filing. However, the check was not accepted until January 25, 1994, more than six months after the petition was filed, but the owners were not informed of the deposit nor provided with a copy of the court's order directing the clerk to accept the deposit. The appellant cites *Karam v. Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976), for the proposition that the appellees had an affirmative duty to inquire about the pleadings and orders in the case, and argues that appellees should have made more diligent inquiries of the clerk as to whether the funds had been deposited. We do not agree that *Karam* is applicable here.

In *Karam*, following a bench trial the defendant was not provided with a copy of a judgment that had been entered against him, and he did not become aware of the entry of judgment until after the time for appeal had expired. He appealed from an order of the trial court refusing to set the judgment aside. The supreme court said that where the defendant had been provided with a copy of the court's findings and where the defendant thereafter made no inquiries about the status of the entry of judgment on those findings for a period of eight months, the defendant was in no position to contend that he had been the victim of an unavoidable casualty such as to require the trial court to set aside the judgment. *Karam*, *supra*.

The situation in *Karam* is clearly distinguishable from the case at bar. Here, appellees' counsel did inquire of the clerk shortly after the application was filed as to whether any funds had been deposited, and he was informed that none had been. We do not believe that it was the obligation of the appellees to inquire daily at the clerk's office whether appellant had deposited the funds as it alleged in its application that it had done. To the contrary, Ark. Code Ann. § 18-15-409(a)(1987) requires that, after the funds are deposited in the registry of the court, "[t]he court shall thereupon immediately enter an order giving the municipality possession of the property . . ." and that such order "shall be immediately served upon any person of adult age found residing

upon the premises . . . ." We think that it is significant that LRMWW purported to be proceeding under §§ 18-15-401 — 410 and deposited funds pursuant to § 18-15-409, but made no attempt to notify the appellees that its check had been accepted by the clerk for deposit into the court's registry on January 25, 1994. We think that this is a sufficient reason alone to award appellees interest.

II. The Limitation on Cross-Examination

The appellant argues that the court's limitations on the appellant's cross-examination of the appellees' witness amounted to an abuse of discretion. The general rule is that a judge has wide latitude in imposing reasonable restrictions on cross-examination based upon concerns about confusion of the issues or interrogation that is only marginally relevant. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994). Arkansas Rule of Evidence 611 states that the judge may limit the cross-examination to issues presented on direct examination or issues of credibility. We have held that in an eminent domain proceeding, the latitude allowed the parties in bringing out collateral and cumulative facts relating to value estimates is left largely to the discretion of the trial judge. *Arkansas State Highway Comm'n v. Julian Martin, Inc.*, 16 Ark. App. 288, 701 S.W.2d 389 (1985). This court will not reverse unless it finds a clear abuse of discretion by the trial judge in limiting the cross-examination of a witness. *Arkansas State Highway Comm'n v. Dean*, 247 Ark. 717, 447 S.W.2d 334 (1969).

Rhonda Weaver, the appellees' expert witness, had prepared two appraisals relating to the land in this case; the first one was prepared in March 1993, before this condemnation application was filed, and the second one was prepared especially for this case and completed only the day before the trial. The March 1993 report covered not only the land in this case but also a smaller tract of land that was the subject of another condemnation case. The March appraisal contained references to sales of other land that Weaver had not considered when she determined the value of the land involved in this case. However, the appraisal report she prepared the day before the trial, that covered only the 26.7 acres involved in this case, contained references to only those land sales

that she had considered when appraising the 26.7 acres. In her March appraisal, Weaver concluded that the land in this case was valued at $8,000 per acre.

At the trial, Weaver testified on direct examination about land sales referred to in her second report, and she stated that those sales formed the basis for her appraisal of the value of the land in this case, which she opined to be $10,000 per acre. LRMWW's counsel then sought to question Weaver on cross-examination about sales she referred to in her March 1993 appraisal about which she had not testified on direct examination and upon which she had not relied in reaching her opinion of the value of the land in this case. Appellees objected, contending that such questions were beyond the scope of direct examination, and the court sustained the objection.

The appellant argues that the judge abused his discretion by limiting the scope of direct examination and making the scope overly restrictive. The appellant states it wanted to introduce the March report to try to discredit the witness. The appellant contends that "counsel for LRMWW was not permitted to cross-examine appellees' expert witness about her first appraisal of the Property (prepared several months before trial and which had a lower value) or testimony by her in other trials." We do not agree. Appellant's contention that it was not permitted to cross-examine Weaver about the discrepancies between her first and second appraisal reports is not borne out by the record. To the contrary, the court indicated that it would allow appellant's counsel to ask Weaver if a previous report existed and whether, in the previous report, she arrived at a lower value. The judge said:

> Well, I kind of agree with you could ask her about, "Didn't you, at one point in time, arrive at an $8,000.00 per acre figure and you changed it to ten thousand?" But I have some problem saying, "And let's talk about these comparables" when they're not even in the record and she didn't consider them in this last appraisal.

The judge would not permit the testimony about the properties that she didn't testify to at the trial and didn't use in forming her opinion. Again, the judge ruled:

> You want to go in and say, well, let's talk about properties that you've furnished us that you didn't even use in this trial today and talk about your accuracy in those which didn't even form a basis as part of her opinion here. I don't have any doubt you could say, "Well, didn't you, at one time, arrive with a figure of $5,000 per acre or $3,000 per acre just three months prior to this date?"

The cross-examination that the appellant's counsel was not permitted to pursue related only to sales referred to in Weaver's first report, which she did not use in determining the land's value and which were not included among the sales she relied upon in arriving at her estimate of the fair market value of the land as set forth in her second appraisal. The judge found these matters to be collateral; therefore, he did not allow any cross-examination on them. The following dialogue occurred:

> THE COURT: But, boy, we could be here all day if we just started going off and finding other properties that she's appraised and starting to see if they're accurate and was there a house on that property or wasn't there a house on that property. It's collateral to this case . . . .
>
> MR. GILL (attorney for the appellant): Judge, it goes to credibility and the credibility is all that's at issue here. The jury's got to believe one of these appraisers or the other one, and that's all. And I'm —
>
> THE COURT: I'm not going to do it, John.

The appellant relies on three cases in arguing for reversal. First, the appellant relies upon *Dean, supra.* In *Dean,* the Arkansas Supreme Court reversed a lower court's decision because the trial judge improperly limited the scope of cross-examination by the appellant of an expert witness about real-estate sales considered by the expert that might have been comparable to the land that was being condemned. In *Dean,* the expert considered some 250 parcels of the land in arriving at a fair price. In trying to expedite the case, the judge limited the cross-examination to two to four of the tracts considered by the expert. *Id.* at 719-20, 447 S.W.2d at 336. The court reversed and held:

> The proper cross-examination of a witness is the most effective attack that can be made upon his credibility and the best means of diminishing the weight which might be accorded his testimony. A wide latitude is permitted in cross-examination as to questions tending to impeach the credibility of a witness or in eliciting matter for consideration of the jury in weighing the testimony.

Id. at 720-21, 447 S.W.2d at 336. However, in this case, the court was referring to allowing the appellant to cross-examine the witness on properties that the expert *had used* in determining what price was appropriate. The court was not referring to properties that were *not used* by the expert. The court quoted from *Coca-Cola v. Moore*, 246 F. 942 (8th Cir. 1917), which held that "[t]he testing of the probative weight of an expert's estimate of value necessarily requires a liberal latitude of inquiry into the factors and considerations *upon which each was based.*" (Emphasis added). *Dean*, 247 Ark. at 721, 447 S.W.2d at 337. Furthermore, the court would not have let the appellant cross-examine the witness on each of the 250 sales used by the expert in determining a price.

The appellant also relies upon *Arkansas State Highway Comm'n v. Lewis*, 258 Ark. 836, 529 S.W.2d 142 (1975), which held that the appellant should have been allowed to cross-examine an expert witness about admissions that his earlier testimony had proved to be wrong in a number of instances because "his credibility might well have been seriously impaired." *Id.* at 838, 529 S.W.2d at 143. However, in the case at bar, the appellant was allowed to cross-examine the witness as to earlier reports in which she came to a lower price. Appellant's counsel was not prohibited from questioning her about her earlier conclusion that the land had a different value, but was prohibited from asking about sales referred to in her first report that were not used in her determination of fair market value nor testified about by her on direct examination.

In the third case relied upon by appellant, *Arkansas State Highway Comm'n v. Pulaski Investment Co.*, 265 Ark. 584, 580 S.W.2d 679 (1979), the court held that an appellant should have been allowed to cross-examine a witness because "[H]is knowledge or lack of knowledge and his record on accuracy regarding the value of the property would go to the credibility to be given

his testimony as an expert witness." *Id.* at 587, 580 S.W.2d at 681. Again, the appellant in the case at bar was allowed to question Weaver about differing prices, but not the details of an earlier report that was not in evidence or used by the expert in determining her estimate of the land's fair market value. In the case at bar, the judge made it clear that he was not going to allow the appellant's counsel to delve into details about property sales referred to in an earlier report, which were not entered into evidence, were not testified about on direct, and were not used by the expert in forming her opinion. The trial court allowed appellant to question Weaver about her first appraisal and the discrepancies between it and her valuation of the land in her second appraisal. We cannot say that the judge's refusal was an abuse of discretion.

In summary, the date of taking is July 23, 1993, the date of the filing of the petition for condemnation and the date the property was evaluated. Therefore, the appellees are entitled to interest from that date. Furthermore, the court did not err in not allowing the appellant to impeach the appellees' expert witness on collateral issues that were not testified to on direct nor used by the expert in determining the value of the condemned land.

Affirmed.

JENNINGS and ROAF, JJ., agree.

ROBBINS, C.J., NEAL and GRIFFEN, JJ., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting. I agree with Judge Griffen's dissent on the issue of the trial court's limitations on cross-examination of appellee's witnesses and for that reason would reverse the decision of the trial court. However, contrary to Judge Griffen's position on the interest issue, I would also reverse the trial court's award of interest to appellees for a period of time prior to when appellees were dispossessed from the property.

I agree with the premise stated by the majority that interest should be paid to a property owner by the condemning authority between the date of taking and the date that payment of damages is made to the property owner. I suppose my disagreement is with the majority's view of when the "taking" occurred. I am of the

opinion that a taking occurs when a condemnor enters onto the land or has the right to so enter. This event should correspond to that date when the property owner loses his right to use and possess the property. The majority cites *Arkansas State Highway Comm'n v. Choate,* 256 Ark. 45, 505 S.W.2d 731 (1974), to show that the date of taking may coincide with the date of valuation of the property. The property in *Choate* was condemned under former Ark. Stat. Ann. § 76-533 et. seq. (now Ark. Code Ann. § 27-67-311 et. seq.), which provides that upon filing the declaration of taking and depositing the estimated compensation, the State immediately has not only the right of entry and possession but fee simple title as well. The State followed this procedure. Consequently, the taking and the valuation date of the property were one and the same, i.e., the date of filing.

The majority cites *United States v. Herring,* 750 F.2d 669 (8th Cir. 1984), and *Newgrass v. Railway,* 54 Ark. 140, 15 S.W. 188 (1891), as holding that the date of taking might be determined to be the date the petition is filed. In *Herring* the United States condemned property under the Declaration of Taking Act that vested title in the government immediately upon the filing of a declaration of taking provided that a deposit is made of estimated compensation. This the government did. Consequently, the taking did occur when the action was filed, but at the same time the government also acquired the right to possession of the property. In *Newgrass* the condemning railroad company had entered into possession of the condemned property prior to the date the condemnation action was filed. The supreme court held that, for purposes of valuing the condemned property under these circumstances, the measure of damages would be the value of the property as of the date the action was filed. As to interest on the damages assessed, the supreme court said, "*As the corporation has been in the enjoyment of the land,* the damages assessed will bear interest from the date of filing the petition." 54 Ark. at 148. (Emphasis added.)

In the case now before our court, there was no order of immediate possession entered by the trial court giving LRMWW the right to possession of the subject property as contemplated in Ark. Code Ann. § 18-15-409(a)(3). Appellees were not entitled

to an accrual of interest on their damages award until they were deprived of both the use of the land and the money representing its value. *See Wilson v. City of Fayetteville*, 310 Ark. 154, 162, 835 S.W.2d 837 (1992); *Arkansas State Highway Comm'n v. Vick*, 284 Ark. 372, 682 S.W.2d 731 (1985). Appellees were simply not deprived of the use of their land, nor was LRMWW entitled to enter onto this land, prior to conclusion of the trial on December 1, 1994.

Without an order of possession, LRMWW, as the condemning authority, did not "take" the subject property and become entitled to enter and possess it until trial and damages were assessed. Until trial, appellees continued to be the sole owners and had the exclusive right to possess and exercise all rights of ownership to the property. While the majority opines that after LRMWW filed their condemnation action the appellees' rights to use and enjoy the land were no greater than the rights of the public in general, no authority for such opinion is stated, and I submit that there is none. Appellees could farm the property or place the property to any other use that applicable zoning regulations would permit after the condemnation action was filed, just as they could before it was filed. The general public did not have any such similar right to use and possess the property.

I find no reason in logic or the law to give a property owner the windfall of having the use and enjoyment of his property and yet an interest accrual on the value of the property for the same period of time. I dissent from the trial court's award of interest prior to the trial.

WENDELL L. GRIFFEN, Judge, dissenting.

> The purpose of cross-examination . . . is not limited to bringing out a falsehood, since it is also a leading and searching inquiry of the witness for further disclosure touching the particular matters detailed by him in his direct examination, and it serves to sift, modify, or explain what has been said, in order to develop *new or old facts in a view favorable to the cross-examiner. The object of cross-examination, therefore, is to weaken or disprove the case of one's adversary, and break down his testimony in chief, test the recollection, veracity, accuracy, honesty, and bias or prejudice of the witness, his source of infor-*

> *mation, his motives, interest, and memory, and exhibit the improbabilities of his testimony.*
>
> —*Arkansas State Highway Comm'n v. Dean*, 247 Ark. 717, 447 S.W.2d 334 (1969) (emphasis added).

Although I agree that the trial court did not err in finding July 23, 1993, the date for taking, and that no error occurred in its decision awarding interest to the property owner appellees, I believe that the trial court improperly limited the scope of cross-examination of the appellees' expert witness. Thus, I would reverse and remand for new trial on that ground.

The issue arose when appellant's counsel was cross-examining the real estate appraiser retained by appellees. The expert witness, Rhonna Weaver, had testified during direct examination that the property involved in the condemnation case was worth $10,000 per acre, based on the sales of property that she considered comparable, as supported by a written appraisal report delivered to appellant's counsel the evening before trial. On cross-examination, counsel for appellant attempted to ask Weaver about another appraisal that she had prepared several months before trial. That appraisal was for appellees and included the subject property along with another parcel, contained comparisons of thirteen (13) different sales that were used to determine the value of both tracts, and assigned an appraised value to the property involved in the condemnation action of $8,000 per acre, $2,000 less than Weaver assigned in the later report and testified about on direct examination. Appellant's counsel attempted to cross-examine Weaver based on the thirteen (13) sales in the March 1993 appraisal report for the purpose of showing factual errors that she allegedly made in describing the comparison sales. After counsel for appellees objected, the trial judge sustained the objection and limited the scope of cross-examination to the comparison sales that Weaver listed in the appraisal report on which she relied during her direct examination. The trial court deemed the earlier appraisal report to be collateral, despite the fact that appellant's counsel did not attempt to introduce it into evidence.

