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Gracie STRACENER *v.* Frank STRACENER

CA 82-6 636 S.W.2d 877

Court of Appeals of Arkansas
Opinion delivered August 18, 1982

Herrod & Vess, by: *E. H. Herrod,* for appellant.

William A. Lafferty, for appellee.

MELVIN MAYFIELD, Chief Judge. The parties to this appeal were divorced in March of 1980, and a property settlement agreement was approved by the court and made a part of the decree. The agreement contained a provision that "The defendant will pay to the plaintiff the sum of $400.00 per month as alimony as long as she remains single and living as a single person."

Several months later the defendant, Frank Stracener, was cited for contempt for failing to make the alimony payments and he filed a response alleging the plaintiff was not living as a single person as required by the settlement agreement and asked that he be relieved from the obligation of making the payments. The court held that the agreement was not subject to modification by the court but was subject to interpretation; that it had been breached; and that alimony should cease effective April 1, 1981.

The appellant, Gracie Stracener, argues that the chancellor's findings are contrary to the law and the evidence.

Mrs. Stracener and her eighteen year old daughter and twenty-one year old son testified. They all agreed that before April 1, 1981, a man moved into appellant's house and was still living there at the time of the hearing in this case. These witnesses also agreed that he sleeps in bed with appellant; has a key to the house; comes and goes as he pleases; parks his car in the driveway; eats with appellant and her children, and uses the washer and dryer and telephone.

The appellant testified that she first rented this man her son's room at a time when the son was living elsewhere but when the son moved back she desperately needed the money so she let the man move into her room. She denied a sexual relationship with him while in her house but admitted that they dated and had sex on occasion before he moved in with her.

Appellant's son testified that the man was not a "room and board" person; that his mother had told him that she and the man loved each other; and he characterized the man as an "unmarried spouse."

From appellant's brief and her reliance upon the cases of *Drummond* v. *Drummond,* 267 Ark. 449, 590 S.W.2d 658 (1979) and *Byrd* v. *Byrd,* 252 Ark. 202, 478 S.W.2d 45 (1972), it appears the real force of her argument is that sexual immorality alone does not justify the termination of alimony and that having sexual relations is not the same as being married. Those cases, however, did not involve the phrase "living as a single person" which is contained in the settlement agreement in this case. Although we have not been cited to a case construing that phrase, Civil Procedure Rule 52 (a) provides that we do not set aside the trial judge's factual finding unless it is clearly against the preponderance of the evidence and we think the evidence in this case amply supports the judge's decision.

Appellant also argues that the court remitted past due alimony payments contrary to the decision in *Bethell* v. *Bethell,* 268 Ark. 409, 597 S.W.2d 576 (1980), but we do not agree. Appellee's contempt hearing was originally set for April 1, 1981, but the alimony question was passed and not heard until September 22, 1981. At that time the court held the defense filed by appellee prior to April 1st relieved him of alimony obligation as of April 1st. The record, however, contains a judgment in appellant's favor for all unpaid alimony up to that date.

We find no error and the decision of the trial court is affirmed.

GLAZE, J., not participating.

A. P. STEPHENSON, d/b/a A. P. STEPHENSON OIL CO. *v.* Richard H. WHITTINGTON, Jr., Ann G. WHITTINGTON, and BANK OF QUITMAN, Quitman, Arkansas

CA 82-8 636 S.W.2d 878

Court of Appeals of Arkansas
Opinion delivered August 18, 1982

Thomas, House & Gardner, by: *Hoyt Thomas,* for appellant.

Dave Wisdom Harrod, for appellees.

MELVIN MAYFIELD, Chief Judge. In May of 1970 the appellant executed a deed to real property in Heber Springs, Arkansas, upon which was located a cafe and service station. Appellant was and is a distributor of Mobil gasoline and the deed contained a provision that Mobil gasoline would be offered for sale on the conveyed property for a period of 20 years and in the event of a breach of that provision the grantor would have the right to repurchase the property for a price computed on a formula set out in the deed.

The property was subsequently conveyed to the appellees Richard and Ann Whittington and they executed a mortgage on it to the appellee Bank of Quitman. In January of 1981 the appellant brought suit against the Whittingtons and the bank, alleging a breach of the deed's provision to offer Mobil gasoline for sale and alleging a right to repurchase free and clear of the bank's mortgage lien.

The chancellor denied appellant the right to repurchase because he found the Whittingtons requested and were refused an allocation to sell Mobil gasoline but he found the provision valid and held that the Whittingtons must continue to use due diligence to obtain an operator's license to sell Mobil gasoline during the remaining period covered by the deed provision. The court also held that in the event appellant should become entitled to repurchase the property he would take it subject to the bank's mortgage.

Appellant's only argument on appeal is that the court should not have made any finding with regard to the bank's mortgage since no breach of the deed provision was found. We agree.

Before the adoption of Ark. Stat. Ann. §§ 34-2501 —34-2512 (Repl. 1962) authorizing the granting of declaratory judgments, our courts would not render advisory opinions entailing no other relief. *Johnson* v. *Robbins,* 223 Ark. 150, 264 S.W.2d 640 (1954). As stated in 10 Wright & Miller, *Federal Practice and Procedure* § 2751 (1973):

> The traditional and conventional concept of the judicial process has been that the courts may act only when a complainant is entitled to a coercive remedy, such as a judgment for damages or an injunction. Until a controversy had matured to a point at which such relief was appropriate and the person entitled thereto sought to invoke it, the courts were powerless to act.

After the adoption of our declaratory judgment act our court said the act "was not intended to allow *any* question to be presented by *any* person: the matters must be justiciable." *Andres* v. *First Ark. Development Finance Corp.,* 230 Ark. 594, 324 S.W.2d 97 (1959). In its opinion the court quoted from Anderson on *Declaratory Judgments* as follows:

> A declaratory judgment will not be granted unless the danger or dilemma of the plaintiff is present, not contingent on the happening of hypothetical future events; the prejudice to his position must be actual and

> genuine and not merely possible, speculative, contingent, or remote. 230 Ark. at 606.

Whether a breach of the deed provision in the instant case will occur in the future is surely speculative and whether such a breach would affect the bank's mortgage is certainly contingent upon the mortgage being in effect at that time. In *Diebold* v. *Civil Service Commission,* 611 F.2d 697 (8th Cir. 1979), the court held the mere threat that the commission's rules might someday be enforced against the plaintiff was not enough to authorize a declaratory judgment action. And in *Ashcroft* v. *Mattis,* 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977), it was said:

> For a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present rights upon established facts.

That part of the trial court's judgment which concerns the effect upon the bank's mortgage of a future breach of the deed provision is reversed.

COOPER and GLAZE, JJ., not participating.

Michael DeWayne JONES *v.* STATE of Arkansas

CA CR 82-28 636 S.W.2d 880

Court of Appeals of Arkansas
Opinion delivered August 18, 1982

James Michael Hankins, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Michael DeWayne Jones appeals from his conviction of theft by receiving, a class "C"

felony, and of having been convicted of two prior felonies. Pursuant to the Habitual Criminal Act he was sentenced to ten years in the Department of Correction. On this appeal he contends that the testimony was insufficient to establish guilt of a class "C" felony upon which the enhanced sentence was based.

Ark. Stat. Ann. § 41-2206 (5) (b) (i) (Repl. 1977) provides that theft by receiving is a class "C" felony if the value of the property received is less than $2500 but more than $100. Ark. Stat. Ann. § 41-2201 (11) (a) (Repl. 1977) defines "value" as "the market value of the property at the time and place of the offense." Appellant contends that the testimony was insufficient to prove that the value of the stolen articles exceeded $100. We do not agree.

Steve Roberson testified that in February 1981 while he was employed by American Gold and Silver Exchange, appellant attempted to sell him three gold rings. Two of the rings were subsequently determined to have been stolen from Samuel Jackson earlier that day. The true owner of the third ring was never found. The appellant was charged with theft by receiving only of the two rings identified as stolen property. Roberson testified that at the time the rings were offered to him by appellant he weighed them and offered $115 for all three rings. He stated that his offering price did not represent the full market value as he had intended to make a substantial profit. He testified that he could not, without weighing the rings and checking the gold market as of the date of the theft, give an exact estimate of their value on the date of the crime. He testified, however, that without that data he could state that the value of the two rings on that date was "in excess of $125."

This was a positive statement of value by one qualified as an expert. The fact that he had not accurately weighed the rings nor refreshed his memory as to market quotations affects only the weight to be given his testimony and not its admissibility. *Mathis* v. *State*, 267 Ark. 904, 591 S.W.2d 679 (Ark. App. 1979).

The owner of the two rings testified that he had

purchased one in 1971 and the other in 1974. Over appellant's objection he was permitted to state the price paid for each ring. The appellant contends that this was error as the original purchase price was not evidence of market value because it was too remote in time. Appellant relies on *Cannon* v. *State,* 265 Ark. 270, 578 S.W.2d 20 (1979), which held that it was error to permit the owner of a stolen automobile to testify as to the purchase price paid twelve years before trial. The court reasoned that under those circumstances original cost in no way reflected the present market value. On the other hand in *Williams* v. *State,* 252 Ark. 1289, 482 S.W.2d 810 (1972) the owner of the stolen property testified that it was "new." The court held that the owner's original cost is admissible so long as it is not too remote in time and bears a reasonable relation to the present value. In the more recent case of *Jones* v. *State,* 276 Ark. 116, 627 S.W.2d 6 (1982) the court again recognized that the original cost of property is a factor the jury may consider in determining value, if it is not too remote in time. In that case the owner testified as to the original cost of C.B. radio equipment purchased two years earlier. The test applied by the court was whether or not the purchase price bore a reasonable relation to the present value. *Tillman* v. *State,* 271 Ark. 552, 609 S.W.2d 340 (1980). In determining remoteness and relevance of original purchase price on present market value, the nature and characteristics of the article must be considered on a case by case basis. We conclude that the trial court correctly determined that the testimony of this owner was relevant because the purchase price was not too remote and bore a reasonable relation to present value. There is a difference in the rate of depreciation of automobiles and other consumer goods and that of gold. While the jury may not substitute its knowledge for evidence, they are not required to set aside their common knowledge and may consider the evidence presented them in accordance with their own observation and experience in the affairs of life. *Polk* v. *State,* 252 Ark. 320, 478 SW.2d 738 (1972). The jury was so instructed.

Affirmed.

GLAZE, J., not participating.

Charles O. MONROE and Allen L. MONROE
v. Milton K. DALLAS

CA 82-22 636 S.W.2d 881

Court of Appeals of Arkansas
Opinion delivered August 18, 1982

Barrett, Wheatley, Smith & Deacon, for appellants.

Robert L. Coleman and *Reid, Burge & Prevallet,* by: *Robert L. Coleman,* for appellee.

DONALD L. CORBIN, Judge. On November 16, 1980, the appellant Allen Monroe and Catherine Monroe, deceased, became engaged in a heated argument which culminated in Catherine Monroe's being shot to death by appellant Allen Monroe. A Texas jury convicted him of voluntary manslaughter and he was given a sentence of twenty years.

Thereafter, Milton K. Dallas, the maternal grandfather, filed a petition in the Probate Court of Mississippi County, Arkansas, for his appointment as guardian of the minor nine-year-old child of Allen Monroe and Catherine Monroe, deceased. Appellant Allen Monroe filed his objection to the appointment of appellee as guardian and indicated his preference for the appointment of his brother Charles Monroe as the guardian. Appellant Charles Monroe then filed a petition for his appointment as guardian of the person and estate of the minor in the Probate Court of Dallas County, Texas. The appellant Charles Monroe also filed his objection, in the Arkansas proceeding, to the appointment of the appellee as the guardian of the minor. On September 18, 1981, over the objections of appellants, the court appointed the appellee as guardian of the person and estate of Mark Allen Monroe, a minor. We affirm.

Appellants argue that the Arkansas probate court erred in appointing the appellee as guardian of the minor child: (1) over the objection of the minor's father, (2) contrary to the minor's father's preference of the appointee and (3) in disregard of the probate proceedings for appointment of a guardian for the minor in Texas. Appellants additionally argue that the Arkansas probate court had no jurisdiction to appoint a guardian as the minor child was a domiciliary of the State of Texas.

Ark. Stat. Ann. § 57-608 provides in part:

> The parents of an unmarried minor, or either of them, if qualified and in the opinion of the court suitable, shall be preferred over all others for appointment as guardian of the person. Subject to this rule, the court shall appoint as guardian of an incompetent the one most suitable to serve who is willing to serve, having due regard to: (a) any request contained in a will or other written instrument executed by the parent for the appointment of a person as guardian of his minor child; . . . (d) the relationship by blood or marriage to the person for whom guardianship is sought.

A reading of this statute indicates that parental preference is

only one of many factors to be considered in determining the one most suitable to serve as guardian. The Supreme Court has stated that the statute does not make an ironclad order of priority; instead, it leaves to the probate court's sound discretion the appointment of a guardian who would forward the best interests of the ward. *McCartney* v. *Merchants and Planters Bank,* 227 Ark. 80, 296 S.W.2d 407 (1956). The probate judge has been vested with sound legal discretion in the matter of the appointment of the guardian for a minor, and his action will not be overturned except in a case of manifest abuse. Ark. Stat. Ann. § 62-2016 (g), *Knight* v. *Deavers,* 259 Ark. 45, 531 S.W.2d 252 (1976).

Evidence in the record supports the finding that the appellee, who is the maternal grandfather of the minor, is a person suitable to protect the minor's welfare. ARCP Rule 52 provides in part:

> Findings of fact shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

We do not find that the appointment was an abuse of the probate court's sound discretion.

In *Shaw* v. *Shaw,* 251 Ark. 665, 473 S.W.2d 848 (1971), the Supreme Court, quoting from *Restatement, Second, Conflict of Laws,* (1971), § 79, stated:

> The state where the child is physically present has the most immediate concern with him; its courts also have direct access to the child and may be most qualified to decide what would best redound to his welfare.

Ark. Stat. Ann. § 57-606 (2) provides:

> If the incompetent is not domiciled in this state but resides in this state, the county of his residence shall be the proper county for the appointment of a guardian.

The appellee went to Dallas after the death of his daughter and removed Mark from the State of Texas. The minor had lived with his grandparents in Blytheville for ten months as of the date of the hearing. The minor attends public school in Blytheville and is engaged in church and athletic activities. We find that the probate court in Arkansas had jurisdiction to appoint the appellee as guardian for this minor. In *Shaw* v. *Shaw, supra,* an action for divorce that was filed in Bazoria County, Texas, custody of the children was awarded to the father. The mother, in an action in Miller County, Arkansas, sought custody of the children on the basis of changed circumstances. Appellant-father contended that the Arkansas chancery court failed to give full faith and credit to the Texas decree by not ordering immediate delivery of the children to him. The Supreme Court adopted the position of Dr. Robert A. Leflar and *Restatement, Second, Conflict of Laws,* in holding:

> We hold that physical presence of the children in this state is a proper basis for the exercise of jurisdiction by the Miller Chancery Court to determine whether there should be a change in custody of the children involved. The fact that the decree of that court might not be accorded extraterritorial effect should not limit the power of the courts of this State to act for the best welfare of the children physically present within their territorial jurisdiction and to treat them as its wards, at least when their presence is not purely transient. See *Keneipp* v. *Phillips,* 210 Ark. 265, 196 S.W.2d 220; *Pope* v. *Pope,* 239 Ark. 352, 389 SW.2d 425; *Tucker* v. *Turner,* 195 Ark. 632, 113 S.W.2d 508. The General Assembly has clearly made a policy determination which supports this view. A guardian who would have custody of a minor may be appointed by the probate court of a county in which he resides, even though he may be domiciled elsewhere. Ark. Stat. Ann. §§ 57-601, 606, 620, 625 (Supp. 1969). This statutory determination can only be based on the premise that this state has such an interest in the welfare of a minor living within its borders that its courts should take such action as may be necessary to provide for its best welfare.

Arkansas has the most immediate concern for this minor's welfare. The Arkansas probate court has access to Mark, as well as other evidence which will allow the probate court in Arkansas to make the most intelligent determination as to what action would best redound to Mark's welfare. We do not believe in the instant case that the probate court erred or abused its discretion in exercising judicial jurisdiction to appoint the appellee, Milton K. Dallas, as guardian for Mark Monroe, his grandson. The minor had resided in Blytheville, Arkansas, for the ten months subsequent to his mother's tragic death.

We affirm.

GLAZE, J., not participating.

Henry FARR a/k/a Toney ANDERSON *v.*
STATE of Arkansas

CA CR 82-24 636 S.W.2d 884

Court of Appeals of Arkansas
Opinion delivered August 18, 1982

William R. Simpson, Jr., Public Defender, by: *Carolyn P. Baker*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. This case involves the revocation of appellant's suspended sentence. He had previously entered a plea of guilty to breaking or entering and theft of property charges, and received a two-year sentence beginning September 11, 1981. The imposition of appellant's sentence was conditioned, among other things, on his not violating any federal or state law punishable by imprisonment. On October 12, 1981, the state filed a petition to revoke the suspended sentence, alleging that the appellant was guilty of the crimes of harassment, battery in the third degree (two counts), fleeing, disorderly conduct and carrying a weapon. At a hearing on November 6, 1981, the court granted the state's petition, revoked his suspended sentence and sentenced him to five years in prison. The court found appellant was guilty of carrying a weapon, disorderly conduct and failing to report to the probation officer.[1] The sole issue raised by appellant on appeal is that there was insufficient evidence of the three offenses with which appellant was charged and found guilty.

Only a clear preponderance of the evidence must be established to justify the revocation of probation. *Harris* v. *State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980). Thus, it is appellant's burden to show that the trial court's findings were against the preponderance of the evidence. In this connection, appellant argues that the state failed to show he was guilty of carrying a weapon, failing to report to his probation officer and disorderly conduct. Of course, if the evidence is sufficient to establish appellant committed any one of the named offenses, the trial court must be affirmed.

[1]At the hearing, the State orally amended its petition to charge appellant with failure to report.

Assuming, without deciding, that the evidence was not sufficient to prove appellant unlawfully carried a weapon or failed to report, we find the evidence is sufficient to prove that he was guilty of disorderly conduct.

A brief review of the facts reflects that two Little Rock police officers, on October 12, 1981, sought to locate appellant to ask him questions concerning information they had received relative to a drug matter. The officers found appellant walking in his neighborhood and tried unsuccessfully to engage him on two separate occasions. They subsequently went to the appellant's residence and saw him enter the back door of his home. One officer went to the front door and the other to the back. Appellant's mother permitted the officer at the front door to enter the home, and, as he did, appellant went out the back door. As appellant came out the back door, the officer at the rear of the house saw him and observed three knives in his belt. The officer asked him to remove the knives and place them on the ground. The officer then placed appellant under arrest. However, after appellant was detained and arrested, he fled from the arresting officer, running back into the house. While in the house, he was confronted by the second officer. This officer asked appellant twice to go outside, but he refused. The officer then took appellant's arm, at which time appellant struck the officer in the face with his fist. A scuffle followed and the appellant was subsequently subdued by the officers. Appellant admitted his involvement in the scuffle with the police officers and testified that he "did get wild trying to get away from the dude."

Disorderly conduct is defined in Ark. Stat. Ann. § 41-2908 (Repl. 1977), as follows:

> 41-2908. Disorderly conduct. — (1) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (a) engages in fighting or in violent, threatening or tumultuous behavior; or
>
> (b) makes unreasonable or excessive noise; or
>
> (c) in a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner

likely to provoke a violent or disorderly response; or

(d) disrupts or disturbs any lawful assembly or meeting of persons; or

(e) obstructs vehicular or pedestrian traffic; or

(f) congregates with two [2] other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement officer or other person engaged in enforcing or executing the law; or

(g) creates a hazardous or physically offensive condition; or

(h) in a public place, mars, defiles, desecrates, or otherwise damages a patriotic or religious symbol that is an object of respect by the public or a substantial segment thereof; or

(i) in a public place, exposes his private parts.

* * *

Appellant contends he did not violate § 41-2908 because his confrontation, fight and scuffle with the officers occurred in appellant's yard and house, not in a public place. We cannot agree with this strained and narrow interpretation of the language contained in § 41-2908. Unquestionably, public inconvenience, annoyance or alarm can occur due to an individual's conduct whether such conduct takes place on private or public property.

Here, two police officers were required to subdue appellant, and because of appellant's evasive and combative actions, the officers charged appellant with committing six crimes. We fail to see how the public's inconvenience is any less affected because appellant's acts occurred on private rather than public property. Obviously, there are situations as are set out in § 41-2908 (1) (c) (e) (f) (h) and (i), which contemplate or specifically require that such disorderly conduct must take place in a public area. However, appellant's violent and combative behavior with the officers here is clearly within that conduct contemplated under § 41-2908 (1) (a), *supra,* and there is no requirement that such conduct must take place on public property.

We affirm.

Affirmed.

Daniel MARTIN *v.* Karen Lyn MARTIN

CA 81-420 637 S.W.2d 612

Court of Appeals of Arkansas
Opinion delivered August 25, 1982

David H. Williams, for appellant.

Cearley, Gitchel, Mitchell & Roachell, by: *Charles D. Harrison,* for appellee.

MELVIN MAYFIELD, Chief Judge. Both parties agree that this appeal involves the construction or interpretation of a property settlement agreement incorporated in their divorce decree.

The agreement provided that the wife would be entitled to the exclusive use and possession of a house (owned by the parties as tenants by the entirety) for a period of ten years or until certain contingencies occurred. Upon the occurrence of any named contingency the house would be sold and the proceeds divided equally after each party received his and her original contribution to the purchase price.

During the wife's use and possession the husband was to pay to her one-half of the monthly mortgage payments and the agreement provided: "In the event of default by the husband for a period in excess of sixty days, the wife may treat the husband's default as a breach of this Agreement and thereby fix his equity in the property pursuant to the above formula as of the date of the default."

Shortly after the decree was entered the husband failed to pay his portion of a mortgage payment and after he missed another payment a motion was filed by the wife asking that the husband be held in contempt and that she have judgment against him for his past due payments.

The controversy centers around the meaning of the word "may" in the sentence set out above. At the hearing before the trial court, it was the husband's contention that

this sentence meant he *could* make the payments and thus build up his equity in the house, but that he was not locked into doing so and if he stopped making the payments his equity would be fixed at that time. It was the wife's contention that the sentence gave her the option to treat the husband's default as a breach of the agreement and fix his equity at that time *or* to treat the agreement as continuing and seek to enforce the payment provision.