I believe that appellant was entitled to attack Weaver's credibility by pointing to the first appraisal report and showing inaccu-

racies in it, despite the fact that the first appraisal report had not been introduced into evidence by appellees or mentioned by Weaver during her direct testimony. I see no error whatsoever in allowing an expert to be cross-examined about a different opinion that she has rendered covering the same property, especially in view of the fact that the sole issue involved in her testimony and the most important issue in this condemnation action was the value of the property that was taken.

In proffering the nature of the testimony that he would have attempted to elicit during the cross-examination, counsel for appellant indicated that the March 1993 appraisal report was inaccurate in several respects concerning the thirteen comparison sales on which it was based and about which Weaver had testified as recently as two weeks before the trial in this case. For instance, Weaver had testified that a comparison property had a view when it did not. She had testified that no structures were on another comparison property and that the sale of that property was an arms-length transaction; appellant's counsel proffered that, to the contrary, structures were located on that comparison property and that it was not an arms-length transaction because the buyer and seller were the same people. Concerning two other comparison properties listed in her March 1993 appraisal (sales 4 and 8) that included the property in this suit as well as other property, Weaver had testified two weeks before the December 1, 1994, trial in this action that the properties had been financed in a conventional arrangement; instead, counsel for appellant proffered that the sales had been seller-financed. In another instance, Weaver had testified that no structures were on a comparison property whose sale value had been used to reach her $8,000 per acre appraised value; counsel for appellant proffered that in fact, there was a barn and several other structures on the property, including a mobile home.

In yet another comparison sale included in the March 1993 appraisal, Weaver had testified two weeks before this trial that a parcel was located in Pulaski County, that the only structure on it was a house in poor condition, and that the property was not in agricultural production. However, counsel for appellant proffered that most of the property lay in Saline County. Instead of having a single house in poor condition, the property was the site of a

brick home, a barn, and silo. Instead of not being in agricultural production as Weaver had indicated in the March 1993 appraisal, the property produced blueberries, fruits, vegetables, pumpkins, and other crops. In another comparison property included in the March 1993 appraisal, Weaver had indicated that the sale was a cash transaction (counsel for appellant proffered that the sale was seller-financed), and Weaver had indicated that there was no water on the comparison parcel (appellant's counsel proffered that there was water service to the property).

The attempt to cross-examine Weaver based on the March 1993 appraisal report that contained a lower appraised value for the property involved in the condemnation proceeding did not involve a collateral question or collateral evidence. In the first place, the 1993 appraisal report was not offered into evidence in the 1994 condemnation trial. As such, it did not constitute hearsay evidence (an out of court statement rendered by the declarant offered to prove the truth of the matter asserted). Furthermore, appellant was entitled to attack Weaver's credibility and show that the March 1993 appraisal report was based on numerous inaccuracies. The jury should have been given this information so that it could properly evaluate Weaver's trustworthiness as a witness. Credibility and bias are never collateral matters, and the effort to cross-examine Weaver about her propensity to make errors in another appraisal that involved the same property was not an attempt to inject a collateral issue or matter into the trial. Even had appellant's counsel offered the appraisal report into evidence, it would not have been hearsay because it was a prior inconsistent statement about the value of the property involved in this lawsuit.

I would reverse and remand for new trial. As the supreme court stated in *Arkansas State Highway Comm'n v. Dean*, 247 Ark. 717, 447 S.W.2d 334 (1969), proper cross-examination of a witness is the most effective attack that can be made upon her credibility and the best means of diminishing the weight that may be accorded her testimony. A wide latitude is permitted on cross-examination as to questions tending to impeach the credibility of a witness or in eliciting matter for the jury to consider in weighing the testimony. Where testimony of a witness is opinion evidence, it is essential that opportunity for thorough cross-examination be accorded, and courts should be especially liberal in allowing full and complete examination of an expert witness. *Id.* at 720-21,

447 S.W.2d 336. In this case, Weaver's opinion testimony about her appraised value of the property deserved close scrutiny by the trier of fact because the lawsuit was primarily a dispute over how much the condemned property was worth. Weaver's reliability for accuracy, trustworthiness, and reliability concerning the way that she calculated value was definitely a valid issue for the jury to evaluate. The fact that she had prepared an appraisal report that included the property in this action in March 1993 and testified as recently as two weeks before the December 1, 1994, jury trial in this case that the property was worth $2,000 less than she contended that it was in the report that she testified about during direct examination were highly relevant issues bearing on Weaver's credibility. Indeed, one could surmise that Weaver's cross-examination two weeks before this trial, based upon the asserted inaccuracies and errors of the March 1993 appraisal, made appellees want to keep the alleged deficiencies in her appraisal protocol from being known by the jury, even if it had not caused her to prepare the appraisal that was delivered to appellant's attorney the night before trial. However, the jury deserved the chance to know that Weaver's $8,000 appraisal was not the only value that she had assigned, and that her $10,000 appraisal had serious defects. In fact, it is hard to conceive how the jury would not want to know that information as it weighed the conflicting appraisal opinions and evaluated Weaver's credibility.

Appellant should have been allowed to cross-examine Weaver about the one thing that mattered most — her capacity for accuracy in assessing the factors that bore on appraising the real estate that was condemned. The trial judge's ruling denied that opportunity to appellant, and meant that the jury was denied the opportunity to consider Weaver's opinion about value in light of her alleged propensity for misstatement and inaccuracy on the most material issue that her testimony involved. To that extent, the trial court denied the jury a full evaluation of Weaver's credibility and abused its discretion.

NEAL, J., joins in this dissent.

Benny HAWKINS and Claudia Hawkins *v.* HERITAGE LIFE INSURANCE COMPANY

CA 96-968 946 S.W.2d 185

Court of Appeals of Arkansas
Division IV
Opinion delivered May 14, 1997

Ponder & Jarboe, by: *Dick Jarboe*, for appellant.

Wood & Lockhart, PLC, by: *W. Kirby Lockhart*, for appellees.

TERRY CRABTREE, Judge. This case presents a question regarding insurance coverage. The appellants are the parents of the late Dwayne Hawkins. On November 4, 1988, Dwayne collapsed while playing in a Pocahontas High School football game. He was hospitalized and died thirty-nine days later without ever regaining full consciousness. During the period of his hospitalization, Dwayne was insured under an accident policy issued to the Pocahontas School District by the appellee, Heritage Life Insurance Company. The appellants filed a claim with Heritage, seeking benefits for medical expenses incurred during their son's hospitalization. Heritage denied the claim on the grounds that Dwayne's death was not "accident-related." As a result of that denial, the appellants filed suit against Heritage, seeking the maximum amount of medical expense benefits payable under the policy, plus a twelve percent penalty, interest, and attorney's fees. Heritage filed a motion for summary judgment, which was granted by the trial court. We reverse and remand for trial.

The standard of review in summary judgment cases is well-established. Summary judgment is an extreme remedy which should only be allowed when it is clear that there is no genuine issue of material fact to be litigated. *Johnson v. Stuckey & Speer, Inc.*, 11 Ark. App. 33, 35, 665 S.W.2d 904 (1984). The burden of sustaining a motion for summary judgment is on the moving party. *Moeller v. Theis Realty, Inc.*, 13 Ark. App. 266, 269-70, 683 S.W.2d 239 (1985). On appeal, we must view the evidence in the light most favorable to the non-moving party. *Undem v. First Nat'l Bank*, 46 Ark. App. 158, 162, 879 S.W.2d 451 (1994). It is our task to 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. *Johnson v. Harrywell, Inc.*, 47 Ark. App. 61,

63, 885 S.W.2d 25 (1994). With these criteria in mind, we undertake our review of the following facts, as revealed by the attachments to the appellee's motion for summary judgment and the appellants' response thereto.

At the time of his death, Dwayne Hawkins was an eighteen-year-old high school senior and a member of the Pocahontas High School football team. His medical history discloses that, during his sophomore and junior years of high school, he experienced two syncopal episodes, one during a track meet and one while he was lifting weights. The episodes were diagnosed, possibly incorrectly, as seizures. Dwayne was prescribed Dilantin and was told to take it every day. There is no evidence of a history of any other medical problems.

During the week before the November 4, 1988, football game, Dwayne had been ill with the flu, yet he recovered in time to dress out for the game. He did not start the game because, according to his father, he had suffered bruised ribs in a game two weeks earlier. However, he eventually entered the game and, according to Mr. Hawkins, was involved in several plays where he encountered physical contact. Mr. Hawkins recalls that Dwayne was participating on punt coverage and ran full speed down the field for over forty yards. At some point, Dwayne was sent into the game as a punter. After kicking the ball, he took a few steps and collapsed on the field.

Mr. Hawkins's account of these events is disputed. According to Coach David Williams, Dwayne was not allowed to start the November 4 football game because he had missed practice earlier in the week. In Coach Williams's affidavit, he states that he is positive that Dwayne was only in the football game for the one play during which he punted the ball and collapsed on the field. He further stated that he did not see Dwayne receive any contact during the play, nor did anyone ever tell him that they saw Dwayne get hit.

After his collapse, Dwayne was taken to the emergency room of the Randolph County Medical Center. The emergency room physician noted that the initiating factor behind Dwayne's collapse could not definitely be determined at that point. Dwayne was

stabilized and transferred to St. Bernard's Regional Medical Center in Jonesboro. The admission report noted that Dwayne had been participating in a high school football game, at which time he experienced a syncopal episode. The report stated that "[h]e received no apparent contact and was simply seen to take a few steps and collapse." The initial assessment of Dwayne's condition was probable hypoxic encephalopathy with the initiating event still uncertain. The possibilities listed included cardiac arrhythmia, seizure disorder, cardiac arrest secondary to bronchospasm, and asthma.

The day following Dwayne's admission to St. Bernard's, a cardiology consultation was performed by Dr. Michael Isaacson. According to Dr. Isaacson's report, "[n]o obvious contact such as bodily injury was noted prior to this collapse." The report further noted that Dwayne had failed to take his Dilantin for the last forty-eight preceding his collapse. Dr. Isaacson suspected sudden cardiac death as the initial explanation for the collapse rather than seizure activity.

Dwayne remained hospitalized until his death on December 13, 1988. The death summary prepared by the hospital declared that it was likely that the event which initiated Dwayne's collapse was ventricular dysrhythmia. The official discharge diagnosis was (1) acute hypoxic encephalopathy secondary to cardiopulmonary arrest; (2) pansinusitis; (3) recurrent ventricular arrhythmia. However, it was noted that the diagnosis could not be made with certainty.

Shortly after Dwayne's collapse and hospitalization, the appellants had submitted a claim to Heritage Life Insurance Company on an accident claim form. Under the portion of the form which asked the claimant to detail how the injury occurred, the following language appeared: "Heart failure and respiratory arrest (no contact)." The claim form was signed by Benny Hawkins on November 7, 1988.

On April 3, 1989, Heritage Life Insurance Company denied the appellants' claim for benefits. The denial was based on the fact that the policy provided medical expense benefits only if the insured received treatment because of an "injury." The term

"injury" was defined in the policy as "[b]odily injury or injuries resulting directly and independently of all other causes from an accident sustained while the Policy is in force as to the Insured Person and which results in loss covered by the Policy."

Four and one-half years after the denial of their claim, Mr. and Mrs. Hawkins filed the lawsuit which is the subject of this appeal. During the course of the lawsuit, the deposition of Benny Hawkins was taken. Mr. Hawkins testified that he remembered Dwayne being in the game for at least two plays other than the play on which he collapsed. He said that he saw Dwayne get hit on at least one of the downs. He also said that he had looked at a videotape of the game and that the tape confirmed his recollection. However, upon viewing the tape with the appellee's attorneys, he admitted that the tape did not clearly show Dwayne's participation in more than one play.[1]

Mr. Hawkins also stated in his deposition that he had once contacted Dr. Isaacson for an opinion on whether physical contact could have contributed to Dwayne's collapse. On July 26, 1991, Dr. Isaacson responded with a letter which contained the following language: "This letter is in regard to our recent telephone conversation of 7-26-91. At the present time, I suppose that prior physical contact could have, in some form or fashion, contributed to your son's collapse but again, these are only speculations on my behalf."

Dr. Isaacson's deposition was also taken during the course of the litigation. The doctor admitted that he did not know exactly what triggered Dwayne's collapse. His best guess was that Dwayne had experienced a cardiac arrest probably as a result of dysrhythmia, which caused a loss of oxygen to the brain. When asked about the possibility that physical contact or strenuous activity could have contributed to Dwayne's death, the doctor said the following:

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[1] The appellants state in their brief that the videotape clearly reflects that Dwayne had participated in a play previous to punting the football. Nothing in the record indicates that the tape was presented to the trial court as an exhibit. Neither has the videotape been furnished to this court on appeal. Therefore, we will not consider it as evidence on behalf of the appellants.

> Q. At this point, I don't know that anyone has seen anything on the films that would show that he was involved in any sort of physical contact, but if the testimony, when this case is tried, produces some testimony that he was involved in physical contact and assuming that he had some underlying cardiac condition, could that have contributed to the arrest?
> A. The possibility that it could have contributed I think has to be considered. I would expect it to be significant contact and contact involving the chest before you would really say that it could possibly had [sic] any contribution.
> Q. What about running as hard as you can run, say, for 50 yards or so?
> A. Hard strenuous activity could have also aggravated an underlying cardiac condition.

All of the above-mentioned evidence was relied upon by Heritage in submitting its motion for summary judgment to the court. The same evidence was relied upon by the appellants. Additionally, Mr. Hawkins provided the court with an affidavit in which he reiterated that his son had engaged in strenuous activity and exertion in kicking the football and had been involved in several plays during the game in which he experienced physical contact. Based upon these exhibits, the court ruled that the appellants failed to demonstrate a compensable "injury" as defined by the policy. The court also found that the appellants failed to establish that a sudden burst of physical activity or contact proximately caused Dwayne's collapse. It is from that ruling that Mr. and Mrs. Hawkins appeal.

Our supreme court has noted that Arkansas courts, as well as courts throughout the land, have faced difficulty in determining what is an "accidental" death or injury. *See Duvall v. Massachusetts Indemnity and Life Ins. Co.*, 295 Ark. 412, 414, 748 S.W.2d 650 (1988). Our courts have adopted the generally accepted definition of "accident" as something "happening by chance, taking place unexpectedly, not according to the usual course of things. *Hartford Life Ins. Co. v. Catterson*, 247 Ark. 263, 265, 445 S.W.2d 109 (1969). The Arkansas Supreme Court has held that, where an injury following overexertion or strain is unforeseen or unexpected and is not such as would naturally and probably result from a voluntary act done, but is rather an unusual

result, such injury is accidental. *Union Life Ins. Co. v. Epperson*, 221 Ark. 522, 524, 254 S.W.2d 311 (1953); *Metropolitan Casualty Ins. Co. v. Fairchild*, 215 Ark. 416, 418-20, 220 S.W.2d 803 (1949). However, in *Duvall*, the most recent case on this subject, the court recognized that not every death that is sudden or unexpected is accidental. The court also noted that the words "bodily injury" are commonly and ordinarily used to designate an injury caused by external violence, and not to indicate disease. *See Duvall*, *supra*, at 415-16.

In this case, unlike *Duvall*, the cause of the decedent's death is uncertain and disputed. Causation is ordinarily a fact question for the jury to decide. *First Commercial Trust Co. v. Rank*, 323 Ark. 390, 402, 915 S.W.2d 262 (1996). The testimony of Mr. Hawkins and the testimony of Dr. Isaacson are sufficient to raise material questions of fact regarding the factors which contributed to Dwayne's death. We therefore reverse and remand for trial.

Reversed and remanded.

GRIFFEN and ROAF, JJ., agree.

Charles FISHER *v.* POOLE TRUCK LINE

CA 96-911 944 S.W.2d 853

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 14, 1997
[Petition for rehearing denied June 11, 1997.]

Davis & Holiman, by: *Zan Davis*, for appellant.

Penix, Penix, Lusby & Nix, by: *Robin Nix*, for appellee.

ANDREE LAYTON ROAF, Judge. The appellant, Charles Fisher, was employed as a truck driver by the appellee, Poole Truck Line (Poole). Fisher was denied workers' compensation benefits when the Commission found that he was not performing "employment services" when he was injured while transporting in his own automobile the results of a physical examination that Poole had required him to take before giving him a work assignment. On appeal, Fisher argues that the Commission's finding

that he was not performing "employment services" at the time of his accident is not supported by substantial evidence. We agree and reverse.

On March 24, 1994, Fisher was injured when his automobile was struck in the rear by a tractor-trailer truck. Fisher ultimately underwent fusion surgery for a herniated cervical disc as a result of this accident. Following the accident, Fisher continued on to his destination, a truck terminal operated by Poole, his new employer. Fisher, a truck driver with some 26 years of experience, had successfully completed a two-day orientation required by Poole of its new drivers, which commenced on March 21st. Poole had also required Fisher to take the standard Department of Transportation (D.O.T.) physical on the day before the accident. On the morning of the accident, Fisher had reported in at the Poole terminal to receive a driving assignment, and had learned that a urine test he had taken the day before as part of the D.O.T. physical had revealed unacceptably high concentrations of protein, and as a result, he would not be allowed to drive until he retook and passed this urine test. Although D.O.T. physicals are valid for two years and Fisher's last physical dated only from the previous March, Poole had required him to take and pass a D.O.T. physical administered by its doctor before assigning him a load. Fisher immediately drove to the doctor's office and retook and passed the urine test.

Although not specifically ordered by Poole to bring back the results of his physical, Fisher knew that by hand-delivering the copy he received from the doctor, he would receive his driving assignment. Except for the two-day employee orientation for which Poole paid Fisher, as a truck driver employed by Poole, he was only to be paid according to the miles he drove.

After delivering the results of the urine test, Fisher went home and on the next day sought treatment at an emergency room for his injuries. Subsequently, Fisher filed a civil suit against the trucking company that struck him and also filed for workers' compensation from Poole.

Poole denied Fisher workers' compensation benefits, contending that he was not an employee and that he was not perform-

ing employment services at the time of the accident. The administrative law judge (ALJ) found that Fisher was an employee at the time of the accident but that he was not performing employment services and, therefore, the injury was not compensable. On the latter issue, which is the subject of this appeal, the ALJ scrutinized the time, place, and the circumstances of the injury in determining whether Fisher was performing "employment services." The ALJ found dispositive the facts that Fisher was driving his own vehicle, that the accident occurred off the employer's premises, and that the urine test result that Fisher was transporting was a document that his employer had to have possession of before he could begin to perform employment services. The full Commission affirmed and adopted the ALJ's findings of fact. Fisher appeals from the finding that he was not performing employment services. However, Poole does not appeal the finding that Fisher was an employee at the time of his injury.

For reversal, Fisher argues that the Commission's finding that he was not performing "employment services" at the time of the accident is not supported by substantial evidence.

As defined in the Workers' Compensation statutes, a "compensable injury" means an "accidental injury" arising out of and in the course of employment. Ark. Code Ann. § 11-9-102 (5)(A)(i). However, § 11-9-102 further provides that "compensable injury" does not include an "[i]njury which was inflicted . . . at a time when employment services were not being performed . . . ." Ark. Code Ann. § 11-9-102(5)(B)(iii).

Fisher contends in essence that his trip from the terminal to the company doctor to retake the urine test and his return to the terminal with the results were employment services because they were part of the orientation process for which he received payment. However, he conceded in his testimony that the orientation was concluded by March 23rd and that all he did on March 23rd was take the D.O.T. physical.

Fisher further asserts that this case can be reversed under the "dual-purpose doctrine" exception to the "going and coming rule," because his transporting the results of his physical benefitted Poole by allowing them to immediately assign him a load.

Poole argues that Fisher's injury is not compensable because it neither arose out of and in the course of employment nor occurred at a time when employment services were being performed. However, Poole did not appeal the Commission's findings that Fisher was an employee at the time he undertook the physical examination.

Significantly, the Commission further found that the physical examination was wholly for the benefit of Poole and at the direction of Poole because Fisher already possessed a valid D.O.T. physical certification at the time of employment. In denying benefits to Fisher, the Commission relied on *Albert Pike Hotel v. Tratnor*, 240 Ark. 958, 403 S.W.2d 73 (1966), in which the supreme court found that a claimant who was injured on the premises of the Arkansas Health Department while in the process of obtaining a health card to allow her to work as a cook for the respondent was not entitled to benefits because she was not an employee. However, the court in *Albert Pike* did not address the issue of performing employment services because it found from the evidence that Tratnor was never employed by the respondent hotel, and we do not agree that the decision was based significantly upon the time, place, and circumstance of the injury. Moreover, the supreme court has recently determined that a home-care nurse's assistant injured while traveling from her employer's office to the home of a patient was performing employment services even though she used her own vehicle and received no wages or travel expenses for the time spent traveling to patients' homes. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997).

In the instant case, Fisher, an experienced and qualified truck driver, was employed by Poole and arrived early on the morning of March 24th for the purpose of driving a load for Poole. As pointed out by Fisher, driving a truck entails more than sitting behind the wheel of a truck, and certain requirements are imposed by the D.O.T. and by the trucking companies for reasons of safety. Fisher stated that some of these requirements included passing written driving and physical examinations; performing daily inspections of the truck; becoming qualified for hauling various kinds of materials, including hazardous material; and the

keeping of accurate log books. Here, the Commission found that Fisher's physical exam was wholly for the benefit of Poole and at the direction of Poole. This finding is consistent with *Woodall v. Brown and Root, Inc.*, 2 Ark. App. 106, 616 S.W.2d 781 (1981), in which this court found that workers' compensation was the exclusive remedy for an employee injured during a physical exam conducted by his employer for two reasons — such examinations are wholly for the benefit of the employer and the employment had commenced at the time the employee underwent the required exam; both factors are present in the instant case. Consequently, Fisher was performing employment services when he traveled from his employer's premises to retake the urine test and was injured on the return trip.

Reversed.

BIRD, NEAL, and GRIFFEN, JJ., agree.

JENNINGS and PITTMAN, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. The issue here is whether the Commission's decision is supported by substantial evidence. A decision of the Commission is supported by substantial evidence if reasonable minds could reach the Commission's conclusion. *Farmland Ins. Co. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). I cannot agree that the Commission's decision is not supported by substantial evidence.

Two statutes are involved in this case. Section 11-9-102(5)(B)(iii) (Repl. 1996) excludes from the definition of compensable injury any "[i]njury which was inflicted upon the employee at a time when employment services were not being performed. . . ." Section 11-9-704(c)(3) (Repl. 1996) requires that "[a]dministrative law judges, the commission, and any reviewing court shall construe the provisions of this chapter strictly." On these facts, and given the requirement that the law be strictly construed, the Commission could reasonably find that Mr. Fisher was not performing "employment services" at the time of his injury.

I cannot agree that our decision here is governed by our earlier decision in *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App.

343, 934 S.W.2d 956 (1996), or the supreme court's subsequent affirmance of that case found at 328 Ark. 381, 944 S.W.2d 524 (1997). In the first place the facts in *Olsten Kimberly* were much more compelling. There the claimant was a traveling nurse employed by the respondent to provide nursing services to its customers in their homes. The claimant was injured in an automobile accident that occurred as she was traveling between her employer's offices and the home of her first patient for that day. In affirming the Commission's decision in that case that the claimant was performing employment services at the time of her accident, both this court and the supreme court relied upon the facts that "delivering nursing services to patients at their homes is the *raison d'être* of the appellant's business, and . . . traveling to patients homes is an essential component of that service." Here, on the other hand, appellant was tentatively hired as a truck driver. He was injured while driving his personal vehicle to deliver to appellee the results of the drug screening that he was required to undergo before he could drive a truck. Delivery of those results was neither part of the job for which appellant had been hired nor an activity that he had been directed or even asked by appellee to undertake; indeed, the evidence showed that such results were ordinarily transmitted by the laboratory to appellee via the U.S. mail. These facts do not even approach those in *Olsten Kimberly*. In the second place we were affirming the Commission's award of benefits in *Olsten Kimberly* and in doing so said we give some deference to the administrative agency's interpretation of the statute.

For these reasons I respectfully dissent.

PITTMAN, J., joins in this dissent.

Tommy JOHNSON *v.* DEMOCRAT PRINTING and LITHOGRAPH

CA 96-915 944 S.W.2d 138

Court of Appeals of Arkansas
Division IV
Opinion delivered May 14, 1997

[redacted]

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

Barber, McCaskill, Jones & Hale, P.A., by: *Michael J. Emerson* and *Derek J. Edwards*, for appellee.

ANDREE LAYTON ROAF, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission finding that the appellant, Tommy Johnson, failed to prove that he suffered a compensable injury from exposure to toxic chemicals during his employment with the appellee, Democrat Printing and Lithograph. Johnson alleges that the Commission applied the wrong standard of proof in determining that his claim was for an occupational disease, and, accordingly, requiring him to prove compensability by clear and convincing evidence. He also asserts that there was not substantial evidence to uphold the decision of the Commission. We disagree and affirm.

Tommy Johnson was employed by Democrat Printing in 1976, and began working as a folder-machine operator in 1977. In the course of his employment, he was required to use certain chemical cleansing agents. An expert presented by Democrat Printing noted that the chemicals were within a classification of petroleum products or derivatives or halogenated hydrocarbons. Johnson testified that he had to use the chemicals to clean the rubber rollers on the folder machine and that the room in which he worked was poorly ventilated.

In 1988, Johnson blacked out at work and thereafter saw the company doctor. The doctor told Johnson that the chemicals would not hurt him and that the blackout was probably caused by

an allergic reaction to the chemicals. Johnson testified that he began to see doctors regularly after this incident because he was suffering from headaches, sinus problems, stomach problems, and physical and mental breakdowns. Johnson claimed that his problems gradually worsened.

Johnson was hospitalized for alcohol treatment in May 1993, after a one-week drinking binge. Johnson testified that he was a "social drinker" and that he had never had any other problems with alcohol. He attributed his drinking binge to the fact that he was having headaches and the alcohol helped him sleep. His wife testified that she attributed the binge to the fact that they were separated for a short time. She stated that she had called her insurance company (through her job at the post office) to get help for Johnson, and that they had admitted Johnson to a rehabilitation program in Louisiana from May 28, 1993, to June 5, 1993. He was discharged with a diagnosis of alcohol abuse, acute major depression, and personality disorder with dependent and antisocial features.

Johnson has not worked since May 20, 1993. He testified that he has had seizures where he would "go berserk and do things [he does] not remember doing. At times [he] would jump into the truck and go from here to Wichita, or wherever." Johnson related to a neurologist that sometimes the "seizures" would last a few seconds and up to days. In August 1993, Johnson sought treatment from Dr. Shinder, a neurologist. Dr. Shinder put him on Dilantin and Paxil and treated him for demyelinating disease and brain damage. Johnson also began to see Joe Brogdon, a psychological examiner, for treatment of his emotional problems.

Johnson had an MRI and two EEGs in 1993 and early 1994 that were normal. Johnson was then referred to Dr. Victor Biton, a board-certified neurologist, for an independent medical evaluation. Dr. Biton noted that Johnson's description of his symptoms was vague and that Johnson responded positively to almost every single symptom that he was questioned about. Dr. Biton initially concluded that Johnson's complaints were not supported by any lab tests. Dr. Biton, however, recommended a comprehensive evaluation to determine if any of Johnson's symptoms were of an

"organic etiology." After extensive testing, which included a 24-hour-a- day monitoring for seven days for abnormal brain activity, he found no evidence of significant damage or seizures. The testing found one "very mild abnormality . . .[which] might be attributed to previous brain damage which can possibly include alcohol and drug abuse that the patient had." Other doctors involved in the testing of Johnson, Dr. Hazelwood and Dr. Hewitt, attributed much of the findings of the tests to Johnson's limited motivation. Only Dr. Shinder diagnosed Johnson with a disease (or injury) that was connected to Johnson's exposure to the chemicals.

The administrative law judge ("ALJ") found that Johnson was complaining of an occupational disease and that the applicable standard of proof was clear and convincing evidence. The ALJ based this decision on the pre-1976 schedule of compensable occupational diseases and the presumption that conditions allegedly caused by the exposure to certain substances were to be handled as occupational diseases. In addition, the ALJ also relied upon the fact that Johnson claimed that his symptoms were gradual rather than sudden. Based on a finding that the medical evidence presented by the employer was far more credible and persuasive, the ALJ found that Johnson had not met his burden of proof and that his claim was, therefore, denied. Johnson appealed to the full Commission. The Commission adopted the findings and decision of the ALJ.

Johnson argues that the Commission was in error to apply the clear and convincing evidence standard to his claim as it was not an occupational disease. We cannot agree. He further argues that there was insufficient evidence to support the decision below. Again, we find no merit to his argument.

1. *Occupational disease*

Arkansas Code Annotated § 11-9-601(e)(1) (Repl. 1996) defines "occupational disease" as *any* disease resulting in death or disability that arises out of or in the course of the occupation, or naturally follows from an injury. (Emphasis added.) Although the Act does not define the distinction between "acci-

dental injury" and "disease," one widely accepted and salient distinction is that occupational diseases are generally gradual rather than sudden in onset. *Hancock v. Modern Indus. Laundry*, 46 Ark. App. 186, 878 S.W.2d 416 (1994); *See also*, 1B Arthur Larson, Workmens' Compensation Law 41.31 (1992).

The characterization that a claim is for an occupational disease is significant in that the claimant's burden of proof is affected. If the claimant's condition is an "injury," he has the burden of proving that it arose out of and in the course of his employment by a preponderance of the evidence. *See* Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). On the other hand, if his or her condition is an "occupational disease," a causal connection between the employment and the disease must be established by clear and convincing evidence. Ark. Code Ann. § 11-9-601(e)(1). *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

As previously noted, "occupational disease" is now defined as "any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee, or naturally follows or unavoidably results from an injury." Ark. Code Ann. § 11-9-601(e)(1). Only silicosis and asbestosis are dealt with separately. Ark. Code Ann. § 11-9-602 (Repl. 1996). Prior to 1976, the legislature listed a schedule of occupational diseases. *See* Ark. Stat. Ann. § 81-1314 (Repl. 1960). The employer contends that petroleum products and halogenated hydrocarbons were listed under the old schedule of occupational diseases, and that conditions allegedly resulting from exposure to these chemicals should be considered an occupational disease. In support of this argument is R. B. Leflar, *Compensation for Work Related Illness in Arkansas*, 41 ARK. L. REV. 89 (1988):

> One can . . . conclude without undue difficulty that diseases listed on the pre-1976 schedule should continue, for the present, to be analyzed under section 14 [occupational disease] standards. When the legislature repealed the schedule, presumably it intended that conditions previously covered by section 14 should remain in the same status, at least in the absence of evidence supporting a change of treatment. In keeping with this reasoning, the Court of Appeals has recognized that cases of tenosynovitis

> (inflammation of a tendon sheath), a condition listed on the old schedule, should be decided under section 14.

Leflar, *supra* at 99. The presumption should be that conditions on the pre-1976 schedule of compensable occupational diseases are still to be treated as such, although the Commission is not required to do so since the schedule has been repealed. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990) (citing Leflar, *supra* at 118-120).