The trial court agreed with the wife and gave her judgment for the amounts found due and the husband appeals. The issue on appeal is raised by appellant's contention that the trial court erred in refusing to allow him to introduce evidence to show his understanding of the meaning of the sentence involved. Contending that the trial court was wrong in holding the settlement agreement clear and unambiguous and in construing it from the four corners of the document, the appellant cites Corbin, *Interpretation of Words and the Parol Evidence Rule,* 50 Cornell L.Q. 161, 164 (1965) that:

> [N]o man can determine the meaning of written words by merely gluing his eyes within the four corners of a square paper . . . when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience.

Our problem is somewhat complicated by the nature of the hearing below. The attorneys stated their contentions to the judge and he told them that, in his opinion, the meaning of the agreement was clear and the word "may" unambiguous and since there was no argument over the amount, he would enter judgment against appellant for the amount due. Thus there was actually no proffer of evidence which the court refused to allow appellant to introduce. Before the Uniform Rules of Evidence became effective such a proffer was necessary but under Uniform Evidence Rule 103 (a) (2) error may be predicated upon a ruling excluding evidence if "the substance of the evidence was made known to the court

by offer or was apparent from the context within which questions were asked."

Although no witness was questioned, it does appear that the "substance of the evidence" which appellant wanted to introduce was apparent to the trial court. The record, of course, must also reveal that evidence to this court before we can review the trial court's action. What the record shows in that regard is that appellant's counsel stated to the trial court that he wanted to put on evidence of the appellant's "understanding" of the agreement which was "that he could escape from it by defaulting, by not making payments in excess of sixty days, and thereby fix his equity and at some time in the future, when the house is sold, get his money out of the house."

We do not think the quotation from Professor Corbin supports appellant's contention that his "understanding" of the agreement was admissible in evidence. We agree that in determining the intention of the parties to a contract evidence is admissible in order that the court may acquaint itself with the parties and circumstances involved in the making of the contract. *Barrett Real Estate* v. *Land Mart of America,* 3 Ark. App. 70, 621 S.W.2d 889 (1981). But this is not what the appellant wanted in evidence. He wanted to show *his understanding* of what the word "may" meant. Another quotation from Professor Corbin applies to that contention:

> 15. If one party asserts an interpretation that accords with the linguistic education and experience of the court, and the other party asserts an interpretation that does not so accord and offers no relevant evidence that the first party knew or had reason to know the latter interpretation, the first party's interpretation will prevail.

3 *Corbin on Contracts* § 572 (B) (Supp. 1971).

The appellant says that the word "may" is sometimes construed as "shall" or "must" and cites *Ark. Rock and Gravel Co.* v. *Chris-T-Emulsion,* 259 Ark. 807, 536 S.W.2d

724 (1976) where the court said "the Spring of '74" was ambiguous because dictionaries recognize it is popularly considered to be the months of March, April, and May, but scientifically considered to be the period from the vernal equinox (about March 21) to the summer solstice (about June 21). But that case also said:

> It is true that when the language of a contract is ambiguous, proof of oral negotiations is admissible to show that the language was intended to have "any particular meaning that the words will reasonably bear." *Kerr* v. *Walker,* 229 Ark. 1054, 321 S.W.2d 220 (1959). But the rule does not allow a party to prove by oral testimony that clear and unambiguous words were *subjectively* intended to have a meaning not fairly attributable to them. (Emphasis added.)

The case of *Countryside Casualty Co.* v. *Grant,* 269 Ark. 526, 601 S.W.2d 875 (1980) is cited by appellant as a case where parol evidence was allowed to "explain the true intentions of the parties." Here, however, the appellant did not tell the court that he wanted to introduce evidence to show what the *parties* intended by the use of the word "may." We do not believe the appellant has demonstrated that the court refused to hear any evidence which would show that the *parties* intended any meaning other than that found by the trial court. As the *Countryside Casualty* case holds, the intention of the parties is a question of fact. We do not reverse factual findings unless the trial court is clearly in error, Civil Procedure Rule 52 (a). We find no error in this case.

Affirmed.

Tommy Lee WASHINGTON *v.* STATE of Arkansas

CA CR 82-29 637 S.W.2d 614

Court of Appeals of Arkansas
Opinion delivered August 25, 1982

James Clouette, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant received a jury sentence of thirty years imprisonment on a burglary charge and fifteen years on a charge of theft of property, the sentences to run concurrently. His only point for reversal is that the trial court erred in forcing appellant to stand trial in the prison uniform of the Pulaski County Jail, an orange jumpsuit. We do not find merit in appellant's argument.

In chambers before the trial, the trial judge discussed with appellant the possibility of appellant's wearing the same clothes he wore on the day of his arrest. The judge stated that appellant had told the bailiff that he didn't have any other clothes and didn't want any. When asked by the judge whether he wanted to wear the clothes he wore to jail or wear the orange jumpsuit, appellant replied, "wear the jumpsuit." At that point appellant's attorney stated, "For the record, we object, Your Honor."

It is not clear from the record whether the orange jumpsuit was distinctive as prison clothing. In chambers, the judge advised appellant and his attorney that the judge would advise the jury that the reason appellant was wearing the orange jumpsuit was that appellant had been in jail since his arrest and had no other clothing he wished to wear. At trial, the judge did so advise the jury, and in addition stated that the orange jumpsuit was the regular uniform of the Pulaski County Jail. The judge also told the jury that appellant's attire was not to be considered as being indicative in any way of guilt. No objection to the trial judge's statement to the jury was made by appellant.

The bailiff reported that the clothes appellant wore at the time of his arrest were in the jail, but were muddy and torn. Appellant was arraigned on the charges on May 27, 1981, at which time an attorney was appointed to defend him. He remained in jail until his trial on November 3, 1981, and there is no evidence that appellant or his attorney made any effort to have appellant's clothes cleaned and mended or to obtain other clothing. Significantly, there was no request for a continuance for the purpose of obtaining other clothing, and only a formal objection was made to the trial court's action.

In *Miller* v. *State,* 249 Ark. 3, 457 S.W.2d 848 (1970), the Arkansas Supreme Court adopted the rule that absent a waiver, the accused should not be forced to trial in prison garb. It cited the basic rule which is summarized in 21 Am. Jur. 2d Criminal Law § 239, which states:

> Since the defendant, pending and during the trial, is still presumed innocent, he is entitled to be brought

> before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require. He is therefore entitled to wear civilian clothes rather than prison clothing at his trial. It is improper to bring him into the presence of the jury which is to try him, or the venire from which his trial jury will be drawn, clothed as a convict.

In *Estelle* v. *Williams,* 425 U.S. 501, (1976), the United States Supreme Court held that a criminal defendant had constitutional rights under the sixth and fourteenth amendments which were violated when he was compelled to wear identifiable prison clothing at his trial. The court stressed that such attire must be distinctive and identifiable.

The rule in *Estelle, supra,* was adopted by the Arkansas Supreme Court in *Holloway, Welch and Campbell* v. *State,* 260 Ark. 250, 539 S.W.2d 435 (1976). In that case, however, it was found that appellants' argument had no merit because they rejected twice the trial court's offer to allow them to change clothes. The trial court gave appellants this opportunity before the trial began and before the actual selection of a jury. Hence, it was held that appellants were deemed to have waived their right. In *Holloway* the record was not clear as to whether the prison garb was distinctive, it being shown only that the attire was matching blue trousers and shirts.

In *Estelle* v. *Williams, supra,* the Court stated:

> . . . the courts have refused to embrace a mechanical rule vitiating any conviction, regardless of the circumstances, where the accused appeared before the jury in prison garb. Instead, they have recognized that the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire. The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon

defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury.

Nothing in the record of this case warrants a conclusion that appellant was compelled, against his will, to stand trial in prison attire, or that the trial judge would not have granted a continuance for the purpose of obtaining other clothing if a request had been made. We hold that under the circumstances of this case, appellant waived his right to be tried in civilian clothing.

Affirmed.

GLAZE and COOPER, JJ., concur.

Henry Leroy TIPPITT *v.* STATE of Arkansas

CA CR 82-20 637 S.W.2d 616

Court of Appeals of Arkansas
Opinion delivered August 25, 1982
[Rehearing denied September 15, 1982.]

William R. Simpson, Jr., Public Defender, by: *Robert J. Price,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant brings this appeal from a conviction for aggravated robbery. He had been tried previously on the same charge but the court declared a mistrial. The sole issue raised by appellant is that the trial court erred in not granting a continuance to permit him to interview potential witnesses and to obtain a transcript of prior testimony of the prosecuting witness. The standard by which we review this case is that the trial judge's action in denying a continuance will not be reversed on appeal in the absence of such a clear abuse of the sound judicial discretion of the trial judge as to amount to a denial of justice. The burden rests upon an appellant to show that there has been such an abuse. See *Kelley* v. *State,* 261 Ark. 31, 545 S.W.2d 919 (1977). We find the appellant failed to meet that burden.

Appellant's first trial ended in mistrial on October 21, 1981. On October 23, 1981, appellant's new, substituted counsel filed a motion requesting the State to supply the names of persons (potential witnesses) who had talked to the prosecuting witness shortly before the alleged robbery. He also requested a continuance so that these persons could be interviewed prior to a second trial. At an Omnibus Hearing on November 2, 1981, the State gave appellant the names of the potential witnesses. The court then set a new trial date of November 12, 1981. At the hearing, it denied appellant's motion for continuance, stating it saw no reason why appellant could not interview these potential witnesses before the trial date. On November 12, before the trial commenced, appellant's counsel announced ready for trial and did not renew his motion for continuance.

Since appellant's motion for continuance was not renewed at trial, we believe it was proper for the trial court to

conclude that appellant was ready to proceed. See *Decker* v. *State,* 255 Ark. 138, 142, 499 S.W.2d 612, 615 (1973), and *Golden* v. *State,* 265 Ark. 99, 576 S.W.2d 955 (1979). Appellant never apprised the court that the potential witnesses had not been interviewed. Nor did appellant inform the court that he was unable to obtain the prosecuting witness' prior testimony. In sum, the record fails to show the trial court abused its discretion in denying appellant's pre-trial motion for continuance.

Affirmed.

Alfonzo WASHINGTON *v.* William F. EVERETT, Director of Labor, and DRAVO STEELSHIP

E 81-316 639 S.W.2d 57

Court of Appeals of Arkansas
Opinion delivered August 25, 1982
[Supplemental Opinion on Denial of Rehearing September 29, 1982.]

John L. Kearney, for appellant.

Alinda Andrews, for appellees.

TOM GLAZE, Judge. Claimant appeals the Board of Review's denial of benefits and its finding that he was discharged from his last work for misconduct in connection with the work. The question we must decide is whether there is substantial evidence to support the Board's decision.

The relevant facts are not disputed. Claimant was discharged for violation of company rules. The company alleged that he falsified a doctor's statement in order to get an early paycheck. Claimant had advised company officials that he had a dental appointment in the office of Dr. Sam Harris on May 22, 1981. Claimant testified that on this date the receptionist for the company informed him that his sister had called to remind him of the appointment. The receptionist never testified, but a phone-o-gram, made a part of the record, reflects confirmation of the appointment by Dr. Harris' office. Why the receptionist completed the phone-o-gram in this fashion was never made clear. The claimant received his payroll check early, before leaving work to go to the dentist. Apparently, he found Dr. Sam Harris' office was closed so he went to another dentist, Dr. W. L. Malette. Sometime on May 22, a company representative called the office of Dr. Harris and found it closed. Based on this information, the company discharged the claimant on June 2, 1981, the day he returned to work after his vacation. Although he possessed a $10 receipt and certificate to return to work which were signed by Dr. Malette on May 22, 1981, claimant testified the employer did not allow him an opportunity to show these documents. Claimant alleges that he was fired, in reality, because of his pro-union activities and because he had filed charges against the employer with the EEOC several months earlier.

From the record, we fail to find any evidence to support the Board's decision to deny benefits. Claimant was discharged for falsifying a doctor's statement in order to get an early paycheck. We have searched the record and nowhere can we find any doctor's statement, false or otherwise, which

could have been used to obtain an early paycheck. The phone-o-gram previously mentioned is the only document we can find that the Board may have considered to be a "false statement," and it was prepared by the company's receptionist, who never testified. This document, by itself, does not rebut claimant's testimony that he had a dental appointment on May 22, that the receptionist told him his sister called to remind him of the appointment and that he obviously misunderstood Dr. Harris' appointment secretary regarding the May 22 date.

The evidence shows the claimant did see a dentist on May 22, 1981. The fact that he went to see Dr. Malette instead of Dr. Harris has no relevance. Nothing in the record reflects that the claimant would have been denied his paycheck if his original appointment had been with Dr. Malette rather than Dr. Harris. The fact is that, for whatever reason, he was unable to keep the appointment with Dr. Harris, but he did see Dr. Malette on May 22. Consistent with the Appeal Tribunal's decision in this case, we find that the evidence overwhelmingly supports the fact that he was discharged from work for reasons other than misconduct. Therefore, we reverse and remand this cause with directions to reinstate benefits to the claimant.

A second issue is raised in this appeal. The Agency had found the claimant ineligible to receive benefits from the week ending May 30, 1981, through the week ending June 13, 1981, because he was not fully available for work as required under Ark. Stat. Ann. § 81-1105 (c). The Appeal Tribunal upheld the Agency decision, finding claimant was not available for work because of car problems. The Board affirmed that decision, but extended the ineligibility to June 20, 1981. We cannot agree.

The record reflects that the claimant missed a benefit rights interview at the Agency which was scheduled for June 17, 1981. Apparently, both the Appeal Tribunal and the Board of Review agree that he did not attend that interview because his car was inoperable. However, he did go to the Agency's office on the 17th after he repaired his car, only to find the interview and benefits film had been shown. We can

find nothing in the record that shows the claimant was to appear at the Agency's office at a scheduled time of the day. He was directed by Agency personnel to come back on another day. He later viewed the benefits film on June 24, 1981.

The facts in this case fail to support the Board's conclusion that the claimant was not physically available for work during the period it found him ineligible to draw benefits. We are not unmindful of *Lanoy* v. *Daniels,* 271 Ark. 922, 611 S.W.2d 524 (1981), wherein the Supreme Court held that claimants must be available for work or in the labor market during the entire week for which they claim benefits in order to be eligible for unemployment benefits for that week. In *Lanoy,* the claimant had been laid off the first four days of the week and on Friday she returned to work. However, after working one hour and forty-five minutes, she left work because her brother died. Here, nothing in the record shows that claimant had any employment to leave or that he was offered any. If he had been offered employment, there is no reason to believe he could not have accepted and been available to work. The most the evidence shows is that the claimant appeared at the Agency's office too late to participate in the interview and the benefits film. Although he experienced mechanical car problems on June 17, he promptly had his car repaired and made himself available to the Agency.

We reverse the Board's decision on this point and remand with directions to reinstate benefits for the claimant.

Reversed and remanded.

MAYFIELD, C.J., and CLONINGER, J., dissent.

Supplemental Opinion on Denial of Rehearing
delivered September 29, 1982

 [redacted]

TOM GLAZE, Judge. Two legal issues were raised in this case, and in its petition for rehearing, appellee contends we erred regarding the second issue, *viz.*, whether appellant was fully available for work as required under Ark. Stat. Ann. § 81-1105 (c). The Board found that he was not, and we reversed.

No briefs were submitted by the parties in the original determination of this case, but appellee does submit a brief in support of its petition for rehearing.

In our original opinion, we cited the case of *Lanoy* v. *Daniels,* 271 Ark. 922, 611 S.W.2d 524 (1981). We attempted to distinguish that case from the facts at bar, and in doing so; appellee contends we imposed a requirement not provided for in § 81-1105 (c), *i.e.*, a claimant must be employed or offered employment before disqualification can occur under § 81-1105 (c). Since this is not our intent, we wish to amplify our decision concerning this second issue.

The facts in *Lanoy* are substantially different from those posed here. In *Lanoy,* the claimant had been laid off by her employer. In determining eligibility for benefits, the Board found she was available for work the first four days of the week in question. She conceded, however, that she was not available on the fifth day (Friday) because she left work because she learned her brother died. Since she was unavailable one day of the week, the Supreme Court denied benefits, holding § 81-1105 (c) required her to be available for work or in the labor market during the entire work week for which she claimed benefits in order to be eligible for unemployment benefits for that week.

In the instant case, appellant never conceded that he was unavailable. It is true that the evidence shows that he missed his benefits rights interview on June 17, 1981, because of car problems. However, this fact alone fails to establish appellant was unavailable for work as contemplated under § 81-1105 (c). Undisputedly, appellant ap-

peared at the Agency's office on June 17 at which time he was directed to return for the interview at a later date.

Clearly, appellant was present at the Agency's office on June 17 albeit late for any one of three interviews conducted during the day. Although appellee argues to the contrary, there is nothing in the record that shows appellant was to be at the office at a designated time on June 17 or that he was to be present at a specific scheduled benefits interview. On the facts of this case, appellant was not shown to be unavailable to work, and the facts are decidedly distinguishable from those posed in *Lanoy*.

MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in today's supplemental opinion on rehearing. My dissent to the original opinion was based upon my view that the decision of the Board of Review was supported by substantial evidence and should be affirmed.

Jo Ann McEWEN *v.* William F. EVERETT, Director of Labor, and BLEVINS ELECTRIC COMPANY

E 81-357 637 S.W.2d 617

Court of Appeals of Arkansas
Opinion delivered August 25, 1982

Hardin, Grace, Downing, Napper, Allen & East, by: *Jack East, III,* for appellant.

Thelma Lorenzo, for appellees.

TOM GLAZE, Judge. Claimant was employed by Blevins Electric Company on February 16, 1981, and worked until

June 3, 1981. On June 5, 1981, claimant quit her job, notifying her employer (the President of the Company) by phone that she was quitting because he had kissed and touched her without her permission. Claimant made the call from her lawyer's office; the call was recorded without the employer's knowledge.

Claimant filed for unemployment benefits on June 19, 1981. On July 6, 1981, the Agency awarded her benefits finding that she quit because of sexual harassment on the job, that she tried to preserve her job rights by talking with the vice-president, and that she quit with good cause connected with the work as required by Section 5 (a) of the Arkansas Employment Security Law.

Section 5 (a), which is found at Ark. Stat. Ann. § 81-1106 (a) (Cum. Supp. 1981), provides:

> 81-1106. Disqualification for benefits. — For all claims filed on and after July 1, 1973, if so found by the Director an individual shall be disqualified for benefits:
>
> (a) Voluntarily leaving work. If he voluntarily and without good cause connected with the work, left his last work. Such disqualification shall continue until, subsequent to filing his claim, he has had at least thirty (30) days of employment covered by an unemployment compensation law of this State, or another state, or of the United States.
>
> Provided no individual shall be disqualified under this subsection if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification; or, if after making reasonable efforts to preserve his job rights, he left his last work because of his illness, injury, pregnancy or other disability.

* * *

On July 22, 1981, an appeal hearing was held at the instance of the employer. Both the claimant and the employer

attended the hearing and each was represented by counsel. On July 24, 1981, the Appeal Tribunal reversed the Agency and denied claimant benefits. The Tribunal found that claimant voluntarily quit her job without good cause connected with the work. The Tribunal noted that claimant had never voiced an objection to the alleged sexual harassment by the employer because she was in fear of losing her job. The employer denied the allegations of harassment, and the company's vice-president (the employer's son-in-law) testified that he had not observed anything out of the ordinary. The vice-president, however, *did* admit that the claimant had talked with him about her specific concerns over her employer's treatment.

The claimant appealed to the Board of Review, and on November 19, 1981, it affirmed the decision of the Appeal Tribunal. The Board stated:

> If the alleged sexual harassment were of such an extreme nature to cause her to quit her job, she made no effort to stop the harassment and she stated she endured it for several weeks. Not until her actual resignation, did she mention the reason for quitting to the employer. *There is nothing in the record to show that the employer's actions constituted sexual harassment to such a degree that it was unbearable.* (Emphasis supplied.)[1]

The Board's finding in support of its decision to deny benefits implies that the sexual harassment claimant endured must be "unbearable" before such treatment could be considered good cause to voluntarily quit her job. We cannot agree. The proper standard in determining good cause is set forth in *Teel* v. *Daniels,* 270 Ark. 766, 769, 606 S.W.2d 151, 152 (1980) as follows:

> " . . . [A] cause which would reasonably impel the average able-bodied, qualified worker to give up his or her employment. . . .

[1]Actually, claimant testified the sexual harassment occurred during her last two weeks of employment.

> "...
>
> "... '[G]ood cause' is dependent not only on the reaction of the average employee, but also on the good faith of the employee involved. In this context, good faith, which has been held to be an essential element of good cause, means not only the absence of fraud, but also the presence of a genuine desire to work and to be self-supporting....
>
> "...
>
> "...[Another element] in determining good cause is whether the employee took appropriate steps to prevent the mistreatment from continuing....

The conduct of the employer, of which claimant complained, included one instance of kissing, one of grabbing her breasts and other occasions of patting her "all on the back" or on her face. We can hardly agree with the Board if it intended, by its findings, to conclude that these types of acts are not reasonably sufficient to impel the average able-bodied, qualified worker to give up his or her employment.

Apparently, the Board was primarily concerned with claimant's response, or lack thereof, to her employer's affectionate displays. Claimant testified that she withdrew or jerked away from her employer when he kissed her and when one of the touching incidents occurred. However, she said that she never otherwise objected to the treatment because she needed the job. She undisputably expressed her complaints to the vice-president (and son-in-law of the employer), but he responded by saying that he was between "a rock and a hard place." The only time claimant discussed these matters with the employer was when she telephoned him from her attorney's office. As noted earlier, this conversation was recorded unbeknownst to her employer. Although appellee argues to the contrary on appeal, a fair reading of this conversation supports claimant's story that unpermitted, sexual contact took place. Obviously, the Board agreed since it concluded that "[t]here is nothing in the record to show that the employer's actions constituted sexual harassment to such a degree that it was unbearable." In view of the Board's finding on this point, it is not

necessary for us to relate the text of the taped telephone conversation. It is enough to say that we cannot agree that sexual harassment must be "unbearable" before an employee can quit. Nor do we agree with the Board, under the facts of this case, that claimant's response to such harassment failed to meet the standards required under § 81-1106 (a), *supra.* Claimant discussed the matter with the company's vice-president, and he was unable to assist her. In fact, the vice-president expressed that he was placed in a difficult position in view of the complaints she directed toward the company's president. We believe that claimant reasonably determined her situation was impossible to resolve. Since there was no other official or supervisor to whom she could turn to for help besides the person (employer) committing the acts, we believe it was reasonable under these circumstances for her to quit. Short of directly confronting her employer, she had no other recourse. We certainly cannot agree that she was required to resolve the complaints with the person who perpetrated the harassing acts when he also is the president of the company, the person who hired her and the one who could fire her. We fail to find any substantial evidence to show claimant failed to make every reasonable effort to preserve her job.