In this instance, we agree with the Commission's finding that Johnson's claim was for an occupational disease and not an injury. Johnson did not allege that his condition occurred at a single, specific point in time, but rather testified that his symptoms were gradual in nature. Johnson also did not contest that the products from which he claimed exposure were petroleum products or halogenated hydrocarbons included on the pre-1976 list. We cannot say that the Commission was in error to conclude that Johnson complained of an occupational disease and that his claim was then subject to a higher standard of proof.

2. *Substantial evidence*

Workers' compensation appeals are governed by the substantial evidence standard of review. *Dugan v. Jerry Sweetser, Inc.*, 54 Ark. App. 401, 403, 928 S.W.2d 341 (1996); *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995). When reviewing decisions from the Workers' Compensation Commission, the court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms if supported by substantial evidence. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996) (citing *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. *Crawford, supra* (citing *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992)); *See also, Couch v. First Nat'l Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995). 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. *Crawford, supra* (citing *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983)). Where the Workers' Compensation Commission has denied a claim, "substantial evidence" requires the appellate court to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Bussell v. Georgia-Pacific Corp.*, 48 Ark. App. 131, 891 S.W.2d 75 (1995).

In the present case, there was testimony and evidence received from three physicians and a psychologist regarding Johnson's condition and prognosis. Of those four, only one (Dr. Shinder) found Johnson's alleged symptoms to be caused by his exposure to the chemicals. The other three (Drs. Biton, Hewitt, and Hazelwood) found that Johnson's symptoms were undocumented and unrelated to chemical exposure in the workplace. Johnson also testified as to his symptoms and inability to work. He argues that Dr. Shinder's testimony should be given more weight because he was the physician with whom he had the most contact.

It is well established that the credibility of witnesses and the weight to be given to their testimony are matters exclusively within the province of the Commission. *Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *James River Corp. v. Walters*, 53 Ark. App. 59, 918 S.W.2d 211 (1996). The Commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of any conflicts in the medical evidence is a question of fact for the Commission. *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996); *Barnard v. B & M Constr.*, 52 Ark. App. 61, 915 S.W.2d 296 (1996); *Brantley v. Tyson Foods, Inc.*, 48 Ark. App. 27, 888 S.W.2d 543 (1994); *Bartlett v. Mead Containerboard*, 47 Ark. App. 181, 888 S.W.2d 314 (1994). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Jackson v. Circle T. Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995).

Moreover, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Stafford v. ArkMo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996); *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Based on the evidence before the Commission, we cannot conclude that there was insufficient evidence to support this decision.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

James Earl MAYS *v.* STATE of Arkansas

CA CR 96-674 944 S.W.2d 562

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 21, 1997

Mikke Connealy Marshall, for appellant.

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

JOHN E. JENNINGS, Judge. James Earl Mays was charged with the aggravated robbery of Mack's Liquor Store in Blytheville. He was found guilty by a Mississippi County jury and was sentenced by the court to ten years' imprisonment. On appeal Mays contends that the evidence was insufficient to sustain the conviction and that the court erred in denying his motion to suppress testimony related to a photographic line-up. We find no error and affirm.

When reviewing the sufficiency of the evidence on appeal, we do not weigh the evidence but simply determine whether the evidence in support of the verdict is substantial. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996). Substantial evidence is that which is forceful enough to compel a conclusion one way or the other and passes beyond mere suspicion and con-

jecture. *Drummond v. State*, 320 Ark. 385, 897 S.W.2d 553 (1995). In determining whether there is substantial evidence, we review the evidence in the light most favorable to the appellee, and it is permissible to consider only that evidence which supports the guilty verdict. *Williams v. State*, 321 Ark. 635, 906 S.W.2d 677 (1995). The question of the sufficiency of the evidence to support a conviction is one of law. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994).

Appellant's conviction rests primarily on the testimony of two witnesses, Robert Pillow and Joseph Bearden. Robert Pillow was the clerk at Mack's Liquor Store on the day of the robbery. He testified that at about 2:25 or 2:30 p.m. a man entered the store. The man raised his shirt, showing a gun in the front of his pants and said, "You know what I want." When Mr. Pillow realized he was being robbed, he opened the cash register and gave its contents to the man. The man took Pillow to the back of the store and told Pillow that he could not go out the front door. Pillow gave the man his keys. While they were going into the back room the bell went off at the drive-through window. Pillow said, "I need to get that," and the man said, "No, no, just come on." The man tied Mr. Pillow up, went back in the store and got a half-gallon of liquor, and went out the back door. Pillow testified that the man was in the store for five minutes.

The prosecuting attorney asked whether Mr. Pillow got a good look at the person's face and Mr. Pillow answered, "I didn't really pay attention too close because I was scared, I was worried about the gun." Mr. Pillow described the man as black, "medium-skinned," in his mid-thirties, and having a clean-cut moustache. Pillow testified that the man weighed 160 to 180 pounds. Then:

> Q. Do you see that person today?
>
> A. Well, that fellow looks like him except he's got, he's got a beard that he didn't have that day.

Pillow testified that he identified the person that robbed him from a four-photograph line-up provided by the police officers. Finally, on direct examination:

Q. All right, sir. Now, do I understand your testimony, are you able to say today that the defendant seated over here is the person except for the facial hair?

A. Yes, sir, he resembles the person very much so except for the facial hair. But, you know, he had, you know, he had a hat on so, you know, from here up, I can't honestly say that that's him. I cannot say that.

Then on cross-examination:

Q. Good afternoon, Mr. Pillow. You say you cannot honestly say that this person seated at counsel table is the person?

A. No, ma'am. He just, he looks like the fellow, but like I said, there was a hat on. And, you know, from here down, yes, ma'am, except without the beard.

At the conclusion of cross-examination:

Q. And if I recall your testimony earlier, you were not certain of the person's identity in the line-up, is that correct?

A. Yes, ma'am.

Q. And you're not certain today of the person's identity, is that correct?

A. Yes, ma'am.

Q. Okay.

Joseph Bearden was a liquor salesman calling on Mack's Liquor Store on the day of the robbery. He testified that between 2:30 and 2:45 p.m. a car pulled up to the drive-through window as he, Bearden, drove up. Bearden knocked on the door and got no response. As he headed back to his car he saw a man come from behind the liquor store. He testified that the man did a "stop- step" like he was going to back up. He positively identified the appellant as the man he saw that day. He testified that "it looked like [the man had] a moustache, but I couldn't tell if there was much of a beard."

Ross Thompson, a Blytheville police officer, testified that he showed a photographic line-up to Mr. Pillow. He testified that Mr. Pillow picked out the photograph of the appellant without hesitation but that Pillow could not unequivocally say that that was the person who robbed him. Officer Thompson also testified

that the photographic line-up had been lost within the police department.

In ruling on the defendant's motion for directed verdict the trial judge said:

> THE COURT:
>
> In this case here we have a situation where the victim himself has indicated that he could not positively identify the defendant as the person who robbed him. But on the other hand, he has said in open Court that the defendant resembles the individual that came in the store, that the only difference is that he couldn't identify him because he said he had hair on his face at this point in time. Also when the photo line-up was presented to him that he again made a statement that he couldn't positively identify him, the individual there as being the one that perpetrated that robbery, but there were two pictures there that he indicated that looked almost like twins. But, in fact, he did pick out the defendant as being the person who committed the robbery. That coupled with the statement from Mr. Bearden that he saw the defendant behind Mack's Liquor Store and that upon viewing him first that the defendant halted or paused or acted in a suspicious manner before he moved on down the alleyway.
>
> All of that looked upon in the most favorable light certainly constitutes, in the Court's opinion, substantial evidence enough to allow it to go to the jury. As you know, the Court is not to weigh the evidence, not to decide whether or not it is evidence that even at a preponderance is substantial. And the Court is going to rule that there is substantial evidence and the matter should go to the jury. The motion for directed verdict is denied.

We think that the trial court's ruling was correct. The law does not require that a witness's description be totally accurate. *State v. Radford*, 559 S.W.2d 751 (Mo. App. 1977). In *Davis v. State*, 284 Ark. 557, 683 S.W.2d 926 (1985), the supreme court said, "The accuracy of the [victim's] identification of appellant and the alleged weaknesses of that identification were matters of credibility to be resolved by the jury." While Mr. Pillow was not absolutely certain in his identification of appellant as the robber, appellant's conviction does not rest on Mr. Pillow's testimony alone. Under the circumstances the jury could reasonably infer

that the man who robbed Mr. Pillow was the same man seen behind Mack's Liquor Store by Mr. Bearden. Mr. Bearden positively identified the man he saw as the appellant. The circuit judge did not err in denying the motion for directed verdict.

After the State's opening statement appellant asked the court to rule that any references to the photographic line-up would be inadmissible, because the photographs had been lost by the police department. The court denied the motion. We find no error in the court's ruling.

Testimony about an out-of-court identification is generally admissible. *See Hilton v. State*, 278 Ark. 259, 644 S.W.2d 932 (1983); *Jacobs v. State*, 316 Ark. 698, 875 S.W.2d 52 (1994). Appellant relies, in part, on *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988). In *Hamm* the supreme court held that when the State lost the tape recording of the defendant's confession it was error to admit the transcription. The court expressly noted, however, that oral testimony about the confession was admissible.

Appellant's reliance on *Bowden v. State*, 297 Ark. 160, 761 S.W.2d 148 (1988), is misplaced. *Bowden* involved a live line-up and the issue of whether the defendant waived his right to counsel. Neither issue is involved in the case at bar.

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

ROBBINS, C.J., and GRIFFEN, J., agree.

NEAL, CRABTREE, and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. While I agree with the majority that the trial court did not err in denying the motion to suppress testimony relating to the photograph lineup, I strongly disagree with the holding that the trial court correctly denied Mays's motion for directed verdict.

The majority has found the following evidence substantial, and thus sufficient to sustain the conviction of James Earl Mays for aggravated robbery of a liquor store: the testimony of the victim, Robert Pillow, who repeatedly failed to identify Mays as the robber in both a photographic line-up and at trial, and the testimony

of Dennis Bearden who positively identified Mays as a man whom he saw coming from the alleyway behind the liquor store around the time of the robbery. Bearden testified that he closely observed Mays as he walked away from the building because he became suspicious of him, and that he "got a good look at him." However, although the victim testified that the robber left wearing a hat and carrying a half-gallon of liquor, and described him as approximately 5′8″ tall, the observant Mr. Bearden made no mention of either a hat or a half-gallon of liquor, and described the person he observed as a little over six feet tall.

The majority holds that the trial court correctly denied Mays's motion for directed verdict because "the law does not require that a witness's description be totally accurate," relying upon a Missouri case, *State v. Radford*, 559 S.W.2d 751 (Mo. App. 1977) and *Davis v. State*, 284 Ark. 557, 683 S.W.2d 926 (1985), for the propositions that a witness's description need not be totally accurate, and that weaknesses in the *victim's* identity of the accused are matters of credibility for the jury to resolve. However, in both *Radford* and *Davis*, the victims positively identified the accused in a pretrial line-up and at trial. In *Radford*, there was a discrepancy in the defendant's height and the estimation of height reported by the victim; the victim in *Davis* was unsure at the trial held six years after the robbery whether Davis had been wearing a beard. The majority's reliance upon *Radford* and *Davis* is clearly misplaced.

Even more troubling is the majority's failure to address Mays's argument concerning the circumstantial nature of the evidence. Since no one identified Mays as the robber, the case against him was entirely circumstantial. It is well settled that the fact that evidence is circumstantial does not render it insubstantial. *Tucker v. State*, 50 Ark. App. 203, 901 S.W.2d 865 (1995). To constitute substantial evidence in a criminal trial, however, circumstantial evidence must exclude every other reasonable hypothesis consistent with the appellant's innocence, and the factfinder must not be left to speculation and conjecture. *Carter v. State*, 324 Ark. 395, 921 S.W.2d 924 (1996); *Knight v. State*, 51 Ark. App. 60, 908 S.W.2d 664 (1995). Although the question of whether circumstantial evidence excludes every other reasonable hypothesis other than the accused's guilt is usually for the jury, *see Abbot v.*

State, 256 Ark. 558, 508 S.W.2d 733 (1974), on appellate review, the reviewing court considers whether the evidence was in fact sufficient to exclude all other reasonable hypotheses. *Dixon v. State*, 311 Ark. 613, 846 S.W.2d 170 (1993). Two equally reasonable conclusions regarding what occurred merely give rise to a suspicion of guilt, and that is insufficient as a matter of law to sustain a criminal conviction. *Carter v. State*, *supra*.

Here, even the evidence that supports the conviction presents two equally plausible hypotheses: either Mays was the person who committed the robbery, or he was, unluckily for him, simply in the wrong place at the wrong time. Consequently, the jury had to resort to speculation and conjecture to convict Mays of this crime, and I would reverse and dismiss.

NEAL and CRABTREE, JJ., join in this dissent.

Danny Harold REID *v.* Theresia Neely REID

CA 96-790 944 S.W.2d 559

Court of Appeals of Arkansas
Division IV
Opinion delivered May 21, 1997

Roland E. Darrow, II, for appellant.

Sharon M. Fortenberry, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order denying appellant's request for his child-support obligation to be suspended during his incarceration in prison. Appellant argues on appeal that the chancellor abused his discretion by refusing to abate the payment of support because his imprisonment rendered him incapable of producing income with which to meet his obligation. We find no abuse of discretion and affirm.

When the parties divorced in July of 1995, custody of their two children, ages sixteen and four, was placed with appellee, Theresia Neely Reid. Appellant, Danny Harold Reid, was ordered to make biweekly payments of $200 in child support. On December 4, 1995, appellant was convicted of raping the parties' sixteen-year-old daughter, and he was sentenced to a term of twenty years in prison. On February 5, 1996, appellant filed a motion seeking abatement of his child-support obligation, urging his conviction and resulting imprisonment as the sole change in circumstances.

Appellee was the only witness at the hearing. She testified that appellant was a few hours shy of obtaining a bachelor's degree in engineering and that he was earning $42,000 a year at the time

of the divorce. She agreed to a reduction in child support to the minimum family chart amount of $30 a week, but she stated her belief that appellant should not benefit by being relieved of his duty of paying support as a reward for raping their daughter.

After a brief recess, the chancellor issued his ruling denying appellant's motion to suspend the payment of child support. The chancellor found that the children's needs had not diminished and that the position in which appellant found himself was one of his own creation. He thus found no change in circumstances warranting abatement of the obligation. The chancellor further concluded that appellant should not be allowed to profit from a wrongful act committed against a child for whom he was obliged to pay support. The chancellor also reasoned that the continuation of the support obligation would not place an undue burden on appellant, given his level of education and earning potential. An order was entered incorporating the chancellor's findings and reducing appellant's child-support payments to $30 a week. This appeal followed.