Robert W. BURNS, Guardian, et al *v.*
Stanley LUCICH and Anna LUCICH

CA 81-442 638 S.W.2d 263

Court of Appeals of Arkansas
Opinion delivered September 1, 1982

William R. Wilson, P.A., for appellants.

Wright, Lindsey & Jennings, for appellees.

GEORGE K. CRACRAFT, Judge. The guardians of the person and estate of Agnes Bauer brought this action to recover from Stanley and Anna Lucich personal property and monies alleged to have been obtained from their ward either during a period of time when she was mentally incompetent or by undue influence and duress at times when, due to advanced age and mental infirmity, she did not possess the requisite mental capacity to make valid gifts. The value of these gifts exceeded $161,000. Appellees admitted receipt of gifts beginning in 1974 and ending November 3, 1977 but denied that Ms. Bauer was incompetent, did not have the mental capacity to make gifts, or that they were obtained by undue influence. The chancellor filed an exhaustive memorandum opinion in which he made specific findings of fact. The decree dismissing the complaint for want of equity contained the following findings and conclusions:

FINDINGS OF FACT

1. Agnes Bauer's mental condition was normal for a person her age and she had sufficient mental capacity to make valid gifts during the "gift period".

2. There is no substantial evidence that Stanley and Anna Lucich defrauded, coerced or took undue advantage of Agnes Bauer or otherwise exercised any undue influence and, to the contrary, all of the gifts were intelligently, deliberately and freely given.

3. The relationship between Agnes Bauer and the defendants was not the sort of "confidential relationship" which raises a legal or evidentiary presumption of invalidity of gifts.

CONCLUSIONS OF LAW

1. The plaintiffs have failed to sustain their burden of proving that Agnes Bauer lacked sufficient mental capacity to make valid gifts during the time period involved in this lawsuit.

2. The plaintiffs have failed to sustain their burden of proving that any of the gifts were obtained as a result of undue influence, fraud, duress, overreaching or by any other means condemned by the law.

3. The plaintiffs have failed to sustain their burden of proving that the relationship between Agnes Bauer and Stanley and Anna Lucich was such as to raise a presumption that the gifts were obtained by abuse of that relationship or to shift the burden of proof on this point.

Appellants maintain that the trial court erred in each finding and conclusion. We do not agree and address each point of reversal after a recital of those facts deemed necessary to an understanding of our decision.

Agnes Bauer, a wealthy widow, was born in 1900 and had entered into three childless marriages. Her third husband, Frank Bauer, died suddenly and unexpectedly in 1974. She grieved extensively over his death. All of the witnesses testified that after his death she was lonely, frightened and depressed.

Shortly after Mr. Bauer's death James H. Gray, a stepson of her second marriage, moved into Mrs. Bauer's home to assist her in her adjustment. He stayed only a short time, explaining that he had moved out because of her peculiar actions and the hours she kept. She then moved two houses west of her house into the home of the appellees who had

been neighbors and friends for some time. Appellees changed their living arrangement, purchased additional furnishings and installed additional doors in order to provide Mrs. Bauer a private bedroom and bath. For months she spent nights in appellees' home, returning to her own house during the day. Monsignor James E. O'Connell who had been living in appellees' home for seven years continued to reside there during this period. Monsignor O'Connell had been a close friend of both Mr. and Mrs. Bauer for over twenty years and had known Mrs. Bauer since the 1930's when she resided in Fordyce during her first marriage.

The friendship and association which Mr. and Mrs. Bauer had maintained with appellees continued to grow after his death. For the first year or more after the death of Frank Bauer, Stanley Lucich spent a great deal of time helping Mrs. Bauer get her affairs in order and trying to get her to relax and get her mind on other things. She would bring these problems to him or send for him. He testified that he suggested the custodial and trust arrangements with Union National Bank in order to achieve that result. Thereafter all her financial matters were handled by the bank and most of her bills sent to its trust officer, Henry E. McCord. Appellee's advice to her thereafter was limited to explanations of those communications from the bank which he could understand but she could not. All other questions were referred to Mr. McCord.

Mrs. Bauer was left with two Cadillac automobiles and offered one as a gift to Stanley Lucich who had evidenced kindness and attention to her from the time she had moved into the neighborhood. He selected the older one. In 1976 he traded that car for a new one and financed the balance of some $7,000. When Mrs. Bauer learned of the transaction she paid the trade-in difference as a gift over his protest.

From the gift of the used Cadillac to the 7th day of November, 1977, Mrs. Bauer, with ever increasing frequency, gave to the Luciches at least eighty-six separate gifts of clothing, furs, jewelry, silver, china and money, amounting, in the aggregate, to a sum in excess of $161,000. The largest of these gifts was a cashier's check for $25,000 given to

the Luciches in July 1976 at a time when it was contemplated that they would purchase a lot next door to Mrs. Bauer and build a home on it. Both Mr. and Mrs. Lucich testified that the gifts were received over their protestation, a fact which was corroborated as to many of those gifts by Monsignor O'Connell who was present when they were received.

In support of the allegation of mental infirmity and incapacity, the appellants offered lay testimony that in 1974, immediately after the death of Frank Bauer, Mrs. Bauer became extremely nervous, depressed, forgetful, disoriented, repetitious and unable to properly identify persons and relatives. They stated that she referred on several occasions to her deceased husband and other relatives as still living. It was their testimony that this condition existed as early as 1974 and worsened continuously until the present time.

Gaston Williamson, a prominent Little Rock attorney and witness for appellants, testified that Mrs. Bauer made changes in her will in 1974 and again in 1975. He said that at those times she was fully competent and had the mental capacity to execute the instruments. In 1974 she executed a custodial agreement with Union National Bank of Little Rock under which the bank would act as her agent in collecting all dividends and interest on her securities and investments and place them in her checking account. In August of 1976 Mrs. Bauer executed a revocable trust agreement, transferring all of her assets, including title to her home, to Union National Bank for her use and benefit during her lifetime, with remainder to her nieces and nephews after her death. Mr. Williamson, the drafter of the trust agreement, and Mr. McCord, trust officer of the bank, both of whom were present when it was discussed and executed, each testified that she was mentally competent to execute the instrument.

At the time the trust agreement was executed Mrs. Bauer had already made substantial gifts totalling approximately $50,000 to the Luciches. A month prior to that date Mr. McCord had delivered to Mrs. Bauer a cashier's check for $25,000 which she had told him she was giving to the

Luciches as a gift. Mr. McCord testified that he had ascertained that there had been no coercion by the Luciches. He stated that Mrs. Bauer had led him to understand that the Luciches' friendship had been "important to her and they had been helpful to her. I had no doubt in my mind that she was telling the truth about that."

A year later in August, 1977 Mr. McCord noticed overdrafts in Mrs. Bauer's accounts and called her about them. He testified that she stated she didn't remember executing the checks which caused the overdrafts. He stated that during this time she would call him several times on the same day inquiring about her bank balances. Concerned by these actions, he invited her to lunch with him and his superior. Both officers of the bank testified that during lunch she was extremely nervous and repetitious.

As a result of their observations McCord and Williamson, the bank's attorney, called on Mrs. Bauer to discuss these overdrafts with her. They testified that she at first denied writing one of the checks payable to appellees and then recalled it, and that she did not recall writing the other two checks which they questioned. Both concluded then that she was incapacitated and that a guardianship would be required. Steps to initiate guardianship proceedings were taken immediately.

Dr. Alfred Kahn, Jr., Mrs. Bauer's personal physician since 1955, was requested to execute a medical affidavit affirming her incompetency. Dr. Kahn was hesitant to do so. He wanted to go to court, "state what her medical history was and let the judge make his own determination regarding her competency." He was informed that the probate judge would prefer a medical opinion, and upon assurance that her heirs would not sue him, Dr. Kahn "reluctantly" executed the affidavit. The guardians were appointed on November 7, 1977. No gifts to appellees were made after that date.

Dr. Kahn testified that he had been Mrs. Bauer's physician since 1955. In 1974 in conducting a two day examination for neck pains, he found her to be "reasonably

vigorous for a person seventy years of age." In October of 1975 his examination report reflected "she stated her health was stable but she had been emotionally upset at the death of her husband." At that time Dr. Kahn noted nothing suggesting neurological disease. Her memory seemed to be intact. He felt that there were some changes "which occur with aging in the brain" which he felt was the cause of her depression. He prescribed medication to increase blood flow.

He saw her again on September 19, 1977 "for intermittent rectal bleeding." At that time he noted some "decrease in mentation," meaning that her mental processes were slowing down and she was somewhat forgetful. He observed nothing descriptive of incapacity.

Dr. Kahn saw her again in February of 1978 after the guardian was appointed. At that time he noted no change in her mental process. On April 11, 1979 he saw her and noted marked deterioration. He concluded that "Sometime between September 1977 and April 1979 she became incompetent, but I cannot give you an exact date."

Dr. Alma Faye Houston, a psychiatrist who had not seen Mrs. Bauer, stated that she read Dr. Kahn's medical reports and the deposition of James H. Gray as to Mrs. Bauer's actions, nervousness and forgetfulness. She opined that Mrs. Bauer had been in a weakened mental state from as early as 1974 and that such a person is "more easily manipulated than others." Decreased mentation and forgetfulness are not descriptive of incompetency and she found no description of incompetency in these documents until Mrs. Bauer was declared incompetent in November of 1977. "I think you could say she became more and more disoriented and confused to where she was incompetent . . . going on the basis of Dr. Kahn's records." Dr. Travis Tunnell, a clinical psychologist associated with Dr. Houston, agreed with her analysis.

The appellees offered the testimony of a large number of Mrs. Bauer's close neighbors, friends and servants who saw her on an almost daily basis. Others of Mrs. Bauer's

friends of many years' standing who saw her frequently also testified. None noticed any indication of incompetency or undue influence during the period in issue. Most of them had some knowledge of the gifts in question from Mrs. Bauer herself and some had even been present when the gifts were presented or discussed by Mrs. Bauer. Though they were not aware of the extent of the gifts given appellees, based on their knowledge of the relationship and the characteristic generosity of Mrs. Bauer, they were not shocked that these gifts totalled such a large amount.

All witnesses were in complete agreement that there was a very close and friendly association between Mrs. Bauer and the appellees. All agreed that the appellees were most solicitous of her, giving up a lot of their own life to see that she was cared for and her emotional needs met, taking her whenever and wherever she wanted to go. Some witnesses referred to the relationship as "mutual adoration" and a "loving relationship." Most witnesses agreed that this developed because Mrs. Bauer was lonely and Mrs. Lucich was a kind person. Monsignor Francix X Murphy testified that he had known both donor and donees for many years. He described the relationship as "two women who had great respect for each other . . . [T]hey both showed empathy toward each other and Anna would do anything she could to make Agnes' life more pleasant. She went out of her way to be helpful to Agnes. . . . Before the guardianship Agnes was very clear, very sharp and knew what she was doing —there was no indication that she did not know what she was doing before the guardianship." Monsignor O'Connell described it as a very close and friendly relationship which evidenced much concern and care on the part of each for the other. He testified as follows:

> I knew at the time she was arranging to make a gift of $25,000 to Anna and Stanley Lucich. In my opinion at the time she was mentally competent and did not demonstrate to me any lack of knowledge of what she was doing. She demonstrated to me that she was doing it of her own free will and there was no question in my mind about it. It did not surprise me in the least the way she was doing this because she wished to demonstrate

her affection for Anna in some way, in my opinion, to express appreciation for all the things Anna had done for her. Anna had been very kind to her indeed.

. . . .

During the entire time that I have known Agnes Bauer and up until the time the guardian was appointed for her she did not ever give any indication to me that she was mentally incompetent.

. . . .

I have been present when Mrs. Bauer had made gifts to Mrs. Lucich. On many occasions the gifts would have been made and then she would tell me about it in their presence. The one particular one that I mentioned in the deposition that I made was a diamond necklace and a set of earrings, a matching set. Agnes came in with the box wrapped and opened it up in the presence of Anna and me . . . . In view of my presence at the time and my knowledge of the circumstances, in no way was the gift solicited. I have never known an occasion in which Anna or Stan solicited a gift from Agnes.

Monsignor O'Connell himself had been the object of her bounty on three occasions. She had given him a set of golf clubs, paid a balance in excess of $4,000 owed on his automobile and had given him a check for $50,000 which he told her he would not accept. She insisted that he retain the check, which he never cashed. He stated that he did not accept this gift because she had earlier expressed a desire to make a gift of $100,000 to Christ the King Catholic Church. He felt it improper to accept the gift for some other purpose and was hopeful that she would make the larger gift later.

Dr. David Miles, a neurologist who resided in Mrs. Bauer's neighborhood and saw her on frequent visits during the period in issue, observed no indication of mental weakness or incompetence. He stated that during his observation of the relationship between the parties he "did not see at any time any indication that Mrs. Lucich was trying to take advantage of Mrs. Bauer. I had knowledge of many

kindnesses of Mrs. Lucich to Mrs. Bauer." He described Mrs. Lucich as "a very kind, warm and helpful individual . . . that thinks primarily of other people before she thinks of herself." He described Mrs. Bauer as "a very outgoing person, very friendly. She was accustomed to having things going her own way, the way she liked for them to go. She was a very friendly, cordial individual but she was a strong-minded person." There was no evidence that Mrs. Bauer was not a strong-willed, determined person.

Most of the witnesses characterized her as "very generous," and none noticed any change in that characteristic during the period in issue. Almost all of the witnesses had at one time or another been the object of her generosity. She was known to give substantial gifts to relatives, friends, employees and even to those she did not know but whose need was made known to her. One acquaintance of over forty years stated that she was "embarrassingly generous and never accepted a favor or invitation without making a corresponding gift. Any time Agnes was a guest she came bearing gifts. I think she equated loving and giving in the same term. It was difficult to refuse her any of the things she offered."

There was testimony from her relatives corroborating this generosity. It was shown that she had purchased automobiles for nephews, made gifts to several of them as down payments on homes, checks in the amount of $3,000 to three children of one of her relatives and smaller gifts on a regular basis. It was testified that she had paid $2500 on the funeral expense of one sister and had in the early 1950's begun a monthly gift of $300 to her other sister and $100 a month to one of the nephews. There was also testimony that she had made a $5,000 business loan to one of her step-children and subsequently forgave repayment.

The appellees testified that each of the gifts was given freely and voluntarily, not only without solicitation, but in spite of their protest, and that each time Mrs. Bauer was mentally alert and knew what she was doing. The trial court candidly stated that due to the inconsistencies in the statements of the appellees that his conclusions were not

based upon their testimony except where it was corroborated by other testimony.

It would unduly lengthen this opinion to attempt to recite all of the testimony heard by the court during this five day hearing. This recital is intended merely as a brief resume to point out the conflicts and general tendency of the testimony on which the chancellor based his decision.

The law governing the validity of gifts *inter vivos* is well settled. The donor must be of sound mind, must actually deliver the gift with the intention to vest immediate title, and the gift must be accepted by the donee. The delivery with that intention must be done freely and voluntarily without undue influence and duress. Ordinarily the burden is upon one who attacks such a gift to prove that the donor lacked the capacity to give the gift or was unduly influenced. A different burden of proof arises when it is shown that a confidential relationship existed between the donor and a dominant donee. Where special trust or confidence has been shown, a gift to the dominant party is presumed to be void. The burden then rests upon the dominant recipient to show that he has not overreached the giver. *Gillespie* v. *Holland,* 40 Ark. 28 (1892); *Young* v. *Barde,* 194 Ark. 416, 108 S.W.2d 495 (1937); *Norton* v. *Norton,* 227 Ark. 799, 302 S.W.2d 78 (1957); *Jamison* v. *Duncan,* 233 Ark. 780, 348 S.W.2d 709 (1961); *Donaldson* v. *Johnson,* 235 Ark. 348, 359 S.W.2d 810 (1962); *Barrineau* v. *Brown,* 240 Ark. 599, 401 S.W.2d 30 (1966); *Dunn* v. *Dunn,* 255 Ark. 764, 503 S.W.2d 168 (1973).

It is also well settled that although chancery cases are reviewed *de novo* on the record we do not reverse a decree unless the chancellor's findings are clearly against a preponderance of the evidence. Since the question of preponderance turns heavily on the credibility of the witnesses, we defer to the superior position of the chancellor in this regard. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 409 (1981); Rule 52 (a), Arkansas Rules of Civil Procedure.

The appellants first contend that the trial court erred in holding that Agnes Bauer was mentally competent during the period in issue and that the evidence did not establish a

discernable date on which she lacked capacity to make valid gifts.

The chancellor concluded that there was no basis for a finding of incompetency prior to August of 1976 on which date she executed the trust agreement with Union National Bank. All witnesses agreed that she was capable of executing it and had the mental capacity to do so. There was lay testimony that she was incompetent and incapacitated in September 1977 when her lawyer and banker discussed overdrafts with her. There was contradicting lay testimony, corroborated by Dr. Miles, that she was mentally competent to make a valid gift even after the guardianship was established in November, 1977. Dr. Kahn testified that she was not incompetent in September 1977 when he examined her and that she became incompetent on some date "after September 1977 and before April 1979." He could not fix the date. On the conflicting evidence we cannot say that the findings of the trial court were clearly erroneous or clearly against a preponderance of the evidence.

Appellants next maintain that the chancellor erred in holding that the relationship between these parties was not of such a character as would raise a presumption of invalidity and that he improperly placed the burden of proving undue influence on appellants. They argue that the clearly established relationship of close affection and repose was sufficient to make the gifts *prima facie* void and the burden of showing the contrary was upon appellees. We agree that the evidence does establish a very close relationship based on mutual affection and that relationships of friendship may be properly classed as "confidential."

In *Gillespie* v. *Holland, supra, Young* v. *Barde, supra, Norton* v. *Norton, supra,* the court stated that such relationships are not limited to legal control but are supposed to arise "whenever there is a relation of dependence or confidence; especially that most unquestioning of all confidences which springs from affection on one side and a trust in reciprocal affection on the other." While a close friendship based on mutual affection may be deemed a confidential relationship, we find no error in the chancellor's finding

and conclusion that this relationship, standing alone, was insufficient to raise the presumption of invalidity.

It is not the mere existence of a relationship of confidence which causes the gift to be deemed *prima facie* void. It is only when the testimony further shows that the donee occupied such a superior position of dominance or advantage as would imply a *dominating* influence over his donor that this presumption arises. *Donaldson* v. *Johnson, supra.* In *Dunn* v. *Dunn, supra,* in discussing the application of this rule in earlier cases the court declared:

> Of course, the confidential relationship based on faith and repose as well as the dominant position must be supported by testimony *before the presumption of coercion will arise.* (Emphasis supplied)

In *Gillespie, Young, Norton* and *Jamison* where the court found both confidential relationships and dominant donees the presumption was indulged. In *Barrineau, Donaldson* and *Dunn* where the confidence was clearly established but it was not shown that the donee occupied a position of dominance in the relationship, the presumption was found inapplicable.

We find no evidence, and none has been pointed out to us, which would lead to the conclusion that the appellees occupied a position of dominance in the relationship. To the contrary there is an abundance of testimony that Mrs. Bauer was a strong-willed and dominant person who wanted things to go her way and that it was extremely difficult to refuse any gifts she offered.

The chancellor in his conclusions made the following observations:

> The many hours of thought I have given to this problem leads me to a conclusion I cannot resist. Agnes Bauer was wealthy and knew it. She was growing old and knew it. When Frank Bauer died she faced the stark reality that she had no one on this earth that seemed to really love her enough to give her the care and attention

she craved and whom she could rely on to take care of her in the event she became incompetent. She was lonely, frightened and depressed and had no one to turn to. She could buy diamonds, cadillacs, furs and the things her heart desired, and not deplete her assets (which were in safe hands in the Union National Bank), and yet all of her wealth had brought her to the last stage in life with no one else she could say generally loved her enough to do these things for her and would really attend to her welfare when she needed it — all she had to look forward to were hired hands whom she did not want.

Into this picture entered the Luciches. They demonstrated to her that they would attend to her needs night and day, they were willing to, and did abandon their way of life and subject their time and attention to her wishes, and were her willing, pleasant and obedient companions. *While I think the Luciches in a sense occupied a relation of confidence to Agnes Bauer, I do not think it is that kind of relationship contemplated in law that warrants interference in planned, deliberate sane acts of a 74-77 year old person.* The Luciches were good, close friends of Agnes Bauer. She found she could rely upon them to give her loving care and attention at all times. At that point in life and conscious of the kind of help she would need in the not too distant future, *I conclude that she intelligently decided to buy, in the guise of gifts, that love and care and attention she craved . . .* [I]t may sound sordid, to suggest that love, care and attention is to be put on a monetary basis, but I do not think this is unusual for wealthy, childless, septuagenerians; and it may be that some may conclude that it was a bad deal for Agnes Bauer, or immoral, or anti-social, or even evil, *but once it is found that the donor is competent and acted with full knowledge and without undue restraint or fraud, the result of the act is not the concern of the law.* The motive of the donor, whether virtuous or not, is not the interest of the law except as an explanation in a search for the truth. All that is needed is that the gift be the free and voluntary act of a mind having proper capacity. With the morals

or justice of such gifts the court cannot deal. (Emphasis supplied)

The chancellor found that Mrs. Bauer had the mental capacity to give the gifts, gave them freely and voluntarily and not as the result of the dominance of appellees. We cannot say that these findings are clearly erroneous or that he did not apply the proper burden of proof.

Affirmed.

Ardie **PROFIT** *v.* STATE of Arkansas

CA CR 82-41 637 S.W.2d 620

Court of Appeals of Arkansas
Opinion delivered September 1, 1982

William R. Simpson, Jr., Public Defender, by: *Carolyn P. Baker*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Ardie Profit was charged with the crimes of burglary and theft of property. He waived a jury and was found guilty of those charges by the trial court. He was given an enhanced sentence of ten years on each charge under the Habitual Criminal Act, the sentences to run concurrently. He contends that the trial court erred in finding that his pre-trial statement had been voluntarily given and that the evidence was not sufficient to sustain his conviction of the charge of burglary and theft of property. We do not agree.

On October 29, 1980 the home of Bradie Lee Anderson was burglarized. A number of items of personal property were taken. Mrs. Anderson gave the police a list describing the stolen articles. Among the items listed were four pillow cases; two were white, one was white with blue stripes, and the other red with white stripes.