Ordinarily, the amount of child support lies within the sound discretion of the chancellor. *Irvin v. Irvin*, 47 Ark. App. 48, 883 S.W.2d 862 (1994). A chancellor's finding as to child support will not be disturbed on appeal unless it is shown that the chancellor abused his discretion. *Borden v. Borden*, 20 Ark. App. 52, 724 S.W.2d 181 (1987). A change in circumstances must be shown before a court can modify an order regarding child support, and the party seeking modification has the burden of showing a change in circumstances. *Hunt v. Hunt*, 40 Ark. App. 166, 842 S.W.2d 470 (1992). In making this decision, the chancellor must consider the needs of one party as compared to the ability of the other to pay. *Irvin v. Irvin, supra.*

Appellant argues on appeal that the chancellor abused his discretion by refusing to abate his child-support obligation during the period of his incarceration. We are not convinced that the record in this case demonstrates such an abuse. The principle at the core of the chancellor's ruling was that appellant was not entitled to relief because he had come into court with unclean hands. It has long been recognized that the clean-hands maxim bars relief

to those guilty of improper conduct in the matter as to which they seek relief. Equity will not intervene on behalf of a party whose conduct in connection with the same matter has been unconscientious or unjust. *Wilson v. Brown*, 320 Ark. 240, 897 S.W.2d 546 (1995); *Marshall v. Marshall*, 227 Ark. 582, 300 S.W.2d 933 (1957). It is said that the purpose of invoking the clean hands doctrine is to protect the interest of the public on grounds of public policy and to preserve the integrity of the court. *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 16 (1991). It is within the chancellor's discretion to determine whether the interests of equity and justice require application of the doctrine. *Id.*

Although there is another school of thought, *see e.g. Edmonds v. Edmonds*, 633 P.2d 4 (Ore. Ct. App. 1981), we are of the same mind as was the court in *Ohler v. Ohler*, 369 N.W.2d 615 (Neb. 1985). In that case, the payor spouse sought to suspend his child-support obligation because he had been sentenced to prison for fifteen years. In affirming the trial court's decision denying the petition, the court based its decision on the maxim of unclean hands and ruled that, under the circumstances, equity would not grant relief. The court further stated:

> Incarceration is certainly a foreseeable result of criminal activity; we find no sound reason to relieve one of a child support obligation by virtue of the fact that he or she engaged in criminal conduct. There is no reason those who have had to step in and assume the applicant's obligation should not be reimbursed by the applicant should his future position enable him to do so.
>
> Further, we do not see how the best interests of the children for whom the support was ordered would be served by temporarily terminating the appellant's child support obligation.

Id. at 618. The court also predicated its holding in part on a decision where it was recognized that, although unemployment or diminution of earnings is a common ground for modification, a petition for modification will be denied if the change in financial condition is due to the fault, voluntary wastage, or dissipation of one's talents or assets. The court then reasoned that a child-support obligation should not be modified where the means with which to pay were reduced or eliminated by criminal activity.

In this respect, the opinion in *Ohler* is consistent with Arkansas law. In *Grady v. Grady*, 295 Ark. 94, 747 S.W.2d 77 (1988), it was held that a court may consider the fact that a supporting spouse has voluntarily changed his or her employment so as to lessen earning capacity and, in turn, the ability to pay child support. The court ruled that a supporting spouse does not have total discretion in making financial decisions which affect the welfare of the family, if the minor children have to suffer at the expense of those decisions.

We uphold the decision of the chancellor in this case on the ground of unclean hands. The misconduct which resulted in appellant's imprisonment was perpetrated against a child for whom appellant owed a duty of support and thus bears a direct connection to the proceeding at hand. We agree that equity will not come to the aid of one who of his or her own volition engages in criminal behavior and suffers the consequences which affect the ability to pay child support. Moreover, the needs of the children have remained unchanged, and, as between appellant and his children, the interest of the children must prevail. We can think of no reason how their best interests are served by depriving them of support or why appellee should be left to shoulder the burden alone when there remains the possibility that the appellant can make recompense in the future.

We also cannot disagree with the chancellor's conclusion that appellant failed to meet his burden of showing a change in circumstances to justify abatement of the obligation. A chancellor's finding 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. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). Appellant relied only on his incarceration as a change in circumstances. Appellant failed to produce evidence that he had no assets or other sources of income available for the payment of support. Similarly, appellant offered no testimony concerning his anticipated release from prison or what, if any, wages he might be eligible to earn during his incarceration. Appellant has thus not demonstrated that he was wholly without the ability to meet his obligation. Consequently, the chancellor's finding is not clearly

erroneous. We also note that a chancellor has the authority to require the person ordered to make child-support payments to furnish a bond or post security to guarantee compliance with the order. Ark. Code Ann. § 9-12-312(c)(1) & (2) (Supp. 1995).

Finding no error in the chancellor's decision, we affirm.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Isaac LANGLEY *v.* DANCO CONSTRUCTION COMPANY and Bituminous Insurance Companies

CA 96-991 944 S.W.2d 142

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 21, 1997

[Petition for rehearing denied June 25, 1997.]

Barron & Barron, P.A., by: *Thomas L. Barron*, for appellant.

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

OLLY NEAL, Judge. Appellant was employed as a laborer by Danco Construction Company on July 13, 1993, when he sustained injuries after being thrown approximately fifteen feet from a loader. Appellant was hospitalized for a week and received medical treatment from Dr. Fred Nagel. Dr. Nagel's notes reflect that appellant initially made complaints of pain mostly in the sternum and right hip area. Appellees accepted compensability of appellant's right hip condition and paid related medical and temporary total disability benefits. Appellant sought temporary total disability and medical benefits based upon his left hip condition, which eventually required a total hip replacement. Appellees controverted appellant's entitlement to benefits for his left hip condition. After conducting a hearing on the compensability of appellant's medical and temporary total disability benefits for the treatment of the left hip, the ALJ found that the July 13, 1993, compensable injury aggravated the appellant's preexisting left hip condition so as to entitle him to payment of related medical and disability benefits. Appellees appealed to the Commission, which reversed the ALJ's decision. Appellant argues that the Commission's decision is not supported by substantial evidence. We find substantial evidence in support of the Commission's order and affirm.

Where the sufficiency of the evidence is challenged on appeal in a workers' compensation case, we view the evidence in the light most favorable to the findings of the Commission and will affirm if those findings are supported by substantial evidence. *City of Ft. Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). 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. *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 293 (1992).

Appellant contends that the condition of his left hip is the result of an aggravation of a preexisting condition caused by the compensable injury that occurred July 13, 1993. Arkansas Code Annotated § 11-9-102(5)(F)(ii)(b) (Repl. 1993), provides:

> If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

Major cause means more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A) (Repl. 1993). Further, a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14)(B) (Repl. 1993).

At the hearing before the ALJ, appellant testified that he was injured at work in 1986, when a ditch caved in on him, and that he had limped off and on as a result of injuries sustained in the accident over the years. Appellant then testified that he had never experienced problems with his hip prior to July 13, 1993. However, a medical report written by Dr. DeLoach on December 22, 1992, detailed appellant's complaints of left thigh pain and some left lower back pain, and also noted that appellant did not relate a specific history of injuring himself at work. Dr. DeLoach also saw appellant on January 8, 1993, and January 25, 1993, and on both occasions noted appellant's complaints of left leg pain.

Appellant was referred to Dr. Jordan for treatment relative to the complaints of back and left leg pain. Dr. Jordan examined appellant on January 28, 1993, and suggested that hip films be made. Dr. Jordan noted that he was certain that a great deal of appellant's problems were coming from hip joint disease rather than lumbar spine problems.

Upon admission to the hospital after being injured on July 13, 1993, appellant complained of pain across his anterior chest, lower back, and in the right hip. X-rays indicated advanced degenerative changes in the left acetabulum and hip, and swelling over the right buttock. In notes dated July 23, and July 30, 1993, Dr. Nagel noted appellant's complaints of pain over the right buttock, sternum and the right hip. Appellant did not complain of pain to the left hip until September 3, 1993, approximately seven weeks after the July 13, 1993, injury.

Appellant points to the testimony of Drs. Pearce and Nagel that the lapse of time between the compensable injury and the first complaint of left hip pain could be explained by the fact that patients with multiple injuries might not become aware of an injury until others have resolved. We note that the Commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992). Further, the credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. *Shaw v. Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991).

Although there was a probable explanation offered to explain appellant's delay in reporting left hip pain, it is the province of the Commission to determine the weight to be assigned all evidence. The Commission noted that appellant testified he had never had problems with his left hip prior to the compensable injury, although the medical evidence proved otherwise. The Commission determined that appellant's credibility was diminished as a result of his testimony which was contrary to numerous medical reports generated.

We find substantial evidence to support the Commission's determination that the July 13, 1993, compensable injury did not aggravate appellant's preexisting left hip condition and was not the major cause of the resulting left hip condition.

Affirmed.

PITTMAN, JENNINGS, and BIRD, JJ., agree.

GRIFFEN and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I respectfully dissent from the majority's opinion because I do not agree that the Commission's finding that Langley did not sustain a compensable left hip injury is supported by substantial evidence.

The majority concludes that Langley's seven-week delay in reporting left hip pain, coupled with his "untruthful" denial that he had experienced problems with his left hip prior to the accident of July 13, 1993, constitutes substantial evidence to support the Commission's findings. However, the majority, and the Commission, have disregarded not only the explanation of both treating physicians regarding the likely cause for the delay, but also the fact that the nature of Langley's accident is indeed consistent with the explanation suggested by his physicians. Here, Langley was thrown approximately twenty feet, knocked unconscious, was hospitalized for one week, and suffered visible, external injuries to both his chest area (multiple contusions) and his right hip and buttock (large hematoma). It is significant that Langley's right hip area was still swollen and causing him significant pain more than five weeks after the accident, such that his doctor considered that surgical draining of the area might be required.

I must also take issue with the conclusion that Langley was untruthful when he denied that he had problems with his left hip before the accident. Nowhere in the medical records of Langley's visits to three different physicians in 1992 and prior to the accident in 1993 is there any indication that Langley ever complained of hip pain. Although he was diagnosed with hip joint disease, Langley consistently complained of left leg and lower back pain, not hip pain, to the several physicians who examined him during this period.

Finally, it was uncontroverted that Langley's preexisting hip disease did not prevent him from performing his job as laborer, a job he had held with this employer for some twenty-four years until the accident of July, 1993.

For the foregoing reasons, I do not believe that reasonable minds could reach the Commission's decision that this man, thrown twenty feet through the air, and severely contused and bruised on both the front and back of his body, did not suffer an aggravation to his preexisting hip condition in this accident.

GRIFFEN, J., joins.

OFFICE of CHILD SUPPORT ENFORCEMENT *v.* Frank LAWRENCE

CA 96-962 944 S.W.2d 566

Court of Appeals of Arkansas
Division IV
Opinion delivered May 21, 1997

Owen, Farnell & Garner, by: *Ray Owen, Jr.*, for appellant.

Charlie L. Rudd, for appellee.

OLLY NEAL, Judge. The Garland County Office of Child Support Enforcement appeals an order entered by the Chancery Court of Garland County denying its petition to require the appellee, Frank Lawrence, to pay child support. For reversal of the chancellor's order, the appellant argues that the decision of the chancery court is contrary to the law and public policy of the State of Arkansas. We affirm.

The facts in the record indicate that appellee and Kimberly Lawrence were married on September 9, 1987. Prior to the parties' marriage, Kimberly Lawrence had given birth to one daughter, Erica, who is not the appellee's biological child. Appellee adopted Erica in February 1990. Subsequent to appellee's adoption of Erica, Kimberly Lawrence commenced an action to obtain a divorce from appellee. In October, 1990, appellee executed an instrument entitled relinquishment and termination of parent-child relationship. On November 13, 1990, the chancellor entered a divorce decree in which the court approved and incorporated the property settlement and the termination of the parent-child relationship.

In August, 1993, Kimberly Lawrence applied for and received AFDC benefits on behalf of Erica. Kimberly Lawrence received benefits for the minor child from August 10, 1993, through January 1, 1994. On September 7, 1995, appellant filed a petition requesting that the court order appellee to pay child support, and for a judgment against him in an amount equal to the benefits received by Kimberly Lawrence on behalf of the minor child. In his final order on the matter, the chancellor denied appellant's petition for child support.

On appeal, appellant argues that the lower court's order is contrary to the law and public policy of the State of Arkansas. Appellant argues that the chancellor was without jurisdiction to grant the relinquishment and termination of parent-child relationship because it was filed in a divorce case, instead of a probate or juvenile proceeding. Appellant is correct in that the authority to terminate parental rights is specifically granted to the juvenile and probate courts. *See* Ark. Code Ann. §§ 9-9-220, 9-27-341 (1987). However, in the context of a divorce, where child custody is at issue, the chancellor is vested with broad discretion to make decisions that are in the best interests of the minor child. *See* Ark. Code Ann. § 9-13-101 (1987).

The record reflects that Kimberly Lawrence filed for divorce from appellee some two months after appellee had adopted Erica. Ms. Lawrence, who worked as a legal secretary at the time of the divorce, assisted in drafting the paperwork. At the hearing on the

divorce petition, Ms. Lawrence testified that she was a victim of physical abuse inflicted upon her by appellee, that Erica was present on each occasion she suffered physical abuse, and that on one occasion appellee threatened her with a gun. Ms. Lawrence testified that it was her belief that the termination of the parent-child relationship was in the best interest of the minor child, because she did not want appellee to be able to exercise visitation with Erica. Upon hearing Ms. Lawrence's testimony, the chancellor inquired as to whether she could support the child without appellee's assistance. Ms. Lawrence assured the chancellor that she could provide for Erica without appellee's assistance, and that she would work two jobs if necessary. The chancellor also inquired as to whether Ms. Lawrence was aware that termination of the parent-child relationship precluded Erica from inheriting from appellee, and from receiving any benefits she would be entitled to as his child. Ms. Lawrence assured the chancellor that she was aware of the consequences of terminating the parent-child relationship, and that she had made plans to execute a will in which she would appoint a guardian for Erica in the event of her death.

Appellant cites *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995), in support of its argument that it was error for the chancellor to order termination of the parent-child relationship. In *Davis*, the supreme court stated:

> It has long been the law in Arkansas that the interests of a minor cannot be compromised by a guardian without approval by the court. *Rankin v. Schofield*, 71 Ark. 168, 66 S.W. 197 (1902). It is not sufficient that a court be made aware of a compromise agreement and that it is agreeable to the guardian; rather, the court must make a judicial act of investigation into the merits of the compromise and into its benefits to the minor. *Kuykendall v. Zachary*, 179 Ark. 478, 16 S.W. 590 (1929).

Id. at 355, 908 S.W.2d at 651.

In the instant case, the required judicial act of investigation into the merits of the compromise and the benefits to the minor child was performed. The law and public policy of the State of Arkansas require that the best interests of the child are of paramount importance in determining issues relative to child custody and support. Indeed, in reviewing Mrs. Lawrence's testi-

mony, it becomes evident that the underlying rationale behind requesting the termination of the parent-child relationship and her plans to draft a will that would make provisions for Erica's custody upon her death, was that she believed it to be in the best interest of the minor child to have no further contact with appellee.

We note that at the time of appellee's execution of the petition to terminate the parent-child relationship there was no statutory requirement that the parent purporting to relinquish parental rights remain obligated to pay child support until the child is adopted. *See* Ark. Code Ann. § 9-9-220 (1987). However, the 1995 amendment made it clear that the duty to support continues, despite the relinquishment of parental rights, until an interlocutory decree of adoption is entered. *See* Ark. Code Ann. § 9-9-220 (Supp. 1995).

We review chancery cases de novo, giving due deference to the chancellor's superior ability to judge the demeanor and credibility of witnesses and reverse only if the chancellor's findings are clearly erroneous. *Laroe v. Laroe*, 48 Ark. App. 192, 893 S.W.2d 344 (1995). Because, at the time of appellee's execution of the relinquishment of parental rights, the law did not provide that a parent had a continuing duty of support until the entry of an interlocutory decree of adoption, we hold that it was not error for the chancellor to deny the appellant's petition for child support from appellee.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

Marianne PENDER *v.* Paul PENDER

CA 96-334 945 S.W.2d 395

Court of Appeals of Arkansas
Division IV
Opinion delivered May 21, 1997

Kenneth G. Fuchs, for appellant.

Jesse W. Thompson, for appellee.