Carrie Shannon who lived more than a block from the burglarized house testified that on the morning of the burglary she saw the appellant carrying four pillow cases which he placed in the car parked near her house. She had observed him coming from an alley. She described two of the pillow cases as being white and the others blue and white and red and white striped. She did not know what was in the pillow cases but each contained something "besides a pillow, he had plenty."

In a written, signed pre-trial statement received into evidence over the objection of the appellant, he stated that he had not actively participated in the burglary. He averred that while en route to a girlfriend's house near Mrs. Shannon's home he was asked by two friends to "stand watch at the

corner while they broke into a house." He did so for about ten minutes after one of his friends entered the house. He stated that sometime later one of those who had burglarized the home brought him a blue and white pillow case. He was asked to take the pillow case into the house in secrecy so that his friend's mother would not know about it. He stated that he took the pillow case into the house as requested. He further stated that the pillow case contained items of property which exactly matched the description of the list given the police by Ms. Anderson at the time of the burglary. In that statement he further admitted assisting his friends in the transportation and attempts at sale of the stolen articles.

At his trial the appellant testified in his own behalf. No other defense witnesses were called. In his testimony, while admitting that he had read and made corrections in his written statement before it was signed, he denied all knowledge that his friends were burglarizing the house, stated that the pillow cases which he placed in the car were brown and contained his girlfriend's laundry, denied his statement of prior possession of, or assistance in the sale of, the stolen goods, and stated that his statement was wrong in those respects. He testified that his two friends did in fact ask him to stand watch, but he did not know what they were doing or why they wanted him to watch and said that he would, only to "avoid any further conversation with them."

On appeal this court views the evidence in the light most favorable to the appellee and affirms if there is any substantial evidence to support the conviction. *Fountain* v. *State,* 273 Ark. 457, 620 S.W.2d 936 (1981); *White* v. *State,* 271 Ark. 692, 610 S.W.2d 266 (Ark. App. 1981).

The testimony of Ms. Anderson clearly establishes a burglary and theft of property. She also testified that the day before the burglary appellant had come to her home inquiring as to the whereabouts of a person who had never lived there. He was thus placed at the scene of the crime the day before it occurred. Ms. Shannon gave eye-witness testimony that the defendant placed pillow cases matching descriptions of those stolen in a motor vehicle near her house and that the pillow cases contained articles other than those

intended for their use. In his pre-trial written statement the appellant admitted being at the scene of the burglary and that he had participated in it to the extent of serving as lookout. He admitted having the recently stolen articles in his possession that same day and of his participation in the attempted sale of the items. In his testimony at the trial while denying knowledge of what was taking place, he admitted to having been at the scene of the crime at the time it was being committed.

Unless we agreed with the appellant that his pre-trial statement should have been suppressed we could not say that the finding of the trial court was not supported by substantial evidence. We do not agree.

The appellant made no pre-trial motion to suppress his statement. His first objection came at the time it was offered in evidence at the trial. The burden is on the State to demonstrate that an in-custody statement was freely and voluntarily given, and on appeal we make an independent determination of voluntariness based on the totality of the circumstances and will not set aside a trial court's finding of voluntariness unless it is clearly against a preponderance of the evidence or clearly erroneous. *Beard* v. *State,* 269 Ark. 16, 598 S.W.2d 72 (1980). From our review of the testimony and of all of the circumstances surrounding the appellant's pre-trial statement we cannot say that the trial court's finding of voluntariness was not supported by a preponderance of the evidence or was clearly erroneous.

The appellant testified that he was arrested on February 26 and was then fully informed of all of his *Miranda* rights. He told the officers that he knew nothing of the burglary and the only statement that he could make was that he was in no way involved. Shortly thereafter he did orally give information as to the location of the stolen items. This information proved incorrect. He stated that on the morning of March 1st he was again brought to the interrogation room and questioned. He testified that he then requested and received permission to call Cliff Jackson, a Little Rock attorney. He stated that he informed the officers of the name of his attorney and pursuant to his advice requested that the

questioning be terminated and that he be returned to his cell. He stated that despite this request on the advice of his attorney the questioning continued. The attorney did not testify at the trial. It may be noted however that he did testify at a hearing on a motion for a new trial which is hereinafter discussed. While he did state that he did have such a telephone conversation in which he so advised the appellant, his testimony would establish that his call was made on the afternoon of March 1st at a time when the statement had already been made and signed. Appellant further testified that he made the written statement on March 1st only after Officer Fulks, who was present during part of the interrogation, promised him that if he would give information about other burglaries the charge against him would be "non processed."

Officers Alexander and Sylvester who were present during the February 26th interrogation testified that at no time did he request that the questioning be terminated and that he merely indicated that he did not wish to make a written statement at that time. Both officers testified that at no time did he ever request an attorney, although he had been fully advised of his rights. Officer Alexander testified that on the morning of March 1st he again interrogated appellant in response to appellant's request that he come to the interrogation room for that purpose. Officers Alexander and Shadrick, who were present during the interrogation on March 1st, testified that at no time during that interrogation did appellant request an attorney, mention that Mr. Jackson was his attorney or request that the questioning be terminated. They both testified that the statement was given freely and voluntarily and without inducement.

The appellant argues that as Officer Fulks was in the room for "a while" and Officer Alexander admitted leaving the room for a short period of time, it was possible that the remarks were made in his absence. This argument would be more persuasive if the record did not show that Officer Shadrick was in the room at all times during interrogation and denied that any inducements were made by any person. The appellant contends that as Sergeant Fulks was a material witness to the making of the confession that it was

the duty of the State to produce him at the trial or explain his absence relying upon *Hays* v. *State,* 269 Ark. 47, 598 S.W.2d 91 (1980) and *Smith* v. *State,* 254 Ark. 538, 494 S.W.2d 489 (1973). We do not think that these decisions are applicable here. The oral motion made by counsel made no reference to inducements made by any person but objected solely upon the failure to terminate the questioning after the attorney's advice had been made known. Appellant was not questioned about such a remark by his own counsel. His reference to it came voluntarily at the end of his testimony in response to questions of the court to make certain that he had truthfully answered that he understood his rights in the making of his statement. No written motion to suppress the confession was filed within ten days of trial date as required by Rule 16.2, Arkansas Rules of Criminal Procedure, as amended by per curiam order dated June 1, 1981, now found in 273 Ark. 550, 616 S.W.2d 493. The State was not apprised of the alleged inducement relied upon for suppression prior to the time the document was offered into evidence. Appellant argues that as the court in which the case was tried does not conduct omnibus hearings, he had no occasion to raise it prior to that time. That the court does not conduct such hearings or dispose of motions at pre-trial hearing does not excuse compliance with the requirement of timely filing of a motion to suppress.

Although not required to do so the trial court permitted the untimely motion and determined the issue of voluntariness. Under these circumstances the failure to make timely objection in no way weakened the State's burden of proving voluntariness. The failure to disclose the objection in a timely motion, however, can affect the State's obligation to produce all material witnesses to the confession at the hearing.

We conclude from all of the circumstances surrounding the incident that absent a denial of a specific request that Officer Fulks be produced, the denial of the other officer present that such a statement was made, if believed, sufficiently rebutted the self-serving statement made by the appellant.

The testimony of the police officers tended to show that all of appellant's rights were preserved and that his statement was given voluntarily. Where evidence is in conflict it is for the trial court to determine the weight and credibility to be given the testimony. The defendant's testimony regarding his interrogation is not entitled to more weight than that of the officers'. *Smith* v. *State,* 256 Ark. 67, 505 S.W.2d 504 (1974); *Decker* v. *State,* 255 Ark. 138, 499 S.W.2d 612 (1973).

The appellant finally contends that the trial court erred in refusing to grant a new trial based on newly discovered evidence. At the conclusion of the trial the court resolved the credibility questions against the appellant and specifically found that he was unbelievable. Among other noted inconsistencies in his statement the trial court expressed doubt that Mr. Cliff Jackson would be found in his office on Sunday morning. The appellant desired a new trial in order to introduce the testimony of Mr. Jackson that such a telephone call had been made to him. In denying the motion for new trial the trial court specifically found that the testimony of Mr. Jackson was not new evidence because it was merely corroborative and could have been presented at the trial. His connection with the appellant was known at all times and constantly referred to during the trial. It was in no sense newly discovered. We find no error.

We affirm.

Herman PICKENS *v.* STATE of Arkansas

CA CR 82-27 638 S.W.2d 682

Court of Appeals of Arkansas
Opinion delivered September 1, 1982
[Rehearing denied September 29, 1982.]

William C. McArthur, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was charged with aggravated robbery in violation of Ark. Stat. Ann. § 41-2102 (Supp. 1981). After a trial by jury, he was found guilty and sentenced to twenty-five years in the Arkansas Department of Corrections. From that decision, comes this appeal.

Appellant raises four grounds for reversal.

THE GRANTING OF A CONTINUANCE

The record reflects that the appellant initially appeared for plea and arraignment without an attorney on February 3, 1981. Arraignment was rescheduled for March 3, 1981; appellant was found to be indigent; and Mr. Robinson, a local attorney, was appointed to represent him. Trial was scheduled for June 29, 1981. On April 13, 1981, Mr. Robinson filed a motion to be relieved because appellant had retained an attorney. Mr. Robinson was relieved as counsel and Mr. Moorehead was substituted. On June 11, 1981, Mr. Moorehead, the retained attorney, filed a motion for a continuance from the June 29, 1981, trial date. That motion was granted and trial was rescheduled for August 12, 1981.

On August 11, 1981, Mr. Moorehead filed a motion to be relieved as counsel for appellant. The motion alleged that irreconcilable differences had arisen between Mr. Moorehead and his client, and that he could not adequately represent him. The motion further indicated that appellant

wished to have other counsel. The trial court, on the day of trial, heard arguments from counsel and from appellant, and denied the motion. Appellant was given the choice of proceeding to trial with Mr. Moorehead's services or representing himself. Appellant admitted that he had only contacted one other attorney and had not retained that attorney. Appellant indicated that he had been somewhat dissatisfied with Mr. Moorehead's services for approximately two weeks prior to trial but had not retained other counsel, nor had he contacted any attorneys until the week of trial.

Had the trial court granted the appellant's motion for a change of counsel, that would have necessitated the granting of a continuance for the new attorney to have adequately prepared for trial. Therefore, the motion for a change of counsel is viewed as a motion for a continuance. *Leggins* v. *State,* 271 Ark. 616, 609 S.W.2d 76 (1980).

The question of whether a continuance should have been granted is within the discretion of the trial court and the burden is on the appellant to show that there has been an abuse of discretion. *Thorne* v. *State,* 269 Ark. 556, 601 S.W.2d 886 (1980); *Leggins* v. *State, supra.*

In *Leggins, supra,* the Arkansas Supreme Court dealt with a situation similar to the case at bar and said:

> If such a change [of counsel] would require the postponement of trial because of inadequate time for a new attorney to properly prepare a defendant's case, in denying or granting the change, the court may consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to defendant.

The Court went on to say:

> In the instant case, the appellant neither provided a material reason for his requested change of attorneys,

> nor identified an attorney who would proceed to trial with him. He was dilatory in making the motion and identified no prejudice to his case from a failure to grant the motion.

We find the language from *Leggins* appropriate in this case, since essentially the same factors are present in the case at bar as were present in *Leggins*. Accordingly, we find no merit to appellant's argument that the court erred in failing to grant a continuance so that he could obtain other counsel.

THE NUMBER OF PEREMPTORY CHALLENGES

Appellant alleges that he was entitled to twelve peremptory challenges, and that the trial court erred in limiting him to eight. Act 115 of 1981 amended Ark. Stat. Ann. § 43-1922 (Repl. 1977), and after the amendment twelve peremptory challenges are allowed only in cases involving prosecutions for capital murder. Appellant was tried after the effective date of the amendment, but the crime was committed at a time when the statute in question allowed twelve peremptory challenges for cases involving prosecutions for offenses punishable by death or life imprisonment. Essentially, appellant is arguing that the statute in question is substantive law rather than procedural law and that his rights have been violated by the failure of the trial court to apply the statute in effect at the time of the alleged commission of the crime.

In *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981), the Arkansas Supreme Court dealt with the argument that a former statute requiring an incarcerated defendant to be tried within two terms of court laid down a rule of substantive law which the court could not supersede by a rule of procedure permitting a longer delay. In *Cassell, supra,* the court stated:

> In criminal matters substantive law declares what acts are crimes and prescribes the punishment; procedural law provides or regulates the steps by which one who violates a criminal statute is punished.

In *Duncan* v. *State,* 260 Ark. 491, 541 S.W.2d 926 (1976), the Arkansas Supreme Court said:

> At the retrial the newly adopted Uniform Rules of Evidence will be in force, because new procedural statutes ordinarily apply to pending cases.

Consequently, we hold that the 1981 amendment to the statute in question affected procedural rather than substantive law, and that the trial court did not err in failing to grant appellant's request for additional peremptory challenges.

THE LIMITATION OF CROSS-EXAMINATION

Appellant argues that, on several occasions, the trial court erred in sustaining objections to appellant's cross-examination of various witnesses. Neither the questions, answers, objections, nor rulings are abstracted and thus, from this record, we are unable to determine whether counsel was unduly limited. However, taking appellant's arguments at face value and viewing them in light of the fact that the trial court has considerable latitude of discretion in determining the scope of proper cross-examination, we find no abuse of discretion exercised by the court in limiting cross-examination as was done in this case. *Shepherd* v. *State,* 270 Ark. 457, 605 S.W.2d 414 (1980).

THE SUFFICIENCY OF THE EVIDENCE

The victim testified that, as he left his home going toward his armored car, an individual pulled a gun on him and demanded his keys. After a scuffle with that individual, and another man who came on the scene, one of the individuals shot him and ran away. The victim fired at one of the individuals four times. The victim could not identify his assailants. Another witness observed an individual running away from the scene, but she could not identify him. Another witness identified appellant's co-defendant as being a person who was near the premises at approximately the time the crime occurred. She observed the two men walking toward the apartment building, coming back,

walking away from the apartment building toward the area of the victim's house, and then running back toward the apartments. Upon observing a police car approaching, she notified the police of their suspicious activity. The suspects were located in the vicinity and were arrested.

A Pine Bluff police officer collected various bits of physical evidence found in the victim's carport along with a ski mask and a .32 caliber automatic pistol. Another officer found two pairs of green coveralls, a patch of blue cloth, and a pair of brown jersey gloves. Other items of physical evidence were located and all of these items were delivered to Berwin Monroe, evidence analyst for the State Crime Laboratory. His testimony indicated that the items found were consistent with having been possessed by the defendants in the area in which they were seen. The appellant's shirt was also analyzed and fibers matching it were found within one of the pairs of coveralls. The coveralls were thus connected with the appellant, as well as the crime scene, since vegetation found on the coveralls was consistent with that located in the area where the attempted robbery took place.

In criminal cases, we affirm where there is substantial evidence to support the verdict. *Lunon* v. *State,* 264 Ark. 188, 569 S.W.2d 663 (1978); *Pope* v. *State,* 262 Ark. 476, 557 S.W.2d 887 (1977). In determining whether the evidence is substantial, we review the evidence in the light most favorable to the appellee. *Pope* v. *State, supra.* Substantial evidence has been defined as evidence which is

> 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 a suspicion or conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980).

Although the evidence is circumstantial, it is not insufficient. Circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any

other reasonable conclusion. *Cassell* v. *State, supra; Wortham* v. *State,* 5 Ark. App. 161, 634 S.W.2d 141 (1981).

There was ample evidence from which the jury could conclude that the appellant was guilty of the offense charged. We conclude that the evidence was substantial, and therefore we find this argument to be without merit.

Affirmed.

Carla Ann WORRING *v.* STATE of Arkansas

CA CR 82-35 638 S.W.2d 678

Court of Appeals of Arkansas
Opinion delivered September 1, 1982
[Rehearing denied September 29, 1982.]

William C. McArthur, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. This is the second appeal involving this appellant. In the first case, *Worring* v. *State,* 2 Ark. App. 27, 616 S.W.2d 23 (1981), we reversed appellant's conviction for manslaughter and remanded the case for a new trial. After the retrial, appellant was convicted again of manslaughter and sentenced to two years in the Arkansas Department of Corrections. From that decision, comes this appeal.

THE FACTS

Appellant's husband was killed by a single gunshot fired from a weapon which was in the possession of appellant. Appellant had followed her husband's truck to a darkened area behind a truck terminal in Stuttgart, Arkansas. Appellant found her husband seated in a parked automobile with Diane Moritz. There was some conversation between appellant and her husband, and the confrontation ended with the appellant's husband being shot. He died a short time later at a local hospital. On this appeal, appellant raises several grounds for reversal.

THE PRIOR RECORDED TESTIMONY

Diane Moritz, the individual with whom the deceased was sitting at the time he was shot, testified at the first trial concerning the events which led to the shooting. After the second trial had begun, the trial court was informed that Ms. Moritz was reluctant to testify. She was some four or five months pregnant, and feared for the safety of her baby if she was required to testify. A letter from her obstetrician, Dr. Maxwell R. Baldwin, was introduced as court exhibit 1. The letter states:

September 22, 1981

Re: Diane Moritz

TO WHOM IT MAY CONCERN:

Mrs. Diane Moritz is a maternity patient of mine.

She is now about 18 weeks pregnant. I examined her in my office yesterday. Diane's pregnancy is currently progressing satisfactorily. Diane was herself emotionally greatly distressed concerning her testifying in an upcoming trial.

Although there is no way that I can assert that Diane's participation would definitely harm her pregnancy, I am concerned lest any unnecessary risks be taken. Unless her personal testimony is absolutely essential, my professional opinion is that her court appearance does represent a considerable hazard to her health and her pregnancy.

I am not recommending that Diane be excused from a court appearance for frivolous reasons. However, I understand that because of previous recorded testimony, her testifying again may not be essential. If this be so, then excusing Diane from a court appearance seems the safer approach at this time.

Sincerely,
/s/ Maxwell R. Baldwin
Maxwell R. Baldwin, M.D.
[T. 387]

The trial court interviewed Ms. Moritz, outside the hearing of the jury, and she stated to the court that she believed testifying might make her lose her baby. She also indicated that she could not take the nerve medication that her physician had given her prior to her testifying in the first trial. After the hearing, the trial court noted appellant's objection to the use of prior recorded testimony. Appellant objected on the basis that the charge in the case at bar was different from the charge in the original case, and that the elements and methods of defending against the charge were different. The court stated:

Now it certainly might be that some of her testimony in view of the reduced charge that she's being tried on now

> may or may not be relevant or material to this charge and for that reason you might or the State might want to exclude certain parts of it. But the testimony is going to remain the same. [T. 384]

The court also noted Ms. Moritz's condition during the hearing and stated:

> You will all agree that with the exception of some brief moments she was steadily crying and she is obviously very emotionally upset to the point of I think being sick right now if the sounds I hear coming from . . .
>
> By Mr. Brown: Yes, sir, I would have to agree.
>
> BY THE COURT: I believe the lady is now sick in the court's chambers. I don't know if reliving that night would endanger her health or her unborn child's health but I for one am not willing to take that chance. It may not but then again, it might. And I'm going to go back there and talk to her but my inclination is at this point that I'm going to declare that she's not available in the sense that we can use her prior recorded testimony. [T. 384, 385]

The next morning, September 24, 1981, at 8:30 a.m., the court again spoke with Ms. Moritz. The court stated to counsel:

> When I visited with her Mrs. Moritz was still extremely emotionally upset to the point of being almost hysterical. She had become very ill and had become very sick at her stomach. After talking with her for about fifteen minutes I became quite satisfied that she would in all likelihood fall to pieces on the witness stand. She never was able to gain her composure in the court's chambers. And in her pregnant condition the court was not going to take the risk of having any court appearance interfere with her pregnancy and I did excuse her from the subpoena that the State had issued and find that she is for all practical purposes not available to testify in the trial of this case and the State will be permitted to read

> to the jury the transcript of her testimony at the first trial. . . . [T. 391, 392]

Further, the court inquired of counsel as to whether they had reviewed Ms. Moritz's earlier testimony. Counsel indicated that they had, and that portions of it, alleged to be irrelevant to the current proceedings, were stricken.

The Uniform Rules of Evidence, Rule 804, Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides, in pertinent part, as follows:

> Rule 804. Hearsay Exceptions — Declarant Unavailable. — (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:
>
> * * *
>
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or . . .
>
> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination.

The burden of proving the unavailability of the witness is on the party who offers the prior testimony. *Looper* v. *State,* 270 Ark. 376, 605 S.W.2d 490 (Ark. App. 1980); *United States* v. *Amaya,* 533 F.2d 188 (5th Cir. 1976). On appeal, the test is whether the trial court abused his discretion in determining that the witness was unavailable. *Satterfield* v. *State,* 248 Ark. 395, 451 S.W.2d 730 (1970); *United States* v. *Amaya, supra.*

In *United States* v. *Myers,* 626 F.2d 365 (4th Cir. 1980),

the United States Court of Appeals, Fourth Circuit stated:

> During trial, a government witness, who was pregnant, refused to testify because she was afraid. The court correctly ruled that she had waived her fifth amendment rights by testifying before a grand jury, but then, expressing concern over her condition, the court excused the witness and admitted her grand jury testimony. Under the circumstances, we find no reversible error in this ruling. On retrial, however, if she persists in her refusal, the court should not hesitate to use its contempt power in an effort to elicit her testimony so that she may be cross-examined.

In *Peterson* v. *United States,* 344 F.2d 419 (5th Cir. 1965), the United States Court of Appeals, Fifth Circuit dealt with a situation where the defendant was being retried on income tax evasion. Mrs. Helen Flora was the head bookkeeper. She had been present and testified at two earlier trials. She was unavailable for the third trial because of pregnancy and attendant complications. Her physician testified that her pregnancy was not normal and that she was unable to travel to the location of the trial without extreme risk to herself and her unborn baby. The appellate court held that Mrs. Flora's prior testimony should not have been used to establish a conspiracy, because that was not an issue which had been presented on the two former trials, and therefore, her testimony was not tested by cross-examination on that issue. Further, one major difference in *Peterson* and the case at bar is that in *Peterson* the trial had not yet begun. The appellate court pointed out that a request for a continuance should have been made.

In *Phillips* v. *Wyrick,* 558 F.2d 489 (8th Cir. 1977), *cert. denied,* 434 U.S. 1088, 98 S. Ct. 1283, 55 L.Ed.2d 793 (1978), the court pointed out that admitting prior testimony of a witness did not violate the confrontation requirement where the witness was unavailable at trial, the testimony was given at a previous judicial proceeding against the same defendant, and the defendant had an opportunity to cross-examine the witnesses. The court referred to *California* v.

Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970), and noted that:

> The factors set forth as determinative were that at the preliminary hearing the witness was under oath; the defendant was represented by counsel, the same counsel, in fact, who later represented him at trial; the defendant had every opportunity to cross-examine the witness as to his statements; and the proceeding was conducted before a judicial tribunal equipped to provide a record of the hearing.

In the case at bar, the primary issue is whether the testimony of Ms. Moritz was sought and "unavailable" and not whether she was physically present in court. *Barber* v. *Page,* 390 U.S. 719, 88 S. Ct. 1318, 20 L.Ed.2d 255 (1968); *Mason* v. *United States,* 408 F.2d 903 (10th Cir. 1969), *cert. denied,* 400 U.S. 993, 91 S. Ct. 462, 27 L.Ed.2d 441 (1971).

On these facts, we hold that the trial court correctly ruled that the witness, Diane Moritz, was "unavailable", and that, therefore, under Rule 804, her prior recorded testimony was admissible.

CLOSING ARGUMENTS

Appellant argues that the trial court erred in allowing the prosecuting attorney to argue outside of the record and to use inflammatory argument. We have examined the record and find that counsel refers to four occasions on which he alleges the court erred. In each of those instances, the trial court either sustained counsel's objection or admonished the jury.

The trial court has broad discretion in controlling, supervising, and determining the propriety of arguments of counsel and its rulings in that regard will not be reversed on appeal in the absence of gross abuse. *McCroskey* v. *State,* 271 Ark. 207, 608 S.W.2d 7 (1980); *Price* v. *State,* 268 Ark. 535, 597 S.W.2d 598 (1980).

We find no abuse of discretion on the part of the trial court, and therefore we find this argument to be without merit.

SUFFICIENCY OF THE EVIDENCE

Appellant alleges that the evidence was insufficient to justify her conviction. Arkansas Statutes Annotated § 41-1504 (Repl. 1977), provides in pertinent part, as follows:

> Manslaughter — (1) A person commits manslaughter if:
> (a) he causes the death of another person under circumstances that would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be;
>
> * * *
>
> (c) he recklessly causes the death of another person; . . .

In this case, the State elicited testimony which indicated that appellant observed her husband sitting in an automobile behind a truck terminal with another woman. She removed a .22 caliber pistol from under the seat of her car and walked up to the automobile in which her husband was seated. There is a conflict in the testimony as to whether appellant actually threatened her husband, but as a result of the confrontation he was shot once and died shortly thereafter.

There was ample evidence from which the jury could find that appellant either recklessly caused her husband's death, or that she caused his death under extreme emotional disturbance. There was evidence in the form of testimony by Dr. Malak, the State Medical Examiner, which might have supported a finding by the jury that the gun discharged because the deceased grabbed it. Even if that fact had been

conclusively proven, the jury still could have convicted appellant by finding that her actions were reckless and that she did cause her husband's death by virtue of those actions.

In criminal cases, we affirm where there is substantial evidence to support the verdict. *Lunon* v. *State,* 264 Ark. 188, 569 S.W.2d 663 (1978); *Pope* v. *State,* 262 Ark. 476, 557 S.W.2d 887 (1977). In determining whether the evidence is substantial, we review the evidence in the light most favorable to the appellee. *Chaviers* v. *State,* 267 Ark. 6, 588 S.W.2d 434 (1979); *Pope* v. *State, supra.* Substantial evidence has been defined as evidence which is:

> 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 a suspicion or conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980).

We find the evidence sufficient to sustain the conviction, and, having found no merit to the other points raised by appellant, we affirm.

Affirmed.

Paul Ray JOHNS *v.* STATE of Arkansas

CA CR 82-36 637 S.W.2d 623

Court of Appeals of Arkansas
Opinion delivered September 1, 1982

Dan Stripling, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant was convicted by jury verdict of battery in the second degree and sentenced to two years imprisonment. His only point for reversal is that the trial court erred in not giving appellant's requested instruction that voluntary intoxication was a defense to the offense charged. We agree that the requested instruction should have been given.

Appellant was arrested by the Searcy County Sheriff and a deputy for driving while intoxicated. Appellant was placed in the back seat of the sheriff's car but was not searched or handcuffed. While en route to the jail, appellant drew a .22 caliber pistol and threatened to shoot the officers. In the ensuing struggle, the gun discharged, and the sheriff received a burn.

Both the sheriff and the deputy testified that appellant was too intoxicated to drive, but that he was not drunk; the sheriff stated that he did not remember testifying earlier that appellant was too drunk to resist arrest, but admitted that he may have said that. Appellant testified that he was drunk and did not remember the events surrounding his arrest.

Ark. Stat. Ann. § 41-1602 (Repl. 1977) provides that a person commits battery in the second degree if " . . . (c) with the purpose of preventing a law enforcement officer or fireman from acting in the line of duty, he causes physical injury to any person . . . "

Ark. Stat. Ann. § 41-203 (1) defines "purposely" as follows:

> A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

The instruction requested by appellant would have told the jury that in order for appellant to establish an affirmative defense of intoxication he must prove by a preponderance of the evidence that he was intoxicated, and that as a result of that intoxication the existence of a purposeful mental state was negated. Since the crime of battery in the second degree requires a purposeful mental state, the defense of self-induced intoxication is available to appellant, and the requested instruction correctly states the law.

Under the Arkansas common law, voluntary intoxication was recognized as an affirmative defense when the offense charged required a specific intent. In *Olles and Anderson* v. *State,* 260 Ark. 571, 542 S.W.2d 755 (1976), the voluntary intoxication of one of the defendants was raised as an affirmative defense to a prosecution for burglary and larceny. The Arkansas Supreme court in that case stated:

> Of course, voluntary intoxication is not a defense, even though it may produce a form of 'temporary insanity' or render the person charged unconscious of what he is doing. *Robertson* v. *State,* 212 Ark. 301, 206 S.W.2d 748; *Wood* v. *State,* 34 Ark. 341. Still, when an offense can be committed only by doing a particular thing with a specific intent, it may be shown that an accused was so drunk at the time of the crime that he could not have entertained or formed the necessary intent, but the determination of whether there was that degree of intoxication is solely within the province of the jury. *Stevens* v. *State,* 246 Ark. 1200, 441 S.W.2d 451.

At the time of the criminal code revisions, § 207 of Act 280 of the Acts of Arkansas for 1975, codified as Ark. Stat. Ann. § 41-207, provided:

> Self-induced intoxication is an affirmative defense to a prosecution if it negates the existence of a purposeful or knowing mental state.

This paragraph was deleted by the Legislature by Act 101 of the Acts of Arkansas for 1977. The issue was then presented whether the common law was reinstated. In

Varnedare v. *State,* 264 Ark. 596, 573 S.W.2d 57 (1978), this issue was decided. The Arkansas Supreme Court held that voluntary intoxication remained a defense to specific intent crimes where the intoxication negated the required intent. The court held that by removing self-induced intoxication as a statutory defense, the legislature, in effect, reinstated any prior Arkansas common law on the subject.

In *Ellis* v. *State,* 267 Ark. 690, 690 S.W.2d 309 (Ark. App. 1979), the Arkansas Court of Appeals also recognized that the common law had been reinstated. This court, in *Ellis,* recognized that while self-induced intoxication appears to remain a common law defense to a crime in which an essential element is that the act be done knowingly or purposely, the defendant has the burden of establishing the defense by a preponderance of the evidence. The court held that since appellant offered an instruction which contained no provision as to the burden of proof and the instruction had no provision that defendant must be so intoxicated at the time of the act that he was incapable of acting purposefully, it was not error for the trial judge to refuse to give the instruction.

In order to be found guilty of battery in the second degree, it was necessary for appellant to be adjudged capable of forming a purpose to prevent an officer from acting in the line of duty. It was undisputed that appellant was intoxicated, and the determination whether the appellant was in such a state of intoxication as to render him incapable of forming such a purpose is solely within the province of the jury.

The judgment of the trial court is reversed and the case is remanded for a new trial.

David Honor JOHNSON, Jr. *v.* STATE of Arkansas

CA CR 82-64 638 S.W.2d 686

Court of Appeals of Arkansas
Opinion delivered September 8, 1982
[Substituted Opinion on Denial of Rehearing September 29, 1982.]

William R. Simpson, Jr., Public Defender, and *Steven R. Davis,* Deputy Public Defender, by: *Arthur L. Allen,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. David Honor Johnson, Jr. appeals his conviction of possession of a controlled substance with intent to deliver and theft of property having

a value of less than $100, contending that the evidence was not sufficient to sustain the convictions. We do not agree.

He first contends that the State failed to prove that Meperidine, which he was charged with possessing, was a controlled substance. As originally enacted the Controlled Substances Act listed and scheduled the specific drugs which were prohibited and delegated authority to the "Coordinator" to add, delete or reschedule any drugs listed in the original enactment if he found them to meet the statutory criteria. Ark. Stat. Ann. § 82-2602 (Repl. 1976). By 1979 amendments, codified as Ark. Stat. Ann. §§ 82-2601 (x) and 82-2602 (a) the responsibility originally vested in the Coordinator became vested in the "Commissioner," i.e. the Director of the Arkansas Department of Health. Revisions of the schedules are required to be made in accordance with the Administrative Procedures Act. Appellant argues that since Meperidine is not listed in the original act and the State did not introduce a revised schedule prepared by the Department of Health at the trial, he could not be convicted of possession. At the trial of the case the question of whether Meperidine was a controlled substance was never raised. Both parties tried the case on the theory that it was a controlled substance and the jury was so instructed. The question has been raised here for the first time on appeal.

Appellant contends, however, that failure of the State to show at trial that Meperidine was listed in the Controlled Substances Act is a jurisdictional matter that can be raised at any time. *White* v. *State,* 260 Ark. 361, 538 S.W.2d 550 (1976). *White* does so hold. However, *White* was decided when the statute itself scheduled prohibited substances. In *White* the Supreme Court found *from the statute itself* that the substance for which the defendant had been convicted of possessing was not listed as a prohibited substance and reversed his conviction. In the case at bar, although the State did not furnish the trial court copies of the Board of Health schedule, it has attached to its brief a copy of a "Revised Schedule of Controlled Substances" promulgated by the Department of Health pursuant to Ark. Stat. Ann. § 82-2614.3 (Supp. 1981) and effective March 1, 1980. That

schedule is on file in the office of the Secretary of State and bears the certification of the Director of the Arkansas Department of Health attesting that it was promulgated pursuant to the Arkansas Administrative Procedures Act. It specifically lists Meperidine as a controlled substance under Schedule II, as alleged in the information on which appellant was tried, convicted and sentenced.

Appellant contends that as this regulation was not tendered for judicial notice or otherwise proved in the trial court we are required to reverse his conviction on jurisdictional grounds. It is not necessary to introduce evidence of statutes in this state. The court judicially knows them. *Blythe* v. *Byrd,* 251 Ark. 363, 472 S.W.2d 717 (1971). Nor is it necessary to introduce evidence of regulations of the State Health Department promulgated pursuant to statutory authorization. Courts take judicial notice of such rules and regulations of boards and agencies which are adopted pursuant to law. *State* v. *Martin and Lipe,* 134 Ark. 420, 204 S.W. 622 (1918). *Seubold* v. *Ft. Smith Special School District,* 218 Ark. 560, 237 S.W.2d 884 (1951). As the regulation listing Meperidine as a Schedule II controlled substance was a matter within the judicial knowledge of the trial court it was not error for him to exercise the jurisdiction conferred by the regulation. On appellate review this court takes similar note of such regulations. *Seubold, supra.* We find no merit in this contention.

The appellant next contends that the evidence was insufficient to support the findings that he possessed the controlled substance or that he intended to deliver it in exchange for value. We do not agree. On appellate review of a criminal conviction this court must view the evidence presented in the light most favorable to the State and will affirm a jury verdict if there is any substantial evidence to support it. A recital of those facts most favorable to the State leads us to the conclusion that there was more than substantial evidence to support the verdict of the jury.

On February 16, 1981 Mary Ellen Lamb, Assistant Director of Pharmacy Service at St. Vincent Infirmary, discovered that there were 100 units of Meperidine missing

from a shipment received from Wyeth Laboratories. She stated that Meperidine is a Schedule II controlled substance and the the missing drugs had a value of $450. No objection was made to either statement. Officer James Step of the State Drug Enforcement Unit testified that as a result of Ms. Lamb's call he maintained a surveillance and first saw appellant when he came out of St. Vincent Infirmary during the noon hour. Appellant got in his automobile, drove to the back door of St. Vincent Infirmary and re-entered the building. He then returned to his car. The officers followed him to the McDermott Elementary School parking lot where Carolyn Brown got into appellant's car with him. A short time later she left it carrying a brown garbage sack which she put into her car which was parked nearby. She had not carried the sack when she entered appellant's car but had it when she exited.

The officers followed Ms. Brown to a parking lot at the Doctors Building, confronted her and seized the bag, which contained ten boxes of Meperidine from Wyeth Laboratories in a plastic outer wrapper. The State laboratory technician confirmed that the contents of the garbage bag was Meperidine. An expert testified that he found appellant's fingerprints on one of the plastic wrappers. Ms. Brown testified that when she met appellant at the school he asked her to keep the package for him. He had the bag in his car when he arrived at the school and did not tell her what the contents were but asked her to bring it to him later at the home of a mutual friend. After they picked up Ms. Brown and the bag the police directed her to call the appellant at the friend's home and tell him that she would deliver the package to him at a specified street corner. When appellant arrived at the designated corner he was taken into custody.

Appellant testified that he was a shipping clerk at St. Vincent Infirmary and received merchandise as it arrived on trucks and routed it to the proper departments in the hospital. He was not permitted to handle narcotics unless their cartons were damaged. He admitted that he gave the garbage bag to Ms. Brown but said that it contained two dozen lemons which he had placed in his car when he left the hospital. He said he was not a Meperidine user and never

had been. The officers testified that the bag contained 100 doses of Meperidine, the same amount found missing at the hospital. There was nothing to suggest that the bag that the appellant carried to his car and gave to Ms. Brown was not the same bag seized by the officers later that afternoon.

The appellant argues that Ms. Brown must be considered an accomplice and that her testimony was not sufficiently corroborated. When the State relies on testimony of an accomplice to support a conviction that testimony must be corroborated by other evidence which tends to connect the accused with the commission of the offense. It is not necessary that the evidence be sufficient to sustain the conviction but the evidence must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes* v. *State,* 276 Ark. 203, 634 S.W.2d 107 (1982); *King* v. *State,* 254 Ark. 509, 494 S.W.2d 476 (1973); *Brewer* v. *State,* 271 Ark. 810, 611 S.W.2d 179 (1981). Appellant himself admitted giving her the bag he removed from St. Vincent Infirmary. His fingerprint was found on one of the bags of the controlled substance. The police officers testified that they saw the defendant with Ms. Brown at the times and places she claimed to have been with him and saw her enter his car without the bag and leave with it in her hands. The testimony that she was to deliver it later at a friend's house was corroborated by her telephone call to him at that friend's house and his agreeing to meet her at a specified corner to redeliver the package. Defendant's own testimony corroborated that of Ms. Brown. While it appears that a large part of the evidence was circumstantial, this does not mean that the evidence was not substantial. *Rhodes* v. *State, supra.* Whether one is an accomplice is usually a mixed question of law and fact, and the finding of a jury as to whether the witness is an accomplice is binding unless the evidence shows conclusively that the witness was an accomplice. *Cate* v. *State,* 270 Ark. 972, 606 S.W.2d 764 (1980). The jury was properly instructed that if they found that Ms. Brown was an accomplice the appellant could not be convicted on her testimony alone unless they found that it was corroborated by other evidence tending to connect David Honor Johnson with the commission of the offense and that the sufficiency

of the corroborative evidence was for the jury to determine. We cannot find that the verdict is not supported by substantial evidence.

Appellant next contends that the State failed to prove the requisite intent to deliver the drugs in exchange for value. He testified that he had not used and would not use Meperidine. It would therefore be obvious to the jury that he was not in possession of it for personal use. The court gave to the jury AMCI approved Instruction No. 3307, which states that the quantity of the substance, which they found beyond a reasonable doubt to have been possessed by the defendant, is evidence which they may consider along with all other facts and circumstances in determining the purpose or intent for which the substance was possessed. Intent can seldom be proved by direct evidence and must be inferred from facts and circumstances. It is a matter for the jury to determine and an inference to be drawn by the jury from other facts and circumstances shown by the evidence. *Wrather* v. *State,* 1 Ark. App. 55, 613 S.W.2d 601 (1981); *Smith* v. *State,* 264 Ark. 874, 575 S.W.2d 677 (1979). This was a permissible instruction as Ark. Stat. Ann. § 82-2617 (4) (d) provides for a rebuttable presumption which arises from proof of possession of more than 2 grams of Pethidine. According to the Board of Health schedule Meperidine is a form of Pethidine.

The appellant also questions the sufficiency of the evidence with regard to his conviction of theft of property valued at less than $100. We likewise find no merit in this contention. The testimony of Ms. Lamb clearly establishes that 100 units of the substance were taken from a shipment at St. Vincent Infirmary. The testimony of Ms. Brown, corroborated by another witness, establishes that the appellant was in possession of the recently stolen goods when he delivered them to her for safekeeping. Proof of possession of recently stolen goods is sufficient evidence to sustain a conviction for theft. *Paladino* v. *State,* 2 Ark. App. 234, 619 S.W.2d 693 (1981).

We find no error and affirm.

Willie H. WASHINGTON *v.* STATE of Arkansas

CA CR 81-113 638 S.W.2d 690

Court of Appeals of Arkansas
Opinion delivered September 8, 1982

Bill D. Etter and *Joe C. Boone,* for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was convicted of second degree murder, and was sentenced to twenty years in

the Arkansas Department of Corrections. As his only point for reversal, appellant argues that the trial court erred in failing to grant appellant's motion in limine, which sought to prohibit the State from offering evidence of, or questioning appellant about, a previous murder conviction. The trial court refused to grant the motion in limine. From that decision, comes this appeal.

The appellant indicated that he intended to testify in his own defense: Where a defendant in a criminal case testifies in his own behalf, his credibility is placed in issue, and the State may impeach his testimony by proof of prior felony convictions. *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979). The Uniform Rules of Evidence, Rule 609 (a), Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statements, regardless of the punishment.

The prior conviction for murder does not involve dishonesty or false statement, and therefore subsection (2) is not applicable to the case at bar.

In the case at bar, the trial court was required to weigh the probative value of the prior conviction against its prejudicial effect, since the prior conviction for murder would only be admissible because of its seriousness and not because it involved dishonesty. *James* v. *State,* 274 Ark. 162, 622 S.W.2d 669 (1981). A trial court has a great deal of discretion in determining whether the probative value of a prior conviction outweighs its prejudicial effect, and the

decision of the trial court should not be reversed, absent an abuse of discretion. *Cooley* v. *State,* 4 Ark. App. 238, 629 S.W.2d 311 (1982).

A number of cases have dealt with the admissibility of prior felony convictions for the purpose of attacking credibility, where the prior felonies do not involve crimes of dishonesty. Some of the factors which should be considered by the trial court are:

(1) The impeachment value of the prior crime.

(2) The date of the conviction and the witness' subsequent history.

(3) The similarity between the prior conviction and the crime charged.

(4) The importance of the defendant's testimony.

(5) The centrality of the credibility issue. *United States* v. *Mahone,* 537 F.2d 922 (7th Cir. 1976), *cert. denied,* 429 U.S. 1025, 97 S. Ct. 646, 50 L.Ed.2d 627 (1976); *United States* v. *Jackson,* 627 F.2d 1198 (D.C. Cir. 1980).

In *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981), the Arkansas Supreme Court dealt with this issue. In that case, defense counsel had sought a pretrial motion asking that, in the event Jones elected to testify, that the State be restrained from impeaching his credibility by showing that Jones had pleaded *nolo contendere* to an earlier charge which was identical to the one on which he was now being tried. The Supreme Court noted that the "prejudicial effect of the previous conviction clearly outweighed its value as bearing on credibility." That decision seemed to rest on the fact that the crime with which Jones was charged and the prior rape conviction, were both sexual crimes involving small children, thus highly prejudicial, and that the State

was free to question Jones's credibility based on two other felony convictions which were for dissimilar crimes.

In *Gordon* v. *United States,* 383 F.2d 936 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029, 88 S. Ct. 1421, 20 L.Ed.2d 287 (1968), the United States Court of Appeals, District of Columbia Circuit, discussed the admissibility of prior felony convictions. The court pointed out various factors which should be considered in determining whether to admit evidence of prior convictions. Additionally, the court noted that special problems were created when a prior conviction involved the same conduct for which the accused is on trial. The court indicated that it believed such convictions should be admitted sparingly because of the "inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time' ".

In *United States* v. *Lewis,* 626 F.2d 940 (D.C. Cir. 1980), the same court dealt with the same issue. Lewis had earlier entered a guilty plea to the distribution of heroin, and at trial was defending himself on the basis that he had no knowledge of the narcotics transaction with which he was charged. The Court of Appeals affirmed the trial court's determination that the probative value of admitting the evidence exceeded its prejudicial effect, even though the crimes were similar.

In the case at bar, appellant asserted the affirmative defense of self-defense, having admitted that he actually did shoot the deceased. There was a direct conflict in the evidence. The testimony of the State's witness, if accepted by the jury, would result in a murder conviction. The appellant's testimony, if accepted by the jury, would result in acquittal. Therefore, the whole case turned on the resolution of the credibility factor between the State's witness and appellant.

The purpose of impeachment evidence is to show background facts which bear directly on whether jurors ought to believe a particular witness, rather than other and conflicting witnesses. As was said in *United States* v. *Lewis, supra*:

> Courts should be reluctant to exclude otherwise admissible evidence that would permit an accused to appear before the jury as a person whose character entitles him to complete credence when his criminal record stands as direct testimony to the contrary.

We cannot say that the trial court abused his discretion in admitting the prior felony conviction for purposes of impeaching the appellant's credibility, and therefore we affirm.

Affirmed.