WENDELL L. GRIFFEN, Judge. This is an appeal from an order of the Faulkner County Chancery Court holding that it lacked personal jurisdiction over appellee Paul Pender to divide his military pension, thus failing to grant appellant Marianne Pender that portion of the pension that was marital property. We hold that the chancellor's decision was not clearly erroneous. Therefore, we affirm.

The parties were originally married in 1972. They divorced in Mississippi County, Arkansas, in 1980. Some time later, the couple reconciled and lived together in a common-law marriage in Texas until June 1991 when they separated. Appellant moved to Faulkner County, Arkansas, while appellee moved to Oklahoma. Appellant filed for divorce in the Faulkner County Chancery Court in October 1993, alleging that she served appellee in Oklahoma with the summons and divorce complaint by certified letter. Appellee signed for the certified mail on October 18, 1993, but filed no answer within the thirty-day deadline. The

trial court set a hearing date of January 25, 1994, after which appellant was granted an uncontested divorce, and, among other things, one-half of appellee's military retirement pension. The decree was amended twice to comply with the Air Force's requirements for a qualified domestic relations order, and the last amended decree was filed on September 19, 1994.

On September 22, 1994, appellee filed a motion to set aside the divorce decree and amended divorce decree based upon fraud (alleging that the parties had already been divorced in 1980), and that he was never served with the summons and complaint but did receive other documents by certified mail. The trial court heard this matter on August 25, 1995, taking testimony only on the issue of whether appellee received service of process. After the hearing, the trial court found that appellee had been properly served and ordered the parties to submit briefs on the issue of whether it had jurisdiction to divide appellee's pension. Subsequently the chancellor found that federal law precluded the court from asserting jurisdiction to divide the military retirement benefits, and, therefore, that it lacked personal jurisdiction to divide the military pension. It is from this ruling that appellant appeals.

Appellant first argues that the trial court erred in limiting the testimony regarding appellee's contacts with the state in resolving the issue of whether Arkansas could exercise personal jurisdiction over appellee. Appellant failed to abstract the final order of the trial court containing the rulings from which she has appealed, abstracting nothing past the chancellor's remarks in open court. However, appellee submitted an abstract that cured appellant's deficiencies, thus allowing us to review her appeal. Appellee abstracted the last amended divorce decree, filed of record on November 27, 1995, which included the following findings: that the court had jurisdiction to hear the divorce action and that service of process on appellee was proper; that the court had no personal jurisdiction over appellee; that under U.S.C. § 1408(c)(4), the court had no personal jurisdiction over appellee to divide appellee's military pension; and that under the case of *Janni v. Janni*, 271 Ark. 953, 611 S.W.2d 785 (Ark. App. 1981), the court lacked personal jurisdiction to award further relief to appellant. We will, therefore, address this appeal on the merits, specifically

addressing the issue of whether the trial court erred in limiting testimony on the issue of whether the court had personal jurisdiction over appellee, and whether the trial court erred in finding that it lacked personal jurisdiction over appellee.

It is within the trial court's discretion whether to admit testimony, and its decision will not be reversed absent manifest abuse of discretion. *Callahan v. Clark*, 321 Ark. 376, 901 S.W.2d 842 (1995). Appellant asserts that appellee consented to the jurisdiction of the Arkansas courts when he filed a motion to set aside the divorce decree and amended divorce decree. However, 10 U.S.C. § 1408 states in part:

> A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) [dividing and making award to spouse as marital property] unless the court has jurisdiction over the member by a reason of (a) his residence, other than because of military assignment, (b) his domicile in the territorial jurisdiction of the court, or (c) his consent to the jurisdiction of the court.

Appellee is correct in his argument that section 1408 places a strict limitation on the court's exercise of jurisdiction to dispose of his military retirement pay. This federal law preempts the application of Ark. Code Ann. § 16-4-101 (1997), which would determine whether appellee had "minimum contacts" with the state sufficient to confer jurisdiction over his person.

In *Southern v. Glenn*, 677 S.W.2d 576 (Tex. Ct. App. 1984), the Texas Court of Appeals held that the "minimum contacts" test does not apply in a suit for the partition of military retirement pay, making the requirements for personal jurisdiction those set out in 10 U.S.C. § 1408(c)(4). *Southern* further held that the fact that a defendant in such a case meets the minimum-contacts test is not determinative on the issue of personal jurisdiction where the defendant does not meet the terms of the federal statute regulating disposition of military retirement pay. *Id.* at 582. Because Congress legislated on a subject within its constitutional parameters and over which it has jurisdiction, the state law must yield when it conflicts with federal law. *Id.* Further, it is well-settled in this state that where limited jurisdiction is conferred by

statute, the construction ought to be strict as to the extent of the jurisdiction, but liberal as to the proceedings. *Woods v. Woods*, 285 Ark. 175, 686 S.W.2d 387 (1985) (citing *Wood v. Wood*, 54 Ark. 172, 178, 15 S.W. 459 (1891)).

Under 10 U.S.C. § 1408, no jurisdiction could be exercised over appellee unless he was a resident of Arkansas, domiciled in the state, or consented to the jurisdiction of the court. Where appellant was not a resident of Arkansas or domiciled in the state, the issue presented is whether appellee "consented" to jurisdiction in the Arkansas chancery court when he filed a motion to set aside the divorce decree based on fraud and improper service of process.

Appellant argues that appellee cannot use a "shotgun approach" in "consenting" to the divorce but not to the division of the marital pension. This argument is without merit. Under the doctrine of divisible divorce, appellant could have obtained a dissolution of the marriage without appellee's consent. "Consent" is defined as "a concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. Agreement; approval; permission . . . ." BLACK'S LAW DICTIONARY 305 (6th ed. 1990). We do not agree that appellee acquiesced to the court's jurisdiction when he filed the motion to set aside the divorce decree. Appellant also contends that appellee waived his objection to personal jurisdiction when he appeared at the hearing on the motion to set aside the decree. Appellant only cites one case in support of this argument, *Ingram v. Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993), in which "waiver" was defined as:

> Voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. It may occur when one, with full knowledge of material facts, does something that is *inconsistent with the right*, or his intention to rely upon that right. (Emphasis added.)

Id. at 563, 864 S.W.2d at 243 (citation omitted). Appellee's actions in requesting a hearing on the motion were not inconsistent with his position that there was improper service. Moreover, where appellant cited no convincing authority in support of her

position that appellee consented to the jurisdiction of the court, the trial court will be affirmed on this issue. *Rogers v. Rogers*, 46 Ark. App. 136, 877 S.W.2d 936 (1994).

It is clear that appellee was not a resident of Arkansas or domiciled in Arkansas at any relevant time for the purpose of subjecting his person to the jurisdiction of our courts. Therefore, none of the jurisdictional factors prescribed by the federal statute (residence, domicile, or consent) have been satisfied. The chancellor's decision that he lacked personal jurisdiction to divide appellee's military pension was not clearly erroneous.

Affirmed.

CRABTREE and NEAL, JJ., agree.

Dave Allen COX *v.* CFSI TEMPORARY EMPLOYMENT

CA 96-959 944 S.W.2d 856

Court of Appeals of Arkansas
Division II
Opinion delivered May 28, 1997

Daily, West, Core, Coffman & Canfield P.L.L.C, by: *Eldon F. Coffman*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *James A. Arnold, II*, for appellees.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision. The ALJ found that appellant failed to establish that he had sustained a compensable injury supported by objective findings as required by Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996). On appeal, appellant argues that the Commission erred in not considering deficits in range of motion and mobility as "objective findings." Also, appellant contends, in the alternative, that there is no substantial evidence to support the Commission's decision. We affirm the Commission's decision.

The record reveals that appellant worked for appellee for one month lifting table tops which weighed between twenty-five and forty pounds. On January 4, 1995, between 7:00 a.m. and 9:00 a.m., appellant's back began to hurt. He saw Dr. Michael W. Callaway who diagnosed lumbar strain. Appellant visited doctors from January 1995, through August 1995. Appellant's overall diagnosis was lumbar strain with no positive, objective tests results. The only sign of appellant's back strain was the assessment that appellant was unable to bend over more than ninety degrees.

There were signs of disc bulges, but the disc problems were said to be unrelated to appellant's work activity or his back strain.

On appeal, appellant argues that the Commission erred in not considering his inability to bend more than ninety degrees as an "objective finding." Appellant admits that a range of motion test is not to be considered an "objective finding" when determining impairment ratings as set forth in Ark. Code Ann. § 11-9-102(16)(A)(ii) (Repl. 1996). However, appellant reasons that a range of motion test should be considered an "objective finding" when determining compensability. We disagree.

Arkansas Code Annotated § 11-9-102(5)(A)(ii)(b) (Repl. 1996) provides:

> (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:
>
> (b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence.

Arkansas Code Annotated § 11-9-102(5)(D) provides that a compensable injury "must be established by medical evidence, supported by 'objective findings' as defined in § 11-9-102(16)." "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i) (Repl. 1996).

[redacted] Construing the Act strictly, it is apparent that appellant's inability to bend more than ninety degrees is not an "objective finding" within the meaning of Ark. Code Ann. § 11-9-102(16)(A)(i). Appellant's limitation could clearly have come under his voluntary responses, his manipulation, and control. *See Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996). The Commission, in determining the compensability of appellant's claim, proceeded under Ark. Code Ann. § 11-9-102(16)(A)(i), which was a correct application of the law. Consequently, we cannot say that there is no substantial evidence to sup-

port the Commission's finding that appellant's lack of range of motion was not an "objective finding."

Appellant also argues that even if appellant's inability to bend ninety degrees is found not to be objective, there is no substantial evidence to support the Commission's denial of benefits. We disagree.

A compensable injury must be established by "medical evidence supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996). The record reveals that the only positive finding associated with appellant's injury was his inability to bend over ninety degrees. As we discussed above, this is not an "objective finding." The record does not indicate any other objective tests which rendered a positive result indicating that appellant had sustained a compensable injury.

■■ Substantial evidence is that evidence which a reasonable person might accept as adequate to support a conclusion. *Crawford v. Pace*, 55 Ark. App. 60, 929 S.W.2d 727 (1996). A decision by the 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.* Based on the record and the evidence before us, we cannot say that there is no substantial basis to support the Commission's denial of benefits.

Affirmed.

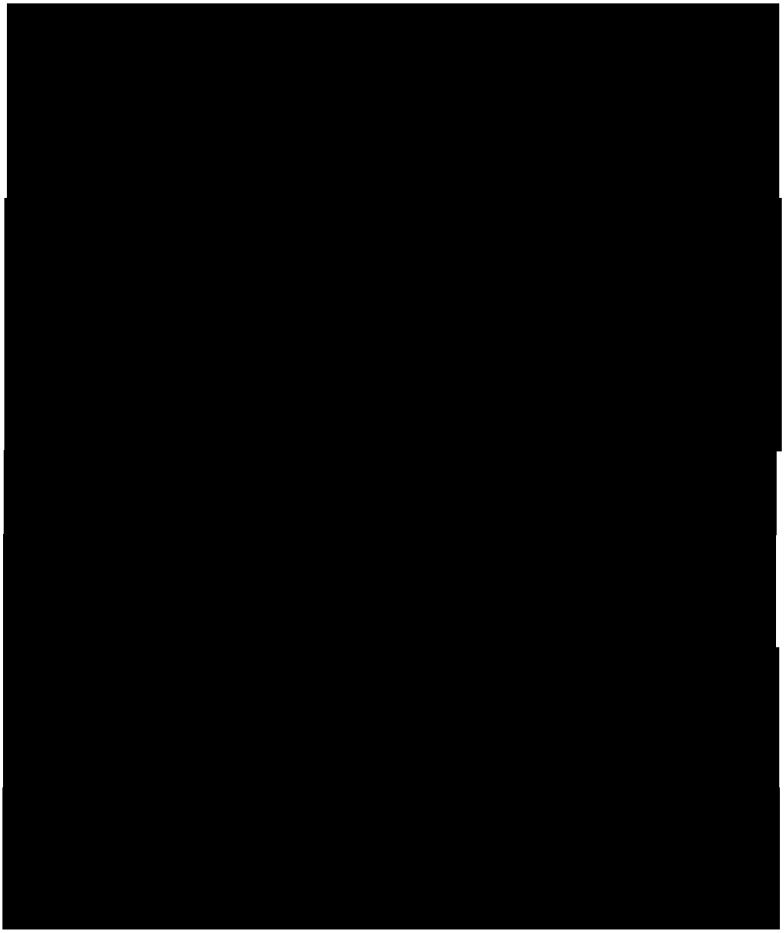
PITTMAN and MEADS, JJ., agree.

Erich DIENER and ERPE, Inc. *v.* John RATTERREE

CA 96-476 945 S.W.2d 406

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 28, 1997

[Petition for rehearing denied July 2, 1997.]



Michael E. Stubblefield, P.A., for appellant.

Andrew A. Flake and *Rex W. Chronister, P.A.*, for appellee.

JOHN F. STROUD, JR., Judge. This case involves a dispute between adjacent landowners concerning a septic system. The appellants are Erich Diener and ERPE, Inc., Diener's wholly owned corporation. The appellee is John Ratterree. The properties purchased by these parties were originally owned by one person, Bobby Taylor. When Taylor owned all of the property, he constructed a commercial building with restrooms served by an underground septic system. The commercial building was located on the portion of the property subsequently purchased by appellee. The lateral leach lines extending from the septic system ran under a portion of the property that was subsequently purchased by appellants.

Appellants purchased their parcel in 1982. The warranty deed to appellant Diener stated that the conveyance was subject to existing easements, but appellant was not told about the location of the leach lines nor did he inquire. Appellee purchased his adjoining property approximately one year later, in 1983. Problems did not arise until 1993, when appellee opened a catfish restaurant in the commercial building on his property. Appellants maintained that the increased usage of the public restrooms on appellee's property caused sewage to rise to the surface of appellants' property from the leach lines running underneath, and appellant Diener severed the lateral lines located on his property. The parties eventually filed actions against each other, and those actions were consolidated for trial. Following a hearing, the trial court found that a permanent servitude had been created on appellants' property during Taylor's prior ownership when there was unity of title. The court awarded appellee $1,000 in damages, representing the cost of repairing the lateral lines that were severed four times by appellant. The court also permanently enjoined appellants from interfering with those lines. The court denied appellee's request for damages based on trespass. This appeal followed. We affirm.

Appellants argue in the first point of appeal that the "trial court erred in finding that the existence of a septic system during unity of title created a permanent servitude on the appellants' property in favor of the appellee, and in awarding damages to the appellee." We find no error.

■■ Under this point, appellants use the terms "prescriptive easement" and "implied easement" as if they were interchangeable. They are not. Here, we are dealing with a type of "implied easement." Our supreme court has defined an "implied easement" as follows:

> Where, during unity of title, a landowner imposes an apparently permanent and obvious servitude on part of his property in favor of another part, and where at the time of a later severance of ownership the servitude is in use and is reasonably necessary for the enjoyment of that part of the property favored by the servitude, then the servitude survives the severance and becomes an easement by implication. *In order for such an easement to be estab-*

> *lished it must appear not only that the easement was obvious and apparently permanent but also that it is reasonably necessary for the enjoyment of the property, the term "necesssary" meaning that there could be no other reasonable mode of enjoying the dominant tenement without the easement. An easement by implication does not arise merely because its use is convenient to the beneficial enjoyment of the dominant portion of the property.*

Kennedy v. Papp, 294 Ark. 88, 741 S.W.2d 625 (1987) (emphasis added).