Carl Anthony HARRIS *v.* STATE of Arkansas

CA CR 82-19 638 S.W.2d 698

Court of Appeals of Arkansas
Opinion delivered September 8, 1982

 [redacted]

William R. Simpson, Jr., Public Defender, by: *Carolyn P. Baker,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, appellant was charged with the offense of failure to appear under Ark. Stat. Ann. § 41-2820 (Repl. 1977). He was also alleged to be an habitual offender and that his sentence should be enhanced under the provisions of Ark. Stat. Ann. § 41-1001 (Repl. 1977). At trial, he was found guilty by the court, and was sentenced to five years in the Arkansas Department of Corrections. On appeal, appellant argues that his conviction for failure to appear should be reversed because he had not been given written notice of the time and place to appear, and that this failure to give written notice violated his constitutional right to due process of law.

In *Rawls* v. *State,* 266 Ark. 919, 587 S.W.2d 602 (Ark. App. 1979), this Court dealt with a similar situation. The appellant's municipal court conviction for driving while intoxicated was affirmed by the circuit court upon his failure to appear. In that case, this Court held that due process required that an appellant be afforded proper notice and an opportunity to be heard in a proceeding involving the deprivation of life, liberty, or property. In *Rawls,* the appellant did not have an attorney at the time the trial date was set, and he was simply directed to notify his attorney of the trial date. Under Ark. Stat. Ann. § 22-311 (Repl. 1962), interested parties are required to have notice concerning the date scheduled for court proceedings, and they are to be given adequate time so that counsel may prepare for trial. Further, Uniform Rules for Circuit and Chancery Courts, Rule 4, Ark. Stat. Ann. Vol. 3A (Repl. 1979), provides that the attorneys of record be notified not later than fifteen days prior to the date of trial. In *Rawls,* the oral notice given by the circuit court did not comply with Ark. Stat. Ann. § 22-311 (Repl. 1962) and the due process clause of the

Fourteenth Amendment to the United States Constitution because the appellant's counsel was not given adequate time to prepare for trial, thus denying the appellant a meaningful opportunity to be heard. To the extent that *Rawls* can be read more broadly, this Court declines to do so.

In *Prine* v. *State,* 267 Ark. 304, 590 S.W.2d 25 (1979), the Arkansas Supreme Court found that the appellant had no knowledge that his case was set for trial, and therefore it was error for the circuit court to affirm the municipal court judgment for failure to appear. In that case, it was undisputed that the appellant did not receive actual notice regarding when he should appear, and the State admitted prejudicial error which required reversal.

Arkansas Statutes Annotated § 41-2820 (Repl. 1977) provides that a person commits the offense of failure to appear if, after he has been "lawfully set at liberty upon condition that he appear at a specified time, place, and court; he fails to appear without reasonable excuse."

In the case at bar, appellant was present with his attorney at plea and arraignment on October 6, 1980, and was notified of the date his case was to be tried, that being March 10, 1981. Appellant's attorney was certainly aware of the trial date, since he advised the court eight days prior to the trial date that he had been unable to locate his client. The bondsman and the sheriff were also unable to locate appellant.

On the facts of the case at bar, we hold that appellant was given sufficient notice of the date his case was to be tried. Arkansas Statutes Annotated § 22-311 (Repl. 1962) does not require that the court clerk give notice to all interested parties in *all* cases, but only in those cases where the time has not been fixed by the court and in such cases where parties are not required by law to take notice. Appellant was present with his attorney when the trial date was set by the court. At trial on the charge of failure to appear, he was afforded the opportunity to explain to the trial court why he had failed to appear for trial. At that hearing, he never denied having actual notice of the date he was to appear, and his only

reason for failing to appear was that he believed the charges were to be dropped. We find no violation of Ark. Stat. Ann. § 22-311 (Repl. 1962), nor do we find a violation of the due process clause of the Fourteenth Amendment.

Affirmed.

GLAZE, J., not participating.

MORO, INC. and THE HOME INSURANCE COMPANY *v.* Andre DAVIS

CA 82-98 638 S.W.2d 694

Court of Appeals of Arkansas
Opinion delivered September 8, 1982
[Rehearing denied October 6, 1982.]

Tom Forest Lovett, P.A., by: *Tom F. Lovett,* for appellant.

M. J. Probst, for appellee.

TOM GLAZE, Judge. This workers' compensation case presents us with four important issues: (1) whether appellant controverted appellee's (claimant's) request for rehabilitation as provided for under Ark. Stat. Ann. § 81-1310 (f) (Supp. 1979); (2) whether appellant controverted appellee's entitlement to permanent partial disability benefits; (3) whether appellee's healing period continues and he is entitled to temporary total disability; and (4) whether appellee was excused from filing a petition for a change of physician pursuant to Ark. Stat. Ann. § 81-1311 (Supp. 1979),[1] thereby permitting the Commission to require appellant to pay the medical bills of a second physician. These issues arose out of appellee's compensable injury which occurred on October 31, 1979. Dr. H. Elvin Shuffield treated appellee, rated him as having 10% impairment to the body as a whole and released him to resume regular employment effective April 5, 1980. Appellee did not return to work, claiming he still had back problems, and the sequence of events that followed gave rise to the issues under consideration in this appeal.

[1]Sections 81-1310 (f) and 81-1311 were subsequently amended by Act 290 of 1981.

First, we consider the Commission's finding that the appellant controverted vocational rehabilitation benefits. Its decision was based largely on the following letter dated May 13, 1980, from the appellant to appellee's attorney:

> It is our position at this time that additional medical treatment and/or rehabilitation is not necessary and we are unwilling to pay for same.

Appellant wrote this letter in response to a May 1 letter from appellee's attorney to the effect that appellee had an appointment with Roy Murtishaw, a clinical psychologist, for an evaluation and rehabilitation program. Apparently, the parties did not discuss the rehabilitation again until appellee broached the subject at a hearing before an Administrative Law Judge on September 17, 1980. At this hearing, the rehabilitation question was discussed extensively. In support of his claim, appellee introduced a report by Dr. Harold Chakales dated July 30, 1980, that reflected Chakales believed appellee should be a candidate for rehabilitation. Appellant still denied the need for rehabilitation and expressed its desire to obtain a report on the subject from Little Rock psychiatrist, Dr. Henry Good. At this same hearing, appellant also claimed that a May 29, 1980, report by Murtishaw, appellee's psychologist, indicated appellee was "an unlikely candidate for vocational rehabilitation." Our review of Murtishaw's report in no way bears out this claim. The report reflects no mention of rehabilitation but merely relates Murtishaw's evaluation of appellee's psychophysiological difficulties.

Rehabilitation was again mentioned at a second hearing before the Administrative Law Judge on December 10, 1980. By this time, Murtishaw had reported that he had recommended appellee be evaluated for rehabilitation and that he had referred him on July 28, 1980, to the Arkansas Rehabilitation Service for such evaluation. No evaluation report or proposed rehabilitation program had been completed by the December 10 hearing date. For this reason, appellant stated it was unable to express any view on rehabilitation since no plan had been proposed and no testing had been conducted.

We believe the evidence supports the Commission's finding that appellant controverted vocational rehabilitation benefits. Appellant, by its letter of May 13, took the inflexible view that rehabilitation was unnecessary. When this letter was written, we agree that nothing had been shown to prove appellee's need for rehabilitation except that he desired it and had the required permanent disability to be eligible. Subsequent to May 13, however, appellant received the Chakales and Murtishaw reports which recommended a rehabilitation evaluation. Even so, appellant did not recant its view that rehabilitation was unnecessary and it held this position until the Commission decided the rehabilitation issue on January 25, 1982. During this entire period, appellant not only required the appellee to show that he needed an evaluation, but it also placed the entire responsibility on him to present a proposed program of rehabilitation.

Because of the rigid position the appellant took in May, 1980, appellee was required to seek reports from Chakales and Murtishaw merely to show he needed rehabilitation. At this point, it is noteworthy to mention that appellee's need for rehabilitation was further verified by appellant's own psychiatric report dated March 23, 1981.

Appellant complained at the September and December, 1980, hearings that appellee had submitted neither an evaluation report nor a program. As late as the December 10 hearing, appellant continued to state that it was unable to express any view on rehabilitation since appellee had presented no proposed plan. Appellant's actions only added to the difficulties in obtaining a report or plan. If appellant had ever expressed a willingness to explore appellee's rehabilitation potentials, we may have looked on its position here more favorably. For instance, if appellant had cooperated in obtaining an evaluation report, it would have adequately preserved its right to review any proposed rehabilitation program. Here, appellant denied the need for rehabilitation and its uncooperativeness in this regard proved an obstacle to overcome before either a report or program could be obtained. Under these circumstances, the

Commission was fully justified in finding appellant controverted all rehabilitation benefits.

The next issue is whether the Commission was correct in deciding appellant controverted appellee's entitlement to permanent disability benefits. We find it was. This point also involves the previously mentioned May 13 letter to appellee's attorney. In the letter, appellant offered to pay appellee 15% for his disability. This offer was based primarily on Dr. Shuffield's 10% permanent partial disability rating. Appellant stopped paying benefits at this same time and payments were not resumed until after the September 17, 1980, hearing.

Our court has followed the rule that the mere failure of an employer to pay compensation benefits does not amount to controversion, especially when the carrier accepts the injury as compensable and is attempting to determine the extent of disability. *Hamrick* v. *Colson Company,* 271 Ark. 740, 610 S.W.2d 281 (Ark. App. 1981). On the same subject, our Supreme Court held in *Aluminum Company of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976), that if there is substantial evidence to support a finding that a claim is controverted, there is no abuse of the Commission's discretion to award attorney's fees, and this Court cannot reverse the Commission's finding in the absence of a gross abuse of discretion. Here, appellee's permanent partial disability was known to be at least 10% to the body as a whole as early as April 14, 1980, the date of Dr. Shuffield's report. Dr. Chakales announced his physical impairment rating of 10 to 15% by a report dated July 30, 1980. Chakales included an additional rating to appellee's right arm. With this information, appellant had full knowledge that the extent of appellee's disability would be at least 10%, yet it terminated payment of benefits. Appellant attempts to justify its terminating benefits by arguing appellee's attorney would not respond to its May 13 offer to settle. Of course, appellant knew appellee had been rated 10% disabled when it wrote this letter. It also knew that appellee's attorney had previously demanded 30% in his letter of May 1, 1980. On these facts, we cannot say the Commission abused its discretion.

The third issue raised by appellant concerns the Commission's finding that the appellee's healing period had not ended and that he was entitled to temporary total disability. This question is controlled by our holding in *Mad Butcher, Inc.* v. *Parker,* 4 Ark. App. 124, 628 S.W.2d 582 (1982). In *Mad Butcher,* we determined that the healing period continues until the employee is as restored as the permanent character of his injury will permit. If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The medical evidence reflects appellee has reached his maximum healing period. The latest date to which this period could extend was when Dr. Chakales released him on July 30, 1980. Thus, temporary total disability benefits could have been awarded appellee only within the healing period but not after it had ended. See also, *Arkansas State Highway & Transportation Department* v. *Breshears,* 272 Ark. 244, 613 S.W.2d 392 (1981). Therefore, we reverse the Commission's award of temporary total benefits after July 30, 1980. However, consistent with the procedure we adopted in *Mad Butcher,* we remand this matter for the Commission to decide whether appellee is entitled to "current total disability benefits." See *City of Humphrey* v. *Woodward,* 4 Ark. App. 64, 628 S.W.2d 574 (1982).

The final question we address is whether appellee was excused from formally petitioning for a change in physicians. The procedure to change physicians is set forth in Ark. Stat. Ann. § 81-1311 (Supp. 1979). Among other things, § 81-1311 provides that the Commission may order a change of physicians at the expense of the employer when, in its discretion, such change is deemed necessary or desirable. The Supreme Court has recognized the Commission's discretionary authority to approve such changes retroactively with respect to the employer's liability for fees and expenses incurred after the change. *Emerson Electric Co.* v. *White,* 262 Ark. 376, 557 S.W.2d 189 (1977).

The record before us reflects appellant's adjuster was called by appellee immediately after he was released by Dr. Shuffield. Appellee testified the adjuster told him to go to

another doctor after appellee said that he was still having back problems. The adjuster later testified that he recalled appellee's requesting another doctor but that he normally would not have suggested Dr. Chakales. He admitted that his standard procedure in this case would be to suggest a doctor or to try to agree on a mutually acceptable physician. Based upon these facts, the Commission inferred that the appellant had led the appellee to believe, even though mistakenly, that he could be examined by a physician of his choice. Since this was within the fact finding province of the Commission, we are unable to say it erred or that it abused its discretion in the retroactive approval of the change.

Affirmed in part and reversed and remanded in part.

MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in this case for the same reason I concurred in *Mad Butcher, Inc.* v. *Parker,* 4 Ark. App. 124, 628 S.W.2d 582 (1982). I simply want to point out that a claimant's healing period has not necessarily ended just because a doctor has "released" him.

Tami Deaton SMITH *v.* STATE of Arkansas

CA CR 82-61 638 S.W.2d 692

Court of Appeals of Arkansas
Opinion delivered September 8, 1982

Wayne R. Williams, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant seeks to reverse the decision of the trial court to revoke her suspended sentence. The events leading to this appeal began on October 27, 1980, when the court gave appellant a three year probated sentence on a Forgery Second Degree charge. The State later moved to revoke the probated sentence, alleging, among other things, that she had violated the Arkansas Hot Check Law. On November 30, 1981, the court revoked appellant's probation, accepted her prior plea of guilty to the forgery charge and entered a five year suspended sentence. The court stated it was suspending the sentence in consideration of her child and husband. At this same hearing, appellant and her husband assured the court that they would pay all outstanding insufficient checks. On December 7, 1981, the State moved to revoke appellant's suspended sentence. The court considered the State's second revocation motion at hearings held on December 14 and 18. On December 18, 1981, it ordered the suspended sentence revoked and committed appellant to imprisonment for five years less nineteen days jail time. The reason given by the court for revoking the November 30 suspended sentence was that it believed appellant had lied. In brief, the court found at the November 30 hearing appellant and her husband represented they had contacted all parties holding insufficient checks given to them by appellant, but, in truth, there were two parties who had not been contacted until *after* November 30. The court expressed the opinion that it would not have suspended appellant's sentence if it had known of appellant's misrepresentation.

In reviewing an order of revocation we affirm unless we find the court's order to be clearly against the preponderance of the evidence. *Cogburn* v. *State,* 264 Ark. 173, 569 S.W.2d 658 (1978). After carefully reviewing the record here, we can

only conclude that the court's finding that appellant lied at the November 30 hearing was clearly erroneous. The misunderstanding between the court and appellant first became evident at the December 14 hearing where the trial judge said that appellant and her husband had previously stated all the parties holding insufficient checks had been contacted. On this point, the court was in error. Appellant's husband did state at the November 30 hearing that he had made arrangements to pay the "people who have checks now," *i.e.,* at the time of the hearing. He then informed the court that he knew all of them — apparently referring to his preceding remark, "the people who have checks now."

Perhaps the responses of appellant's husband proved confusing to the court. Even so, later remarks by the court, appellant and prosecutor show conclusively that appellant never intended to mislead or lie to the court. The court asked if $200 (in insufficient checks) was out, and appellant responded, "It might be a little bit more." The prosecutor said that he had checks that totaled about $110, so he did not have all the checks. Appellant expressed that she was "not quite sure exactly what's out." Nowhere in the record can we find that appellant stated that she or her husband had contacted all parties holding her insufficient checks. She simply did not know all those parties with checks, and she informed the court of this fact. The court's recollection to the contrary was wrong.

Since the trial court apparently did not have the benefit of a written record of the November 30 proceeding, we certainly can perceive how the misunderstanding arose at the later hearings. Nevertheless, the trial court relied on appellant's violations of the Hot Check Law when it revoked her probated sentence on November 30 and imposed a suspended sentence at the same time. These same violations could not later be used to revoke her suspended sentence. Recognizing this fact, the trial court based its revocation on the finding that appellant had lied. Since we find the court erred on this point, we hold that appellant's suspended sentence revocation had no foundation in fact and the trial court's decision must be reversed. See *Ellerson, Jr.* v. *State,* 261 Ark. 525, 530, 549 S.W.2d 495, 497 (1977).

In conclusion, we note the State's argument that the trial court's revocation order on December 18 was only to correct its revocation order rendered on November 30. In other words, the court's decision on November 30 was based upon erroneous information given by appellant that the court corrected on December 18. Under these circumstances the court had the authority to correct the November 30 judgment before it was executed or appealed. To this effect, see *Charles* v. *State,* 256 Ark. 690, 510 S.W.2d 68 (1974), and *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106 (1977). We find no merit in this argument. First, as we stated earlier, appellant did not offer erroneous information to the court so this could hardly be the basis upon which to correct the November 30 judgment. Secondly, the action taken by the trial court on December 18 was not to modify, amend or revise its earlier order. Instead, the court revoked the suspended sentence it had given appellant on November 30 and, in so doing, it made no attempt to vacate, modify or correct its November 30 order.

For the reasons stated above, we reverse and remand with directions to reinstate appellant's suspended sentence as ordered on November 30, 1981.

Reversed and remanded.

Christopher Riley BONGFELDT *v.* STATE of Arkansas

CA CR 82-51 639 S.W.2d 70

Court of Appeals of Arkansas
Opinion delivered September 15, 1982

[redacted]

[redacted]

Joe O'Bryan of *Thompson, O'Bryan & Martin,* for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Christopher Riley Bongfeldt was charged with the crime of burglary. He was found guilty of the lesser included offense of breaking and entering and appeals from that conviction. He contends the trial court erred both in refusing to suppress evidence of his confession and physical evidence which he contends was seized by warrantless search and also in not dismissing the charge for lack of speedy trial. We find no merit in these contentions. We agree, however, that the court committed prejudicial error in failing to instruct the jury on the lesser included offense of criminal trespass and in not excluding evidence of guilt of other offenses. As some of these points in which we find no error are likely to be raised at retrial of the case we address them, as well.

On the morning of May 12, 1981 the proprietor of Cook's Flying Service observed a siphon hose hanging from the gas tank of his pickup truck in front of the building. He discovered that a rear window had been broken and that a window through a partition to his private office had also been broken. Tools, which were used in gaining entry to that area, had been removed from the rear of the building into the front office. He found nothing else missing other than a bottle of acid which had been emptied outside the building onto the concrete, turning it white. He later found that a fuel tank containing gasoline was missing and called the police.

The police found footprints where the acid had been poured. The footprints which were of a white powdery appearance led to the truck and through the building and office. The prints were made by a tennis shoe with a distinctive tread. They learned that the appellant had lost his job at the hangar the day before the burglary occurred.

The officers went to appellant's apartment where they found these same white footprints leading from his car up a stairwell and into his apartment. The officers identified themselves and their purpose for being there and appellant invited them in stating that he saw no reason why he should not talk to them. The officers informed him of the burglary and of the footprints connecting him to it. While in the apartment they observed a pair of red tennis shoes in plain view. After examining the sole and detecting the odor of acid, they placed appellant under arrest and retained the shoes.

At the police station an officer read and explained appellant's *Miranda* rights. Appellant stated that he understood those rights, but he declined to make a statement at that time. A short time later he elected to waive his rights and gave a written statement in which he admitted breaking into the building to get keys to the truck from which he wished to siphon gasoline. He stated that he gained entrance to the hangar by breaking a window, admitting that he took tools from the back of the building and used them to break the lock on a sliding glass door. He found the truck keys and a short piece of hose. He stated that he emptied the bottle of acid on the concrete, intending to put siphoned gas in it. He placed the hose in the tank of the truck but was unable to siphon gas, so he left the hose there. He later found a gas tank in a boat stored in the hangar, removed it from the building and poured this gas into the tank of his car. He stated that he threw the empty tank into a ditch near the edge of the airport. The police found the gas tank where he said in his statement it would be found.

We first address those arguments concerning errors on which we base our decision to reverse and remand. While not questioning the court's instruction on breaking and enter-

ing, appellant contends that the trial court erred in refusing to give also an instruction on criminal trespass as a lesser included offense of burglary. We agree.

Ark. Stat. Ann. § 41-105 (2) (Repl. 1977) defines lesser included offense as one which is established by proof of the same or less than all of the elements required to establish the offense charged. Appellant was charged with burglary under Ark. Stat. Ann. § 41-2002 (1) (Repl. 1977) which provides that one commits the felony of burglary by entering or remaining unlawfully in an occupiable structure with the purpose of committing any offense punishable by imprisonment. Ark. Stat. Ann. § 41-2004 (Repl. 1977) provides that one commits criminal trespass, a misdemeanor, by purposely entering or remaining unlawfully on the premises of another. The crime is complete upon finding that there has been an unlawful entry. No intent to engage in further unlawful conduct is necessary. The punishment is enhanced if the premises is an occupiable structure. The two offenses differ only as to the requirement of criminal intent at the time of the unlawful entry. Criminal trespass meets all of the requirements of being a lesser included offense of burglary. The Supreme Court held so expressly in *Grays* v. *State,* 264 Ark. 564, 572 S.W.2d 847 (1978).

It is reversible error to refuse to give a correct instruction on a lesser included offense and its punishment when there is testimony furnishing a reasonable basis on which the accused may be found guilty of the lesser offense. *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W.2d 537 (1972); *Glover* v. *State,* 273 Ark. 376, 619 S.W.2d 629 (1981). Where there is no evidence tending to disprove one of the elements of the larger offense the court is not required to instruct on the lesser one because absent such evidence there is no reasonable basis for finding an accused guilty of the lesser offense. In this type of case the jury must find the defendant guilty either of the offense charged or nothing. *Grays* v. *State, supra; Barksdale* v. *State,* 262 Ark. 271, 555 S.W.2d 948 (1977); *Lovelace* v. *State,* 276 Ark. 463, 637 S.W.2d 548 1982); *Fisk* v. *State,* 5 Ark. App. 5, 631 S.W.2d 626 (1982). Where, however, there is the slightest evidence tending to disprove one of the elements of the larger offense, it is error

to refuse to give an instruction on the lesser included one. *Brewer* v. *State,* 271 Ark. 254, 608 S.W.2d 363 (1980).

In this case there was evidence presented on which the jury might have found appellant's entry was without the criminal intent required for conviction of the larger offense. While he made no mention of it in his in-custody statement, appellant testified at trial that he entered the building intending to borrow the gasoline and to pay the owner for it the next morning. While it appears most unlikely, the jury could have believed that testimony and could have found that the criminal intent required for conviction of the larger offense was lacking. In other words, it was not impossible for the jury to have found appellant guilty only of criminal trespass. Where one takes the property of another without his permission but with the present intention of returning it or of paying the owner for it later, he is not guilty of theft. *Mason* v. *State,* 32 Ark. 238 (1877); *Haywood* v. *State,* 143 Ark. 576, 219 S.W. 750 (1920); 52A C.J.S. 448, *Larceny* § 25 (a). Of course this rule is restricted to the borrowing of such items as are readily replaceable by a person who has the power to restore or replace them. The items taken by this appellant were of such a character. We conclude that it was prejudicial error of the court to fail to give the proffered instruction on criminal trespass.

The appellant also contends that the trial court erred in permitting the prosecuting attorney to inquire of appellant if he had previously entered guilty pleas on two felony charges pending against him in the White County Circuit Court. Appellant's objection on grounds of relevance and motion for a mistrial were overruled. Appellant then responded that he had entered the two guilty pleas. We agree that the question was improper in that form and that it was error to admit the evidence.

Rule 609 (a) Arkansas Rules of Evidence, subject to certain limitations not argued here, permits the impeachment of a witness's credibility by proof of conviction of crimes punishable by imprisonment of more than one year or which involve dishonesty. This rule permits evidence of

conviction of certain crimes for that purpose. It does not deal with evidence of *guilt.*

The State contends that a plea of guilty and suspended imposition of sentence as provided in Ark. Stat. Ann. § 41-803 (Repl. 1977) is "tantamount to conviction" for the purposes of that rule. As the record, except for argument of counsel, is silent as to what action, if any, the court took on the pleas or that they were even accepted, we do not address that argument. We conclude from the record that the court erred in not excluding that testimony.

Although we find no merit to the following contentions we address them as they are points likely to be raised on retrial. Appellant argues that his confession should have been suppressed because the officer continued to question him after he had refused to waive his right to remain silent and told him that he wanted an attorney. The police officer testified that appellant did not assert his right not to be questioned further, but merely indicated that he did not desire to make a statement at that time. He denied that appellant ever expressed a desire to call an attorney then. According to the officer appellant's only reference to an attorney was with regard to a later request that he consent to a search of his premises. According to the officer the interrogation ceased when appellant refused to sign the rights waivers. As he had not been assigned to a cell, they both remained in the office where they discussed appellant's personal problems at home and the recent loss of his employment. They discussed the evidence found by the officer and the reason for appellant's arrest. He stated that when appellant was fully aware of the evidence connecting him with the crime he voluntarily expressed a desire to make the statement.

In his testimony at the *Denno* hearing appellant admitted that he never asked the officers to stop talking to him or "break it off." He finally stated "I had a hangover, but I understood my rights. In fact I exercised my rights at one time. Then after I learned about the evidence they had against me, I decided to waive my rights and make a statement."

The burden is on the State to demonstrate that an in-custody confession was freely and voluntarily given and we will not reverse the trial court's finding in that regard unless it is clearly against a preponderance of the evidence. In making that determination we examine the entire record and review all of the circumstances surrounding the pre-trial statement. *Beard* v. *State,* 269 Ark. 16, 598 S.W.2d 72 (1980). When all of the circumstances surrounding the making of this statement are considered, including the testimony of the appellant, we cannot say the trial court erred in its finding of voluntariness.

While the evidence indicated that appellant initially invoked his right to remain silent and a right to be represented by counsel when a search of his premises was conducted, it appears that subsequently he voluntarily waived those rights. Our court has held that these constitutional rights can be effectively waived even after the accused has initially claimed them, so long as a waiver is knowingly made. *Coble* v. *State,* 274 Ark. 134, 624 S.W.2d 421 (1981). The testimony of the police officers and that of appellant vary to a very slight degree. If any conflicts arose they were for the trial court to resolve based upon the credibility of the witnesses. The testimony of the appellant was not entitled to greater weight than that of the police officers. *Smith* v. *State,* 254 Ark. 538, 494 S.W.2d 489 (1974); *Decker* v. *State,* 255 Ark. 138, 499 S.W.2d 612 (1973).

The appellant next contends that the trial court erred in not suppressing the evidence of the tennis shoes taken from his apartment without a search warrant. We find no merit to this contention. The observation of evidence in plain view is not a search. The basic test in determining the admissibility of such evidence is whether the officer had a right to be in the position he was when the object seized fell into his plain view. *Kelley* v. *State,* 261 Ark. 31, 545 S.W.2d 919 (1977). There is nothing here to show that the officers went to appellant's apartment with the intention of looking for tennis shoes. When they found the shoe prints on the stairwell they had sufficient probable cause to arrest him. They were in his apartment at his invitation and therefore had a legal right to be there. The tennis shoes were in plain

view and the officers recognized their relevance as evidence. They were therefore justified in seizing them.

The appellant also moved that the charges be dismissed for failure to grant him a speedy trial. We find no merit to this contention. The offense was committed on May 10, 1981 and the defendant was tried on October 1, 1981. A period of four and one-half months had elapsed between the date of his arrest and trial. This was well within the period prescribed by Rule 28.1, Arkansas Rules of Criminal Procedure Vol. 4A (Supp. 1981). The appellant contends however that the issue is governed by the "speedy trial act of 1974" which appears as 18 U.S.C. § 3161, et seq. which requires a defendant to be tried within seventy days of his first court appearance or the charges to be dismissed. While congressional acts may govern federal criminal trials, the Arkansas Supreme Court has repeatedly held that the provisions of Rule 28 govern the time within which the State must bring a defendant to trial for offenses which violate our criminal laws. *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981). The federal act does not purport to preempt that area of state law. 18 U.S.C. § 3172 (2) expressly limits the application to "federal criminal offenses which violate acts of Congress." The Supreme Court of the United States has held that the states must afford a defendant a speedy trial in order to meet constitutional provisions but has left to the state the responsibility of determining specific provisions. No case has been cited to us which requires the application of the federal act in preference to our own. We find no merit to this contention.

This case is reversed and remanded for a new trial.

William A. BRANDON *v.* WORTHEN BANK & TRUST CO., N.A.

CA 82-24 639 S.W.2d 66

Court of Appeals of Arkansas
Opinion delivered September 15, 1982
[Rehearing denied October 13, 1982.]

Moses, McClellan & McDermott, by: *Harry E. McDermott, Jr.,* for appellant.

Wright, Lindsey & Jennings, for appellee.

LAWSON CLONINGER, Judge. This action was instituted by appellee, Worthen Bank and Trust Company, to recover from Richard A. Abshire and appellant, William A. Brandon, on a promissory note allegedly executed by Abshire and appellant Brandon on December 5, 1979, in the amount of $30,641.04, due February 4, 1980. A second note was executed solely by Abshire on March 18, 1980, in the amount of $31,032.75, due June 16, 1980, and it is appellant's contention that the second note paid the first note, thereby discharging appellant from liability. Nothing was paid on either note.

Abshire did not appear at trial, and judgment was entered against him on the second note. In a non-jury trial, the trial court found that the second note executed by Abshire was taken by appellee bank as an extension of the time for payment of the original note, and gave judgment for appellee against Abshire and against appellant as a co-maker on the original note.

For reversal appellant urges that he was discharged when the bank substituted the new loan for the existing loan, and that the bank discharged Brandon by suspending its right to enforce against Abshire whether it be an extension or new note.

We hold that appellant's argument has merit, and the decision of the trial court is reversed.

The only evidence relating to the execution of the original note and the second note are the official bank records: Appellant Brandon denies that he signed the original note and alleges that he was not even aware that there was a second note; Mr. Abshire did not appear at the trial; and appellee's loan officer involved in the transactions was unavailable. The intent of the parties at the time of the execution of the notes thus must necessarily be determined on the basis of the bank records and correspondence between appellant and bank officers after collection on the notes was attempted.

The original note, for $30,000 plus interest of $641.04, purports to be signed by Abshire and appellant as co-makers. Testimony showed that Abshire was indebted to Brandon Van & Storage Company, a company owned by appellant, in the sum of $30,000. After appellant demanded payment, Abshire obtained a loan from appellee and used the proceeds to repay the Brandon Van & Storage Company loan. Bank records show that the proceeds of the original note were paid to Abshire only. Appellant denies that he signed the original note, but in the alternative contends that if he signed the note at all, it was only as an accommodation maker. The trial court found that appellant did sign the

original note, and that finding is not clearly against the preponderance of the evidence.

The original note was extended by appellee for thirty days, until March 4, 1980, and then on March 18, 1980, Abshire made an application for a new loan and signed a second note. The loan application shows that the second loan was assigned a new number and noted that it paid off the first loan. The interest rate on the original note was 13%, and the rate on the second note was 14%. On the bank's ledger card for the original loan a notation recites "Paid out." At the bottom of the ledger card are two credit or closing entries; one in the amount of $657.04 for the amount of interest owed, and the other in the amount of $30,000 for the principal owed. Below the credit entries on the ledger card was written, "3/20/80 papers to new loan."

This case is very similar to *Young* v. *Farmers Bank & Trust Company,* 248 Ark. 613, 453 S.W.2d 47 (1970). There, Farmers Bank & Trust Company brought an action upon a $13,000 promissory note executed by Clyde Young and co-signed by Clyde's brother as an accommodation maker. Upon filing the suit, the bank attached Clyde's interest in certain land. The validity of the attachment depended upon whether Clyde was still liable on the note. Clyde contended that the bank released him from liability on the original note by accepting in its place a substitute note for $13,000, plus $850 interest, executed solely by Clyde's brother Johnny. The trial court held in favor of Clyde. On appeal the bank asserted that there was no consideration for its proposed release of Clyde's liability. The Arkansas Supreme Court affirmed the decision of the trial court, stating that a creditor is at liberty to accept one debtor in place of another if a creditor chooses to do so. The court cited Corbin on *Contracts,* § 1293 (1962) which states:

> When two persons are jointly indebted to a third, the creditor may accept the note of one of them either as a mere collateral security or as a substituted contract and satisfaction. If the latter is found to be the fact, the co-obligor is at once discharged by novation. . . . if a promissory note is given and is accepted as immediate

discharge of a prior claim and in substitution for it, there is no revival of the original right even though the note is never paid.

In the *Young* case, the court held that there was ample proof to show that the bank had accepted Johnny Young as its sole debtor. The court noted that after Johnny Young had executed the second note, the bank entered that $13,580 payment as a credit to Clyde's ledger account, reducing that account to exactly zero.

In the instant case, the evidence clearly supported appellant's position that a new obligation was formed when the second note was created: a new loan number was given the second note executed by Abshire; the interest rate was changed on the second note from 13% to 14%; notations on the ledger card of the first note indicate that the note was "paid out" and credit entries of the principal and interest due on the note were made; the new loan was signed by Abshire solely on March 18, 1980; the loan application indicates that the $30,000 was to be disbursed to the first loan; Mr. Jordan, the Worthen Bank manager, admitted that the loan application showed that the second loan paid off the first loan; when the bank filed suit, it attempted only to collect and seek judgment on the second note.

In light of the above stated facts, it is the opinion of this court that the trial judge's decision that the second note of Richard Abshire, dated June 18, 1980, was taken by the bank as an extension of time for payment of the original note was clearly against a preponderance of the evidence. To the contrary, all of the evidence indicates that the second note was accepted by the bank as a substitute for the original note, that it was executed solely by Richard Abshire, and that, therefore, William Brandon was released from liability on the original note pursuant to *Young* v. *Farmers Bank & Trust Company, supra.*

The decision of the trial judge is reversed and remanded to the trial court with instructions to enter judgment in favor of appellant, William A. Brandon.

GLAZE, J., concurs.

CORNISH WELDING SHOP and TRADERS INSURANCE COMPANY *v.* George GALBRAITH, Employee

CA 82-145 639 S.W.2d 68

Court of Appeals of Arkansas
Opinion delivered September 15, 1982
[Rehearing denied October 13, 1982.]

 [redacted]

Brown, Compton & Prewett, Ltd., by: *Floyd M. Thomas, Jr.*, for appellant.

Denver L. Thornton, for appellee.

LAWSON A. CLONINGER, Judge. On this appeal from a decision of the Arkansas Workers' Compensation Commission, the only issue is whether the claim is barred by the statute of limitations.

Claimant-appellee, George Galbraith, was injured on August 1, 1971 when a piece of steel lodged in his eye while he was welding a bumper on a vehicle. The injury caused a 40% loss of vision in appellant's left eye, and that disability was paid for in a lump sum on May 1, 1972.

In February of 1974, while appellee was sitting at the breakfast table, his left eye went "black." A claim was filed on February 5, 1975 for compensation for the loss of the entire left eye.

This case was before this court previously on the issue of compensability. On September 30, 1980, in the case of *George Galbraith* v. *Cornish Welding Shop et al*, an unpublished opinion, this court found that the injury was compensable and remanded the case to the Commission for consideration of the issues of latent injury and the statute of limitations. In a decision rendered on February 10, 1982 the Workers' Compensation Commission found that the claim was filed within the statute of limitations and awarded appellee benefits for the loss of the entire eye.

We affirm the decision of the Commission.

Ark. Stat. Ann. § 81-1318 (b) (Repl. 1976) provides in part:

> In cases where compensation for disability has been paid on account of injury, a claim for additional

> compensation shall be barred unless filed with the Commission within one year from the date of the last payment of compensation, or two years from the date of the injury, whichever is greater . . .

The Commission based its decision, we believe correctly, on the fact that the claim was brought within two years from the date of the injury, and a review of the case concerning the time which the statute begins to run from the last payment of compensaton is unnecessary.

Ark. Stat. Ann. § 81-1302 (Repl. 1976) provides as follows:

> (d) 'injury' means only accidental injury arising out of and in the course of employment . . .
>
> . . .
>
> (n) 'Time of accident' or 'date of accident' means the time or date of the occurrence of the accidental incident from which injury, disability or death results.

It is apparent that "time of accident" and "injury" do not necessarily coincide. An injury may manifest itself at some time well in the future, at which time it becomes known and the time for filing a claim begins to run.

In *Sanderson and Porter* v. *Crow,* 214 Ark. 416, 216 S.W.2d 796 (1949), the Workers' Compensation Commission disallowed claimant benefits on the basis that it was barred by the statute of limitations. The circuit court on appeal reversed the decision of the Commission and the Arkansas Supreme Court reversed the circuit court. Claimant sustained an injury in May of 1942 when he fell on a steel rod, and compensation claims were paid on August 14, 1942. On December 6, 1946, claimant filed for additional benefits basing his claim on the fact that his present disability was a result of latent injuries he sustained in 1942. The Arkansas Supreme Court held that the evidence was sufficient to support the Commission's finding that claimant's present disability was not the result of a latent injury. The court, however, recognized that in latent injury cases, the statute of limitations begins to run from the date the injury becomes

known. The word "latent" applies to that which is present without showing itself. The court noted that in this case, the claimant's injuries were not latent, but recurrent, that is, the effects of the May 27, 1942 injury recurred with regularity.

In *Donaldson* v. *Calvert-McBride Printing Company,* 217 Ark. 625, 232 S.W.2d 651 (1950), the Arkansas Supreme Court recognized that the date of the injury and the date of the accident for purposes of bringing suit are not necessarily the same. It held that by injury is meant the state of facts which first entitled claimant to compensation so that if the injury does not develop until after the accident, the cause of action arises when the injury develops or becomes apparent and not at the time of the accident. The court approved the rule that in most jurisdictions the period within which a proceeding for the recovery may be instituted, or within which an application or claim may be filed, commences to run when the injury accrues, or when the disabling consequences of the accident or injury become apparent or discoverable, rather than at or from the time of the happening of the accident from which the injury results. In *Donaldson,* the Arkansas Supreme Court recognized that Arkansas is "an injury state."

In *Woodard* v. *I.T.T. Higby Manufacturing Co.,* 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980), the claimant initially injured his back while working for respondent in 1974 and compensation benefits were paid by the carrier. The claimant re-injured his back both in 1976 and 1978, and benefits were paid for both claims. However, it was not until 1979 that appellant filed a claim for permanent disability benefits. The Workers' Compensation Commission held that the claim was barred by the statute of limitations, and on appeal this court reversed the decision of the Commission. The court recognized that it was not known until 1978 that claimant suffered from a "herniated nucleus pulposis" which allegedly caused the permanent disability. We held that the statute does not begin to run until the employee knows or should reasonably be expected to be aware of the extent or nature of his injury.

In the instant case, appellant, as did the claimant in *Woodard,* had a compensable injury from the start and received workers' compensation benefits from the time of the initial accident. We hold that the statute did not begin to run in this case until appellee knew or should reasonably be expected to be aware of the extent or nature of his injury, and it is clear that appellant was not aware of the extent of his injury until February of 1974.

Affirmed.

Alberta BRIM, Employee *v.* MID-ARK TRUCK STOP, Employer, UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier

CA 82-155 639 S.W.2d 75

Court of Appeals of Arkansas
Opinion delivered September 15, 1982
[Rehearing denied October 8, 1982.*]

*MAYFIELD, C.J., and CRACRAFT, J., would grant rehearing.

Donald P. Chaney, Jr. of *Wright & Chaney, P.A.,* for appellant.

McKenzie, McRae & Vasser, for appellees.

LAWSON CLONINGER, Judge. Appellant, Alberta Brim, has appealed the decision of the Arkansas Workers' Compensation Commission which denied her claim for temporary total disability benefits and medical expenses for an alleged job-related hernia.

Appellant urges that the Commission's decision is not supported by substantial evidence and that the doctrine of estoppel should be invoked against appellees, Mid-Ark Truck Stop, the employer, and Mid-Ark's insurance carrier.

We agree with appellant's contentions, and the decision of the Commission is reversed.

Appellant worked as a cook at Mid-Ark Truck Stop and earned $3.10 an hour. She was thirty-one years old and had an eighth grade education. She testified that on July 28, 1980 she slipped and fell on a wet floor at her place of work and that she felt something tear in the groin area.

Appellant did not see a doctor until September 2, 1980, after her condition became progressively worse, and surgery for the repair of a hernia was performed on October 1, 1980. Appellees contended that appellant had failed to satisfy the fifth requirement of the hernia statute, Ark. Stat. Ann. § 81-1313 (e) (Repl. 1976), by not actually seeing a doctor within 72 hours following the injury. There is no contention that appellant failed to prove compliance with the other four requirements of the statute.

Ark. Stat. Ann. § 81-1313 (e) (5) provides that in all cases of claims for hernia it shall be shown that "the physical distress following the occurrence of a hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after such occurrence."

The statute does not require a claimant to prove that he was actually attended by a physician within 72 hours after the injury. The statutory requirement is met if the evidence shows that within 72 hours after the injury the claimant's condition was such that he sought and needed the services of a physician. *Prince Poultry Co.* v. *Stevens,* 235 Ark. 1034, 363 S.W.2d 929 (1963); *Ammons* v. *Meuwly Machine Works,* 266 Ark. 851, 587 S.W.2d 590 (Ark. App. 1979). The issue, then, is whether there was substantial evidence to support the Commission's finding that claimant did not seek and need the services of a physician within 72 hours after the injury.

In *Prince Poultry Co.* v. *Stevens, supra,* the Arkansas Supreme Court cited with approval the interpretation given the word "required" by the Supreme Court of Mississippi in *Lindsey* v. *Ingalls Shipbuilding Corporation,* 68 So.2d 872, which was as follows:

> To demand or exact as necessary or appropriate; hence to warrant; to need; call for.

Appellant in this case adequately met her burden of proof that she needed the services of a physician within 72 hours. Appellant testified that immediately after the injury her abdomen began to swell, became real sore, and was feverish. She stated that she was constantly sick at her stomach, that she could not do her housework, and could not dress herself. She said that she had to keep working but that the supervisor permitted her co-workers to do many of her tasks. Appellant's children testified that appellant came from work early because of getting sick at her stomach, and could not get in and out of bed without help. The children said the hernia was visible, and that appellant would go to bed when she came home from work and would not get up until it was time to go to work again.

The only expert testimony was given by appellant's treating physician who wrote that, in his opinion, the hernia of the type that appellant suffered from would have caused her sufficient distress to have required the services of a physician within 72 hours after its occurrence.

Appellant sufficiently sought the services of a physician within the 72-hour period. Appellant and a co-worker testified that on the day following the injury, appellant told the supervisor that she needed to see a doctor about the injury, and that the supervisor told appellant to see a doctor and bring the bill to her for reimbursement. Appellant stated that she did not see a doctor because she could not afford it. Her children needed school supplies and clothes, and she did not have sufficient money for a doctor. The supervisor testified that she did not recall the conversation. Such a statement by the supervisor could not be said to amount to a contradiction of the testimony of appellant and the other employee. *Williams Manufacturing Co.* v. *Walker,* 206 Ark. 392, 175 S.W.2d 380 (1943).

Ark. Stat. Ann. § 81-1313 (e), *supra,* also provides that in every case of hernia it shall be the duty of the employer forthwith to provide necessary and proper medical care.

In *Harkleroad* v. *Cotter,* 248 Ark. 810, 454 S.W.2d 76 (1970), the statement was made that it was incumbent upon the employer to send claimant to a doctor to determine what was the matter and the extent of his or her injury once the injury was reported to the employer. The court stated:

> The statute places a separate and direct duty on the employer to furnish the necessary and proper medical, surgical and hospital care in hernia cases, as well as in other types of injury, and we see no connection between the duty imposed by a statute upon the employer and the duty imposed by a statute upon the employee.

Hence, it would seem that this duty is an affirmative duty on the part of the employer which is separate and distinct from the duty of the employee to seek the services of a physician.

Appellant argues in the alternative that the doctrine of estoppel should have been invoked to preclude appellees from arguing that the fifth requirement of the statute was not satisfied. In *Prince Poultry Company* v. *Stevens, supra,* as in this case, the Commission found that all requirements were met except for the fifth requirement of Ark. Stat. Ann. § 81-1313 (e). In that case, the Commission concluded that it had authority to excuse non-compliance with the fifth requirement and did so since claimant did properly report his injury to the employer and since the employer did not promptly provide medical attention, but instead asked the claimant to work the following day. Furthermore, the employer told claimant that if he did not feel better within a day or two he should go to a doctor. The Arkansas Supreme Court agreed with the Commission, holding that non-compliance with the fifth requirement was excused by the employer's failure to provide prompt medical attention.

The Workers' Compensation Act is entitled to receive a liberal construction from the courts. The humanitarian objects of such laws should not, in the administration of them, be defeated by over-emphasis on technicalities, by putting form above substance. *Williams Manufacturing Co.* v. *Walker, supra.* In the case before the court there is no

intimation of bad faith or malingering on the part of appellant, and there is no serious contention by appellees that the injury resulting in the hernia was not received in the course of appellant's employment. The representative of the employer had a positive duty to furnish the necessary and proper medical attention when appellant reported the injury and the need for a physician.

We hold that appellant sought and needed the services of a physician within the 72 hours required by statute, and that the employer is estopped from insisting upon strict compliance with the statute.