In making their argument under this first point, appellants argue that the use of the claimed "prescriptive easement" was not apparent and that it was not necessary. Whether an easement is apparent and necessary is ordinarily a question of fact. *Greasy Slough Outing Club, Inc. v. Amick*, 224 Ark. 330, 274 S.W.2d 63 (1954). While we review chancery cases *de novo*, we do not reverse the chancellor's findings unless they are clearly against the preponderance of the evidence, or clearly erroneous. Ark. R. Civ. P. 52(a); *Carver v. Jones*, 28 Ark. App. 288, 773 S.W.2d 842 (1989).

Apparentness of use does not necessarily "mean actual visibility, but rather susceptibility of ascertainment on reasonable inspection by persons ordinarily conversant with the subject." 25 AM. JUR. 2D *Easements & Licenses* § 30 (1966). Each case must necessarily depend upon its particular facts. Here, the chancellor found that the septic system was reasonably necessary to appellee's use of the property and that the "test of apparent and obvious" had been satisfied. Those findings are not clearly erroneous. Appellant Diener had owned land adjacent to the property in question, and he knew that the property had to be served by septic systems because there were no sewer lines in the area.

> We announced the rule in this language in *Waller v. Dansby*, 145 Ark. 306, 224 S.W. 615: "The general rule is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty as in the case of vendor and purchaser, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding. Or, as the rule has been expressed more briefly, where a man has suffi-

> cient information to lead him to a fact, he shall be deemed cognizant of it."

Hannah v. Daniel, 221 Ark. 105, 252 S.W.2d 548 (1952). We cannot say that the chancellor's finding that appellant Diener possessed sufficient information to make apparent the existence and location of lateral leach lines extending from the adjoining property's septic system was clearly erroneous.

Neither can we say that the trial court's finding that the septic system is reasonably necessary to appellee's use of his property was clearly erroneous. It is the necessity at the time of the conveyance that governs. *Greasy Slough*, 224 Ark. at 338. The commercial building, with its restrooms and septic system, was in existence at the time of the conveyance in 1983. Because there are no sewer lines in the area, a septic system is reasonably necessary to the property owner's use of the property.

In the second point of appeal, appellants argue that the "trial court erred in finding that the appellants' imputed awareness of the need for septic systems in the general area met the legal requirement that a prescriptive easement be apparent and obvious." This argument was addressed under Point I and needs no further discussion.

Affirmed.

ROGERS and MEADS, JJ., agree.

ROBBINS, C.J., CRABTREE, J., and HAYS, S.J., dissent.

TERRY CRABTREE, Judge, dissenting. While I agree with the majority opinion that an "implied easement" was created when there was unity of ownership of the two parcels in question, I cannot agree with the majority that the easement was "apparent and necessary" at the time the appellant purchased his property.

Before the parties acquired their respective properties, all of the property was owned by Bobby Taylor. Taylor constructed a building with a septic system on part of the property and used it for a real estate office that was open to the public. In 1976, Taylor sold the portion of the land with the building and septic tank to Jolly Baugh. Taylor owned the adjoining property on three sides, and Highway 71 was on the fourth side. The property was used as

a restaurant for approximately three years and then was sold to another party. Baugh regained the property through a foreclosure action and conveyed the property to the appellee, John Ratterree, by warranty deed dated July 13, 1983.

The appellee ran a satellite business at the location until 1987 when the business was closed. In December 1993, the appellee opened a restaurant on the premises. The appellee did not modify or change the original septic system.

The appellant purchased the property that adjoins the appellee's property on August 25, 1982. The warranty deed to the appellant was "Subject to, existing right of ways, easements, restrictions and previous reservations, if any." After purchasing the property, a wet spot developed and the appellant discovered that the lateral lines from the septic tank on the appellee's property ran onto his property. The appellant testified at trial that he had inspected the property before buying it and was not aware of the lateral lines buried on his property.

After trial, the court ruled in favor of the appellee and stated in its order, in part:

> The Court finds that the test of apparent and obvious which is required by law has been met where the Defendant, as in this case, is knowledgeable with the fact that property within that area with indoor plumbing was required to be on a septic or similar system.

Knowledge of other property in the area does not rise to the level of apparent and obvious sufficient to put the appellant on notice that his neighbor had septic system lateral lines running beneath his property. The lines were buried several feet beneath the surface of the land and, at the time the appellant purchased his property, the restaurant was not in operation. The appellant testified that after the restaurant started in business, sewage would bubble to the surface of his property. While credibility of the witnesses is reserved for the trial court and I would normally defer to the superior position of the trial court, the trial court found in this instance that the test of apparent and obvious was met because other property in the area with indoor plumbing had to be on a septic or similar system. This is not the visible use contemplated

in *Greasy Slough Outing Club, Inc. v. Amick*, 224 Ark. 330, 274 S.W.2d 63 (1954), in which the Arkansas Supreme Court quoted *John Hancock Mutual Life Ins. Co. v. Patterson*, 103 Ind. 582, 2 N.E. 188 (1885), stating:

> In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such *visible uses* and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made.

Id. at 338, 274 S.W.2d at 67 (emphasis added).

In the case of *Hannah v. Daniel*, 221 Ark. 105, 252 S.W.2d 548 (1952), relied on by the majority opinion for the proposition that "where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it," the supreme court reversed the trial court and stated:

> [W]e think the preponderance of the evidence is against appellees' contention that the physical condition of lot 12 at the time of appellants' purchase was such, *by reasonable inspection*, to make it apparent of the existence of a servitude that would charge them with notice of an easement.

Id. at 109-10, 252 S.W.2d at 551 (emphasis added).

The *Hannah* case was cited in *Childress v. Richardson*, 12 Ark. App. 62, 670 S.W.2d 475 (1984), for the rule that: "A purchaser of real estate is charged with notice of an unrecorded easement when the existence of the servitude is apparent upon an ordinary inspection of the premises." *Id.* at 64, 670 S.W.2d at 476. In the *Childress* case, this court reversed the trial court's finding that a subsequent purchaser of real property was bound by an unrecorded prescriptive easement for a private gas line that went across the appellant's property. There were three meters for various gas lines and the appellant testified that he thought that two of the meters serviced an adjoining property owner but not the appellee. The court stated:

> In the present case, there was no actual notice to appellants and there was no evidence of the gas line sufficient to put appellants on notice of its presence. The line was entirely under-

> ground, and there was nothing to put appellants on notice that one of the three meters east of appellants' property serviced appellees' residence. Appellant James Childress testified that he was aware of the three meters, but had thought that one of the meters was his and that the other two serviced the two houses on the Flack property. Under the circumstances of this case his belief was a reasonable one.

Id. at 65, 670 S.W.2d at 476.

This case is similar to the *Childress* case, and, rather than overrule a long line of cases that require some use, preferably visible, that would put a prospective purchaser on notice, I would reverse. I dissent.

ROBBINS, C.J., and HAYS, S.J., join.

Vaughn Dale KIRKENDOLL *v.* STATE of Arkansas

CA CR 96-1040 945 S.W.2d 400

Court of Appeals of Arkansas
Division I
Opinion delivered May 28, 1997
[Petition for rehearing denied July 2, 1997.]

Montgomery, Adams & Wyatt, PLC, by: *Dale E. Adams*, for appellant.

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

MARGARET MEADS, Judge. Vaughn Dale Kirkendoll was convicted by a jury of stalking in the second degree. He was sentenced by the court to three years' incarceration in the Arkansas Department of Correction. Appellant argues on appeal that he did not intelligently and voluntarily waive his right to counsel and was therefore deprived of counsel, and that the trial court imposed an illegal sentence. We disagree and affirm.

The charge of stalking in the second degree was brought against appellant in response to his threats and actions toward his ex-wife, Kathi Kirkendoll. A person commits the offense of stalking in the second degree, a Class C felony, if he "purposely engages in a course of conduct that harasses another person and makes a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury." Ark. Code Ann. § 5-71-229(b)(1) (Supp. 1995). "Course of conduct" is defined as "a pattern of conduct composed of two (2) or more acts separated by at least thirty-six (36) hours, but occurring within one (1) year." Ark. Code Ann. § 5-71-229(d)(1)(A) (Supp. 1995). The term "harasses" employed in § 5-71-229(b)(1) means acts of harassment as defined in Ark. Code Ann. § 5-71-208(a) (Supp. 1995). Those parts of § 5-71-208 relevant here define harassment as follows:

> (a) A person commits the offense of harassment if, with purpose to harass, annoy, or alarm another person, without good cause, he:
>
> * * *

> (3) Follows a person in or about a public place; or
>
> * * *
>
> (5) Engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose; or
>
> (6) Places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence, other than the residence of the defendant, for no purpose other than to harass, alarm, or annoy.

Ark. Code Ann. § 5-71-208(a) (Supp. 1995). *See also Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

After the parties separated in January 1995, Ms. Kirkendoll obtained a restraining order against her husband. However, he continually violated this order by following her and going to her home and to her place of employment. In April 1995, appellant told her that it did not matter where she hid from him, that he could just come into church on a Sunday morning and blow her away. The next day, appellant appeared at the church where Ms. Kirkendoll and their daughters were attending a spaghetti supper. She notified the police, but appellant left before any police officers arrived.

Ms. Kirkendoll testified that on July 22, she and her daughters went to the movie theater, and appellant entered the theater and sat down behind them. He did not speak to Ms. Kirkendoll, but he spoke to their older daughter. Ms. Kirkendoll stated that his conduct scared her because she did not know what he planned to do. She saw him again six days later at McDonald's, when he called their children outside to talk to them. She said that she was afraid he would try to take the children.

Ms. Kirkendoll further testified that on August 1, appellant followed her to a funeral, and on August 7, she found a note on her car from appellant stating that he was not going to be a weekend dad. On August 13, appellant called Ms. Kirkendoll and told her that she had taken the girls away from him and that he would "get her for that." On August 14, Robert Williams, a deacon in

her church, told her that appellant had said that if he killed her [Ms. Kirkendoll] that it would be "okay in the eyes of God." At that point, Ms. Kirkendoll decided to press charges against appellant.

At appellant's first appearance on August 31, 1995, the following colloquy ensued:

> TRIAL COURT: All right, you have the right to remain silent. Anything you say can and will probably [be] used against you in court. You have a right to have an attorney present with you during any questioning. If you can't afford an attorney, you need to fill out an affidavit and one will be appointed to represent you if you qualify at no charge to you. You have a right to answer any questions if you want to but at any time you decide you don't want to answer any more questions, all you have to do is say, I don't want to answer any more questions or I would like to have my attorney present and the questioning will stop. Do you understand?
>
> KIRKENDOLL: (Nodding head up and down.)
>
> * * *
>
> TRIAL COURT: We are going to set your arraignment on the 14th. If you are released on bond, you need to be here that day with your attorney. If you can't afford an attorney, you need to fill out the affidavit as I said and someone will be appointed to represent you at your arraignment, or earlier if it's necessary.

At appellant's arraignment on September 14, 1995, the court again questioned appellant about whether he had retained an attorney:

> TRIAL COURT: Do you have an attorney?
>
> KIRKENDOLL: No, sir.
>
> TRIAL COURT: Are you going to hire an attorney?
>
> KIRKENDOLL: No, sir.
>
> TRIAL COURT: Have you filed an affidavit for a court-appointed attorney?
>
> KIRKENDOLL: No, sir.
>
> TRIAL COURT: Are you going to proceed pro se, which means you are going to be your own lawyer?

KIRKENDOLL: Yes, sir.

* * *

TRIAL COURT: You are here today for an arraignment. This is the time for you to enter your plea. Since you are proceeding without counsel, I'm going to advise you of your rights. You have the right to remain silent throughout these proceedings and even in the trial. You have the right to have an attorney present if you want to have one. If you choose not to, that's your choosing. You have a right to cross-examine any of the witnesses that the State would put on the stand against you. You have the right to call any witnesses on your behalf if you wish. And, if you can't get those witnesses here voluntarily, they could be subpoenaed at the expense of the State. Do you understand that?

KIRKENDOLL: Yes, sir.

TRIAL COURT: You have the right to an appeal. If the decision of the Court or the jury is adverse to what you'd like for it to be, you have the right to a jury trial which will be a speedy trial. The jury would have [to] vote unanimously to find you guilty. Do you understand all those rights?

KIRKENDOLL: Yes.

TRIAL COURT: You are charged with stalking in the second degree. It is alleged that on the 6th day of April, 1995, through the 14th day of August, 1995, you purposely engaged in a course of conduct that harassed another person and made a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury of her immediate family. This is a Class C felony. How do you plead?

KIRKENDOLL: Not guilty.

* * *

TRIAL COURT: I am going to require the State to provide discovery by November the 1st and you to provide discovery by November the 27th.

KIRKENDOLL: What do you mean by discovery?

TRIAL COURT: Discovery is where you will give to them a list of all the witnesses that you intend to call and any defenses that you may have. They will be required to do the same to you, okay? They will also be required to give you a recommendation if they intend to make one, what could be a plea agreement. If

you want to accept that, then you can do that on the date that's set for the intent date which is November the 27th. You need to be here on each of these days that are set — set out on this order. Read this order very carefully because it tells you what you're supposed to do.

The issue of appellant's lack of counsel was addressed a third time at the pretrial hearing on January 8, 1996:

TRIAL COURT: Mr. Kirkendoll, your case is set for trial in two weeks, and you —

CASE COORDINATOR: It's January 23rd.

TRIAL COURT: January 23rd. And you've elected up to this point to have no attorney?

KIRKENDOLL: Yes, sir.

TRIAL COURT: Is that still the way you want to proceed?

KIRKENDOLL: Yes, sir.

TRIAL COURT: All right.

DEPUTY PROSECUTOR: Your Honor, would the Court like to inquire of Mr. Kirkendoll's ability to defend himself?

TRIAL COURT: Not at this point. I'll do it when we get closer to trial. Have you received discovery from the State?

KIRKENDOLL: No, sir.

TRIAL COURT: Mr. James, would you make that available to him today?

DEPUTY PROSECUTOR: I did, but he just didn't want to take it the last court date.

KIRKENDOLL: What discovery was that, sir?

TRIAL COURT: The information that they have regarding the case, who their witnesses will be, what they intend to prove, et cetera. Have you —

KIRKENDOLL: Where do I get this information?

TRIAL COURT: From Mr. James.

DEPUTY PROSECUTOR: I handed it to him in court last time and he handed it back to me and said he didn't want it.

On January 25, 1996, the day of appellant's trial, the following exchange occurred prior to jury selection:

TRIAL COURT: I know that you have indicated that you want to go ahead and proceed without an attorney, but before I do that I want to make sure that you understand your rights.

KIRKENDOLL: Yes, sir.

TRIAL COURT: You know that you have the right to have an attorney representing you today?

KIRKENDOLL: Yes, sir.

TRIAL COURT: All right. Do you feel like you're competent to represent yourself?

KIRKENDOLL: I feel like I'm a competent person, sir. I don't know the law as what might forfeit in the courtroom.

TRIAL COURT: All right. What kind of education do you have?

KIRKENDOLL: I have a high school education.

TRIAL COURT: Have you participated in the criminal justice system before?

KIRKENDOLL: In no way.

TRIAL COURT: You ever watched a trial?

KIRKENDOLL: I've watched more today than I ever have.

TRIAL COURT: Have you read anything about the law in this case or —

KIRKENDOLL: No.

TRIAL COURT: Know anything about a trial other than what you've seen on television and what you've seen here today?

KIRKENDOLL: Not much, no.

TRIAL COURT: Well, why have you decided to go forward without an attorney?

KIRKENDOLL: I'm not guilty.

TRIAL COURT: All right. There are some things I need to tell you before we start — and I'm not doing this to frighten you or scare you or make you worry, but I want to make sure that you understand what you are looking at. This is a jury trial.

KIRKENDOLL: Yes, sir.

TRIAL COURT: You've asked for a jury trial.

KIRKENDOLL: Yes, sir.

TRIAL COURT: And there are — there are a lot of things that go on before a jury trial can begin. First thing will be the jury selection.

KIRKENDOLL: Yes, sir.

TRIAL COURT: I don't know, were you here the other day during jury selection?

KIRKENDOLL: No, sir.

TRIAL COURT: All right. The offense —

KIRKENDOLL: If it's all the same with you, sir, I would just as soon they picked the jury.

TRIAL COURT: They?

KIRKENDOLL: Yeah.

TRIAL COURT: Who?

KIRKENDOLL: I understand, you know, the two sides get together and pick the jury. I'll just let the prosecution pick the jury.

TRIAL COURT: Okay. Let me go ahead and explain these things to you. The offense that you're charged with is a felony. It is a Class C felony and I believe the range of punishment is from three to ten years and a fine of up to $10,000 dollars. Do you understand that?

KIRKENDOLL: Yeah. I didn't know what the penalty was, but —

TRIAL COURT: Okay. You understand that most people who go through this kind of trial have an attorney to represent them —

KIRKENDOLL: Uh-huh.

TRIAL COURT: — because they need help. To you, having an attorney would be like me having a mechanic. If I tore into the engine in my car, I can guarantee you I wouldn't go very far after I went down the road.

KIRKENDOLL: Me either, and I may not get very far.

TRIAL COURT: All right. A competent lawyer is knowledgeable in the law, knowledgeable in the procedures, knowledgeable in the rules of evidence, and in the technical issues that would come up before the Court in this case. Even if you've seen — seen some trials on television, even if you have some type of edu-

cation in the law, you may not know all the technicalities that are involved. Are you sure you want to represent yourself?

KIRKENDOLL: Your Honor, I gave 17 years to this woman, and if she wants to take three more from me, that's fine, or even seven more, ten more, whatever.

TRIAL COURT: There are some other things I need to tell you, then. The Supreme Court has ruled that there — that you have the right to go into trial without a lawyer if that's what you want to do. Okay. You have the constitutional right to a lawyer and I've explained that to you I think each time you've been here. Maybe not the last time, but I've tried to tell you that —

KIRKENDOLL: Yes, sir.

TRIAL COURT: — that you have a right to a lawyer. Now, when we're out there, you can't be relying on me to tell you what the law is. The Supreme Court says I can't do that. I'm a referee. I can't be the coach. You understand?

KIRKENDOLL: Yeah.

TRIAL COURT: You're going to be held to about the same responsibility that you would if [you] had a lawyer there. Okay. If you get frustrated and upset, I may exercise my discretion and take a break, but I can't coach you. I can't tell you what you need to do. If, for any reason, I find that you conduct yourself in a manner that is not civil or one that I find to be contemptuous, you may find yourself in jail for that. Do you understand that you will be held to the same standard as if Mr. James or Mr. Stephens went out there and said something inappropriate to the jury, or to a witness, or to me? They might find themselves in the jail as well. You understand that?

KIRKENDOLL: Yes, sir.

TRIAL COURT: All right. I'm going to allow you to proceed; however, I am going to ask Mr. Stephens, who is the public defender here, to sit with you at the table. If you have any questions about what's going on, you can ask him. He won't be standing up and making objections. He won't be conducting the voir dire. He won't be doing the questioning. You will be doing that by yourself.

Appellant allowed the State to select the jurors. During the trial, appellant's ex-wife was allowed to testify regarding incidents

predating the parties' divorce, which were irrelevant to the current stalking charge; however, appellant did not object. Appellant allowed his minister to testify concerning matters about which appellant had spoken with him in confidence. When the State rested, the public defender, who the judge had asked to sit at the table with appellant, instructed him to make a motion for a directed verdict, which was denied.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee that any person brought to trial in any state or federal court must be afforded the fundamental right to assistance of counsel before that person can be validly convicted and punished by imprisonment. *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996). An accused person has a constitutional right to represent himself and make a voluntary, knowing, and intelligent waiver of his constitutional right to the assistance of counsel in his defense; however, every reasonable presumption must be indulged against the waiver of fundamental constitutional rights. *Id.* Certain requirements must be met before a trial court can find that an accused has knowingly and intelligently waived counsel and allow the accused to proceed pro se:

> A defendant in a criminal case may invoke the right to defend pro se provided: (1) the request is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver of the right to counsel; and (3) the defendant has not engaged in conduct which would prevent the fair and orderly disposition of the issues.

Brooks v. State, 36 Ark. App. 40, 44, 819 S.W.2d 288, 290 (1991) (citation omitted).

The accused must have full knowledge and adequate warning concerning his rights and a clear intent to relinquish them before waiver can be found. *Id.* Waiver of the right to counsel presupposes that the court has discharged its duty of advising appellant of his right to counsel, questioning him as to his ability to hire independent counsel, and explaining the desirability of having assistance of counsel during the trial and the problems attending one representing himself, since a party appearing pro se is responsible for any mistakes he makes in the conduct of his trial

and he receives no special consideration on appeal. *Id.* It is the State's burden to show that an accused has voluntarily and intelligently waived his right to counsel. *Oliver, supra*; *Brooks, supra.*

In the present case, the trial judge questioned appellant at each stage of the proceeding with regard to his desire to proceed pro se. The recited portions of the record indicate that the trial judge sufficiently questioned appellant about his desire to appear pro se and the consequences of defending himself. In fact, we believe that this trial judge went to greater lengths than were necessary to ensure that appellant had every possible opportunity to request the assistance of counsel.

The record does not indicate that appellant ever requested and was denied counsel. Quite to the contrary, the record is replete with dialogue between the trial judge and appellant in which the judge inquired as to appellant's intent to employ counsel. Each time, appellant unequivocally stated that he would represent himself. Appellant never apprised the court that he was financially unable to hire an attorney; in fact, after being instructed that if he could not afford an attorney he could complete an affidavit and one would be appointed, appellant told the court that he would not complete the affidavit and that he intended to represent himself. From our review of the record, we determine that appellant knowingly and intelligently waived his right to counsel; therefore, his first argument must fail.

For his second point on appeal, appellant argues that his sentence was unauthorized by statute and therefore illegal. Appellant's point is without merit. He was convicted of stalking in the second degree, a Class C felony, which is punishable by a sentence of not less than three years nor more than ten years. *See* Ark. Code Ann. §§ 5-71-229(b)(3) (Supp. 1995) and 5-4-401(a)(4) (Repl. 1993). Appellant was sentenced to three years in the Department of Correction, which is a proper sentence under the statutes.

Affirmed.

STROUD and NEAL, JJ., agree.

Carl Ledell PENN *v.* STATE of Arkansas

CA CR 96-1155 945 S.W.2d 397

Court of Appeals of Arkansas
Division IV
Opinion delivered May 28, 1997

William R. Simpson, Jr., Public Defender; *Kent C. Krause*, Deputy Public Defender, by: *Jeffrey A. Weber*, for appellant.

Winston Bryant, Att'y Gen., by: *O. Milton Fine II*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Carl Ledell Penn was tried in a bench trial on a three-count indictment for possession of cocaine with intent to deliver, possession of drug paraphernalia, and fleeing. He moved for directed verdict on all counts at the conclusion of the State's case. The trial judge, after addressing only the drug-possession count, granted the motion for directed verdict and announced that the case was dismissed. After a recess, and after another case had been called, the trial judge advised counsel for Penn and the State that he had failed to address the drug paraphernalia and fleeing counts, denied the directed-verdict motion as to these counts, and ultimately found Penn guilty. Penn asserts on appeal that resumption of the proceedings after dismissal of the case violated his right against double jeopardy. We agree, and reverse and dismiss.

At the close of the State's evidence in his bench trial, Penn moved for a directed verdict on all three counts, articulating separate grounds for each offense. Regarding count one, possession of a controlled substance with intent to deliver, Penn argued that the State failed to prove possession, that the substance was cocaine, and that he planned to sell it. Regarding count two, possession of drug paraphernalia, Penn argued that the State failed to prove that the one-inch-square plastic ziplock baggies that were introduced into evidence were actually drug paraphernalia, because they were never analyzed for drug residue, and that the State failed to prove that he actually possessed them. Regarding count three, misdemeanor fleeing, Penn argued that the State failed to prove that he unlawfully fled from a Little Rock police officer whom he knew to be an officer and that he knew that his immediate arrest or detention was being attempted.

After listening to the State's arguments against the motion, the court stated, "I'm going to grant the motion for a directed verdict," because the State failed to prove that Penn possessed a usable amount of cocaine. The trial judge then stated, "I grant the defendant's motion. This case is dismissed." The State voiced no objections. The judge then ordered the controlled substance destroyed and declared a fifteen-minute recess.

When the judge returned after the recess, he called the next case. However, the judge later interrupted these proceedings and

asked the counsel from Penn's case to approach; he stated that he had failed to address the fleeing and drug paraphernalia charges against Penn, and told counsel that he had instructed that Penn not be transported back to the county jail and that he be brought back to the courtroom. The judge then completed the unrelated proceedings and went back on the record in Penn's case.

The judge announced that in his haste to get some aspirin for a headache, he failed to address the other two counts included in Penn's motion for a directed verdict, and that he intended to finish his response to the motion. The judge stated that, in granting the motion for the directed verdict, he had only addressed the charge of possession of cocaine with intent to deliver, and that he "mis-spoke" when he said the case was dismissed. The judge also noted that the dismissal had occurred less than an hour earlier.

Penn objected, citing case authority that proceeding with the trial would violate the constitutional prohibition against double jeopardy. The court, after reading the case, found it unpersuasive. Penn did not put on a case, but renewed his motion for a directed verdict. The motion was denied, and Penn was found guilty of possession of drug paraphernalia and fleeing. He later received a five-year sentence.

Penn's sole argument on appeal is that the trial court erred by finding him guilty of two counts of the information after previously dismissing the case. Penn argues that the trial judge's decision to deny a directed verdict on the drug paraphernalia and fleeing counts after he stated that the case was dismissed constituted double jeopardy. He contends that resuming the proceeding amounted to a reconsideration of an acquittal, and relies on *Sanabria v. United States*, 437 U.S. 54 (1978) (quoting *Fong Foo v. United States*, 369 U.S. 141 (1962)), as authority for the proposition that a verdict of acquittal may not be reversed without putting a defendant twice in jeopardy, even if the dismissal is "based upon an egregiously erroneous foundation." Penn also urges this court to find analogous the situation in *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992), in which the supreme court found violative of the prohibition against double jeopardy a trial judge's reversal of his grant of a directed verdict on an aggravated robbery

charge when he found that he had wrongly assumed that the State was required to prove as an element of the offense that property was actually taken.

The State urges us to accept the trial judge's explanation for what transpired, that the judge misspoke and only intended to dismiss the drug possession charge. The State contends that giving the trial court the benefit of the doubt in this instance would be consistent with this court's usual deference to the trial judge sitting as a trier of fact where, for example, we recognize the judge's superior position to determine the credibility of witnesses and presume that the judge only considers competent evidence when deciding a case. Additionally, the State contends that *Brooks v. State, supra,* is not on point, because the instant case is not one where the judge changed his mind, but is simply a situation where he had not completed his ruling on the directed-verdict motions and made an unfortunate choice of words that did not communicate his true intent. The State notes, however, that if the judge had indeed changed his mind, *Brooks* would control, and the State would have to concede error.

Although we do not agree with the State's characterization of the trial court's actions in dismissing Penn's case, we recognize that the authorities relied upon by Penn, *Sanabria v. United States, supra,* and *Brooks v. State, supra,* involved acquittals based on erroneous applications of law, and are, to this extent, distinguishable from the facts of Penn's case.

In *Sanabria,* the trial court's erroneous exclusion of evidence led him to grant the defendant's motion to acquit because of lack of evidence. The government appealed, and the First Circuit Court of Appeals vacated the judgment of acquittal and remanded for a new trial. The Supreme Court reversed the court of appeals decision, holding that an acquittal for insufficient evidence, even if based on an erroneous evidentiary ruling, barred a second trial on the same offense, stating: "[t]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,'" the legal rulings leading to that judgment might be. 437 U.S. 54, 64.

In *Brooks v. State*, the circuit judge granted the defendant's motion to dismiss a robbery charge, based on his misunderstanding that aggravated robbery required an actual theft of property, and later tried to correct his error by reinstating the case and submitting it to the jury. The supreme court reversed the robbery conviction holding that the trial court's granting of the motion to dismiss constituted a judgment of acquittal, and that submission of the robbery charge to the jury constituted double jeopardy. 308 Ark. at 667-68, 827 S.W.2d at 123.

Clearly, the trial court's dismissal of Penn's case was not based upon an erroneous evidentiary ruling or a mistake of law. We have further been unable to find a case from this or any other jurisdiction which involves an acquittal under circumstances similar to the facts of this case. However, it is clear from the trial court's statements and the ensuing events that Penn's case was indeed dismissed, albeit erroneously, pursuant to Penn's motion for directed verdict, and that the trial court attempted to correct the error by reopening the case after Penn had been removed from the courtroom, and the court had moved on to the next case.

The finality of a verdict of acquittal is the most fundamental aspect of double jeopardy jurisprudence. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). That verdict need not be unequivocal on every issue to operate against the State. As the Supreme Court stated in *United States v. Jenkins*, "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause." 420 U.S. 358, 369-70 (1975).

Penn was tried and then acquitted when the trial court made its pronouncement, "Case dismissed." Further proceedings could not and did not comport with the Constitution. Consequently, we hold that the Double Jeopardy Clause requires reversal of Penn's convictions for possession of drug paraphernalia and fleeing.

Reversed and dismissed.

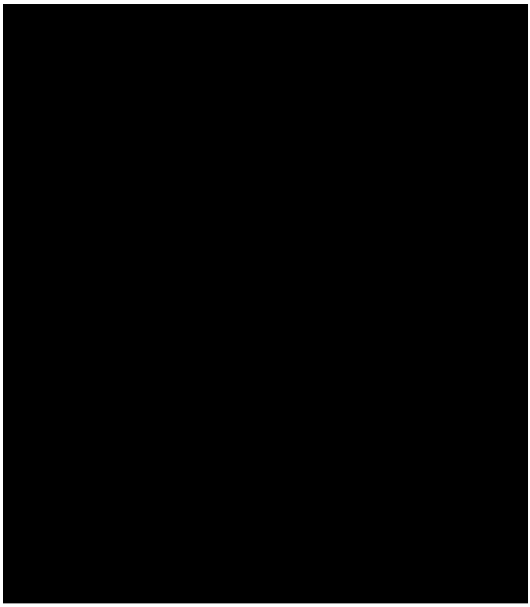
GRIFFEN and CRABTREE, JJ., agree.

IN THE MATTER OF THE UNTIMELY PASSING OF JUDGE JAMES R. COOPER

Court of Appeals of Arkansas
En Banc
Memorial Opinion delivered May 7, 1997

PER CURIAM. From January 1, 1981, until his death on May 3, 1997, Judge James R. Cooper faithfully served the State of Arkansas as a member of the Arkansas Court of Appeals. Upon the occasion of his death, the court wishes to express its sincere condolences to Judge Cooper's family and takes this moment to recognize the dignity and civility that he displayed during his service on the court.

Following the creation of the Arkansas Court of Appeals in 1979, Judge Cooper became one of the initially elected judges, and at the time of his departure he was the last of these original elected judges who remained on the court. During his years as an appellate judge, he maintained a commitment to justice and fairness and stood as a positive example for the other judges with whom he served. Judge Cooper truly had a profound and enduring impact on the direction of the law in this state over a period of nearly two decades. He will be sorely missed on both a professional and personal level by his many friends and colleagues.



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