The decision of the Commission is reversed and remanded with directions to enter an award for appellant for temporary total disability benefits, medical expenses, and attorney's fees for a controverted claim.

MAYFIELD, C.J., and CRACRAFT, J., dissent.

MELVIN MAYFIELD, Chief Judge, dissenting. In my opinion, the decision of the majority has overstepped the line between the function of the appellate court and that of the commission.

The Arkansas Supreme Court has drawn that line as follows:

> Upon review of a decision of the Workers' Compensation Commission, we must accept that view of the facts most favorable to the findings of the commission, weigh and interpret it along with all reasonable inferences deducible therefrom in that light, and affirm where any substantial evidence exists to support its action.

O.K. Processing, Inc. v. *Servold,* 265 Ark. 352, 578 S.W.2d 224 (1979).

The Arkansas Court of Appeals has stated it this way:

> The issue on appeal is not whether this court would have reached the same results as the Commission on this record or whether the testimony would have supported a finding contrary to the one made; the question here is whether the evidence supports the findings which the Commission made.

Bankston v. *Prime West Corp.*, 271 Ark. 727, 601 S.W.2d 586 (Ark. App. 1981).

I, therefore, respectfully dissent.

CRACRAFT, J., joins in this dissent.

KLRA, INC. *v.* Jim LONG, Jerry ATCHLEY, Paul ROTHFUSS and Kerby CONFER

CA 81-431 639 S.W.2d 60

Court of Appeals of Arkansas
Opinion delivered September 15, 1982
[Rehearing denied October 13, 1982.*]

*MAYFIELD, C.J., and COOPER, J., would grant rehearing.

Wright, Lindsey & Jennings, for appellant.

Rose Law Firm, P.A., by: *Vincent Foster, Jr.* and *Hillary Rodham,* for appellees.

TOM GLAZE, Judge. This case involves a sale and purchase agreement wherein appellees agreed to buy appellant's KLRA-AM radio station for $3,000,000. Appellees refused to close the sale, citing a number of reasons for nonperformance. Appellant filed suit against appellees for breach of contract, alleging damages of $1,000,000. The primary issue on appeal is the legal effect of the jury's answers to seven interrogatories. The trial court favored appellees with a judgment, finding the jury's answers established appellees were not liable to appellant under the parties' agreement. Appellant contends on appeal that the court's finding was erroneous because the jury's answers,

when considered together, dictated a judgment for $125,000 in appellant's favor. Alternatively, appellant argues that if the answers are not construed in its favor, no judgment should be entered on the interrogatories, and instead, a new trial should be ordered. We affirm the trial court's decision.

We first discuss the facts and evidence that underpinned the interrogatories which were submitted to the jury. The parties signed the buy and sell agreement on February 24, 1979. A closing date was not set until later. Because of the anticipated delay in closing, the agreement contained a number of covenants and warranties to protect the parties between the date of the signing and closing. For instance, appellees agreed to an escrow deposit of $125,000, evidencing their ability to perform. The sale was also conditioned on the Federal Communication Commission's (FCC) approval of the transfer; had it not acted prior to January 1, 1980, either party could have terminted the agreement. Appellant further covenanted it would continue to conduct the station's business in as diligent a manner as it had done prior to signing the agreement. It also warranted that since January 1, 1979, no material adverse changes had occurred in the business, operations, properties, assets or liabilities of the radio station and that no such changes would occur prior to the closing date.

Subsequent to entering into the parties' agreement on February 24, appellant's station encountered numerous problems. First, business profits decreased $100,000 in 1979 from those reported in 1978. Secondly, Equal Employment Opportunity Commission (EEOC) violations filed against KLRA prior to the parties' agreement caused the FCC to impose certain reporting conditions before it would approve the transfer of the station's license to appellees. In addition, the FCC granted the parties' license application subject to the possible future divestiture of one of appellees' radio stations — they owned KSSN-FM radio station at the time of this application. Although appellees voiced disappointment to appellant over the two conditions imposed by the FCC, they advised the FCC that they would comply with the EEOC reporting requirements, and they did not seek a waiver of the divestiture requirement. The FCC issued its

preliminary conditional consent to the assignment of the license on October 1, 1979.

On October 16, 1979, appellees' attorney wrote appellant's counsel a five-page letter listing different reasons why he believed the appellant was in substantial breach of the parties' February 24 agreement. Among those reasons, he included the following:

(1) A material decrease in profits for 1979.

(2) The reduction of the sales staff and monies spent on promotion and sales activities.

(3) The station's withdrawal from the Standard Rate & Data-Spot Radio Rates & Data (SRDS), a major reference source for new business.

(4) The conditional approval by the FCC for the station's license renewal and consent to assignment.

On October 24, 1979, appellees sent a letter to appellant requesting it to consider a reduction in the agreed purchase price (from $3 million to $2.6 million) in view of the station's loss of profits and the FCC's conditional approval of the license transfer. Although other contacts occurred between the parties, appellant ultimately set December 6. 1979, as the date to close the sale. Appellees refused to close, and appellant brought this action.

This case was submitted to the jury on interrogatories. Two questions, Nos. 3 and 4, were based on specific representations and warranties contained in the parties' agreement. The jury answered each interrogatory as follows:

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that the divestiture condition placed upon the Federal Communications Commission's consent to the transfer of the license was material?

ANSWER: Yes.

INTERROGATORY NO. 1A

Do you find from the preponderance of the evidence that the divestiture condition placed on the Federal Communications Commission's consent to transfer was waived by the Defendants?

Answer this Interrogatory only if you have answered "Yes" to Interrogatory No. 1.

ANSWER: Yes.

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that the Equal Employment Opportunity reporting condition placed upon the Federal Communications Commission's consent to transfer of the license was material?

ANSWER: Yes.

INTERROGATORY NO. 2A

Do you find from the preponderance of the evidence that the Equal Employment Opportunity reporting condition placed on the Federal Communications Commission's consent to transfer was waived by the Defendants?

Answer this Interrogatory only if you have answered "Yes" to Interrogatory No. 2.

ANSWER: Yes.

INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that from February 24, 1979, until the date for closing the sale, the business of KLRA, Inc. was conducted

diligently and only in the ordinary course, as the Court has defined those terms for you?

ANSWER: Yes.

INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that from January 1, 1979, to the date set for closing the sale, there were any material adverse changes in the business, operations, properties or assets of KLRA?

ANSWER: Yes.

INTERROGATORY NO. 5

State the amount of damages, which you find from a preponderance of the evidence were sustained by KLRA, Inc., as a result of the occurrence.

ANSWER: $125,000.00

The jury's answers were accepted by the court, and the jury was discharged. Before judgment was entered, appellant filed a motion for judgment notwithstanding the verdict, contending that the answers required a judgment in favor of appellant but that the damages were inadequate and should be $325,000. Appellees, on the other hand, contended that the jury's answer to Interrogatory No. 4 required the judgment to be entered in favor of the appellees. Appellant filed this appeal after the court entered judgment for appellees.

When it was decided in appellees' favor, the court opined that Interrogatories Nos. 1 through 4 included the four grounds or defenses upon which appellees relied for not performing the parties' agreement. From the jury's answers, the court determined that the jury concluded that even though the appellees had waived the FCC conditions and the appellant had conducted the station's business in a diligent manner, the appellees still were not liable on the contract because material changes had occurred in the

business under Interrogatory No. 4. The court dismissed any consideration of the jury's answer to Interrogatory No. 5 since it involved damages. The effect of the court's ruling was that the jury's answers to Interrogatories Nos. 1 through 4 were consistent, but inconsistent with No. 5 because it dealt with damages sustained by appellant.

Appellant's argument is that the answers to all of the interrogatories were consistent, including No. 5. In brief, appellant contends the jury's answer to Interrogatory No. 4 relates back to the answers it gave in Nos. 1 and 2. In other words, the jury determined that the FCC conditions to which they referred in Nos. 1 and 2 were the material adverse changes it found had occurred in No. 4. Thus, appellant surmises that the material adverse changes that occurred were waived by appellees, and judgment for damages should be awarded appellant.

In considering the court's duty when special interrogatories are involved, both parties cite the same legal authorities. For instance, they cite *Gallick* v. *Baltimore & Ohio Railroad Co.,* 372 U.S. 108, 119 (1963), which states the applicable law as follows:

> But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: *'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798, 807. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in *Arnold* v. *Panhandle & S.F.R. Co.,* 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889; *McVey* v. *Phillips Petroleum Co.,* 288 F.2d 53 (C.A. 5th Cir.); *Morris* v. *Pennsylvania R. Co.,* 187 F.2d 837 (C.A. 2d Cir.) (collecting authorities), before we are free to disregard the jury's special verdict and remand the case for a new trial. (Emphasis supplied).

Here, both parties argue that the answers to Interrogatories Nos. 1 through 4 are consistent. Their disagreement

concerns whether these consistent answers are in conflict with No. 5, *i.e.*, the verdict on damages. The trial court held that they were. In so holding, the court exercised the discretion given it pursuant to Ark. Stat. Ann. § 27-1741.3 (Repl. 1979), which in relevant part provides:

> When the answers are consistent with each other but one or more is inconsistent with the general verdict, *the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict* or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial. (Emphasis supplied). [*See also, Missouri Pacific R.R. Co.* v. *Merrill,* 265 Ark. 292, 578 S.W.2d 35 (1979)].[1]

Both parties agree that the jury held that the EEOC reporting and divestiture conditions in Interrogatories Nos. 1 and 2 were material but waived by the appellees. They also concede the jury found in Interrogatory No. 3 that appellant diligently conducted the operation of the radio station. Thus, answers to Nos. 1 through 3 in no way relieve appellees from performing the parties' contract. However, it is the parties' disagreement regarding Interrogatory No. 4 that presents the real issue before us.

In considering the answer to No. 4, appellees urge that the jury held there were material adverse changes in the business, operations, properties or assets of KLRA, not only because of the EEOC and divestiture conditions, but also because of a 48% drop in profits in 1979. Appellant argues

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[1]*See* Cox and Newbern, *New Civil Procedure: The Court that Came In from the Code,* 33 Ark. L. Rev. 1 (1979). Prior to *Merrill,* the authors of this excellent article speculated that the Arkansas Supreme Court, by its adoption of Rule 49 of the Arkansas Rules of Civil Procedure, had eliminated the usage of general verdict forms accompanied with interrogatories. Such practice was provided for in Federal Rule 49 (b) but was omitted in Arkansas' Rule 49.

that profit losses were not in any way the basis upon which Interrogatory No. 4 was submitted to the jury. Based on this interpretation, appellant contends that the material adverse changes to which No. 4 refers must be limited to the EEOC and divestiture conditions in Nos. 1 and 2. Although appellant's contention is skillfully and adroitly argued, it simply is not supported by the evidence.

The record is replete with evidence showing that the parties considered profits a material factor in the sale of the radio station. In fact, the agreed purchase price was, in part, based upon a multiple of the business' profits. Obviously, a decrease in profits would affect adversely any price to which the parties agreed on February 24, 1979. Even appellant recognized that a drop-off of $100,000, or 48%, in profits in one year was a serious change detrimental to the station. To be expected, the appellees and their witnesses strongly contended that such a loss in profits was a material adverse change which bore directly on the value of the station. Suffice it to say, extensive testimony and other evidence before the jury underscored the importance which profits figured in the appellees' purchase of appellant's business. It would be ignoring the obvious to accept appellant's naked contention that profits were not considered when the interrogatories were framed and submitted to the jury. Such a conclusion would render almost meaningless the extensive evidence which repeatedly showed that appellees believed the station's loss in profits was tantamount to a breach in the parties' agreement. If one reads the testimony abstracted by both parties and then considers the interrogatories submitted to the jury, it is impossible to discount or ignore the importance that profits played in this transaction. Interrogatory No. 4 is the only question that permitted the jury to deal with the loss-in-profits issue. The evidence supports the court's decision that the jury found that the appellees waived the material adverse conditions imposed by the FCC, determined that appellant diligently conducted the station's business, and held that the business operations of the station were materially and adversely affected because of a substantial decline in profits.

We believe it significant that the trial judge heard the

same testimony and evidence as the jury. His opinion was that the interrogatories were in keeping with the presentation of appellees' case, although he expressed concern that Interrogatory No. 5 on damages was premature and might prove confusing until the issue of liability was decided. Appellees' entire defense to appellant's action was to present evidence that the parties' agreement was breached because of (1) a loss in profits, (2) a failure to operate the station diligently, (3) a possibility of divestiture, and (4) EEOC conditions imposed by the FCC. The jury held adversely to appellees concerning three of their contentions but recognized their loss-in-profits defense when it held that material adverse changes occurred in the business, operations, properties or assets of the station. The trial judge reviewed the interrogatories and answers in light of the evidence, and we believe correctly determined that the jury held in the appellees' favor.

Appellant challenged the court's award of attorney fees and costs solely on the ground that appellant should have been the prevailing party. Of course, we disagree. Since no other issue is raised relative to the attorney fee award, we affirm the trial court's decision, including that part which reflects appellees' entitlement to attorney fees, costs and expenses.

Affirmed.

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

MELVIN MAYFIELD, Chief Judge, dissenting. I would remand this case for a new trial because the answers to Interrogatories 4 and 5 are inconsistent.

As I understand it, the appellees do not actually contend that the answers to those two interrogatories are not inconsistent but argue that Interrogatory No. 5 is not really an interrogatory. Apparently, it is appellees' position and also the position of the majority opinion, that this interrogatory and its answer constituted a general verdict and that it was proper for the trial court to enter judgment in

accordance with the answers to the interrogatories notwithstanding the general verdict.

I simply cannot agree that Interrogatory No. 5 and its answer constituted a general verdict. The only authority cited in appellees' brief as support for this remarkable position is the case of *Gallimore* v. *Missouri Pac. R.R. Co.*, 635 F.2d 1165 (5th Cir. 1981), which appellees say is analogous to the situation in the case before us.

That case involved an interrogatory which read:

> What amount of money if paid now in cash do you find will compensate the Plaintiff Kelly Gallimore for his injuries suffered on December 22, 1976?

The jury's answer to the question was $60,000.00. The jury also answered interrogatories finding that plaintiff was negligent but that the defendant was not. The jury also answered another interrogatory saying that the plaintiff's own negligence had contributed only 80% to his *injuries.* Since the defendant was not negligent and there was evidence the plaintiff suffered from a congenital back problem that could have contributed to his injuries, the trial court disregarded the answer to the damage interrogatory and entered judgment for the defendant who was not negligent.

That situation is a common and familiar occurrence in the trial of personal injury cases in Arkansas. Where the interrogatories on liability are answered in favor of the defendant there is no judgment entered for the plaintiff even though the jury answers an interrogatory finding the amount of damages sustained by the plaintiff. But that is not the situation in the case at bar.

In this case, Instruction No. 11 told the jury that in the agreement between the parties the appellant made certain representations and warranties which were *conditions precedent* to the appellees' performance of the contract. The instruction then said:

> KLRA represented and warranted to the defendants:
>
> (a) that since January 1, 1979, there had been no material adverse changes in the business, operations, properties, assets or liability of KLRA, and
>
> (b) there would be no material adverse changes in the business, operations, properties, or assets to the date of closing of the sale.

By its answer to Interrogatory No. 4 the jury found that there *had* been material adverse changes in the business, operations, properties or assets since January 1, 1979. Now it is important to note that the result of this finding is that the appellees were not required to perform their agreement to buy the radio station because the representations and warranties which were violated were *conditions precedent* to the performance of the contract.

Instruction No. 14 told the jury:

> If an Interrogatory requires you to assess the damages of KLRA, then you must fix the amount of money which will reasonably and fairly compensate it in accordance with the following instruction. A party claiming damages for a breach of contract for the sale of property is entitled to the difference, if any, between the contract price and the fair market value of that property. . . .

By its answer to Interrogatory No. 5 the jury said the damages sustained by KLRA as a result of the occurrence was $125,000.00. Now it is important to note that by *this* answer the jury found that the contract to buy the station had been *breached.* Otherwise, under the court's instructions and the language of the interrogatory, the jury could not find that damages were sustained by KLRA. Thus, the situation here is not at all analogous to that in the *Gallimore* case relied upon by the appellees. There, the plaintiff had sustained damages regardless of who was at fault. Here, the radio station could not have sustained damages unless there had been a breach of the contract.

Every experienced trial lawyer knows that a general verdict is one in which the jury finds *generally* for one or more parties to the lawsuit as opposed to making findings of fact on *specific issues*. It is clear to me that Interrogatory No. 5 and its answer was a finding of fact on an *issue* and did not constitute a general verdict. The reporter's note to our Civil Procedure Rule 49 says the rule is substantially the same as Federal Rule of Civil Procedure 49. The note also says that although the rule does not specifically consider the possibility of inconsistent answers to interrogatories submitted to the jury, federal cases have held the trial court can ask the jury to reconsider in an attempt to remove the inconsistency or it can order a new trial. The note cites the case of *Wright* v. *Kroeger Corp.*, 422 F.2d 176 (5th Cir. 1970) where the appellate court remanded for a new trial because the answers to the interrogatories were conflicting and inconsistent.

The appellant moved for a new trial in the instant case and since the court did not ask the jury to reconsider its verdict and the inconsistency was not resolved, I think the appellant's motion should have been granted and I would remand for a new trial.

COOPER, J., joins in this dissent.

Charles CHRISTIAN *v.* STATE of Arkansas

CA CR 82-58 639 S.W.2d 78

Court of Appeals of Arkansas
Opinion delivered September 15, 1982

Garner Taylor, Jr., Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals from a jury verdict which found him guilty of theft by deception. He contends the trial court erred when it (1) denied his motion for continuance, (2) restricted his cross-examination of the victim and a police officer, and (3) determined the evidence sufficient to sustain a conviction. Our study of the record reflects the trial court was correct in each instance, and therefore, we affirm.

I. MOTION FOR CONTINUANCE

Appellant was charged jointly with co-defendant, James Guy, and they were to be tried together on January 7, 1982. However, Guy failed to appear on the morning of the

trial, and appellant's counsel moved for continuance. In support of his motion, counsel alleged that he expected Guy's testimony to establish an alibi for the appellant and anticipated that Guy would take all the liability for the charges filed in the case. The court denied the motion. It was again denied when counsel for appellant renewed his motion, stating the same grounds immediately before the trial commenced.

The trial court's action will not be reversed absent a clear abuse of discretion amounting to a denial of justice, and the burden is on appellant to demonstrate such abuse. *Brown* v. *State,* 5 Ark. App. 181, 186, 636 S.W.2d 286 (1982). It is also settled law that in the absence of a showing of prejudice, we cannot say the refusal of a continuance is error. *Russell* v. *State,* 262 Ark. 447, 559 S.W.2d 7 (1977). *See also, Finch* v. *State,* 262 Ark. 313, 556 S.W.2d 434 (1977).

In considering appellant's contention, we find it significant to mention early that appellant had signed a written statement which clearly reflected his participation with Guy in their theft by deception scheme. This statement was admitted into evidence without objection at appellant's trial. Throughout the two-page statement, appellant related his knowledge and involvement in the scheme, which included his presence at the place and time the crime was committed. In brief, appellant admitted in the statement that Guy bought two old televisions from a rental shop. Guy later "wrapped" them so they appeared as new television sets. The next day, appellant and Guy loaded the sets in appellant's car, and they proceeded to a welding shop where Guy unloaded one of the televisions and sold it. The statement further reflected that the only thing appellant received from Guy for "taking him around" was a tank of gas. Appellant admitted that two other old televisions were bought and sold as new in the same manner. In addition to making a statement, appellant also testified at trial. He admitted that he was with Guy when the crime occurred, but he denied any culpable knowledge of the theft "scam." Nevertheless, the basis of appellant's motion to continue was that Guy's testimony would establish an alibi for appellant, *i.e.,* a defense which is commonly understood to

place a defendant at another place at the time of the commission of the alleged offense. See *Doyle* v. *State,* 166 Ark. 505, 507, 266 S.W. 459, 460 (1924), and *Black's Law Dictionary,* 66 (5th ed. 1979). If the establishment of an alibi was the true basis of appellant's motion to continue, it is difficult to surmise how Guy's failure to testify prejudiced appellant in view of his written statement and in-court testimony, admitting he was with Guy when the crime was committed.

Perhaps appellant's counsel misstated what he intended to prove through Guy's testimony, and it was not the establishment of an alibi at all. In this vein, appellant may have intended to show that although appellant was with Guy at all relevant times, appellant was unaware that Guy was engaging in criminal conduct. Of course, we are forced to speculate in considering what appellant expected to show by Guy's testimony because he failed to proffer any testimony or evidence which would serve as a factual basis to exculpate appellant and his role in the crime.

Since appellant proffered no testimony, it is just as easy to speculate that he did not know what testimony Guy would give and, indeed, had no real assurance that Guy would testify at all. After all, appellant's written statement that recited his own involvement in the theft scheme also clearly charged that Guy was the one who initiated the scheme. On this same point, appellant never established the actual reason Guy failed to appear at the trial, a fact which could easily have been shown, if not at trial, through a motion for a new trial.

As we noted earlier, we find it significant that this is not a situation in which the appellant had proclaimed his innocence throughout the case. Instead, appellant gave the State an incriminating statement which served as the single most damaging piece of evidence in support of the charges filed against him. For that reason alone, it was important for him to show any other evidence upon which he relied to support his continuance motion and claim of prejudice. Appellant should have given the court the evidence that he expected to offer through Guy's testimony. Only then would

the court be in the position to properly weigh such proffered evidence in light of appellant's own self-incriminating statement and the other evidence that was available to prove the charges against him.

Appellant was not prevented from offering testimony that he honestly expected to elicit from Guy if he had been available to testify at the trial. It was his burden to do so, and he failed. Because of this fact, the trial court was in no position to weigh the prejudicial impact of Guy's absence. Consequently, we are unable to say it abused its discretion in denying appellant's motion to continue.

II. RESTRICTION OF CROSS-EXAMINATION OF VICTIM AND A POLICE OFFICER

Appellant first complains that the trial court impermissibly limited his cross-examination of the complaining witness, Mike Cole. Cole purchased one of the televisions for $100 upon the representation it was new. During his cross-examination, he testified that he had recently purchased a new television sometime after his transaction with Guy and appellant. When asked how much he paid for the new set, the court sustained the State's objection that the question was not relevant. Although appellant failed to state to the court why he believed the question was relevant, we can only assume he was attempting to show that Cole knew the price of a new television, and he was not misled or deceived in his purchase from Guy and the appellant. Even so, we find no merit in his argument. First, nowhere in the record do we find any evidence which establishes that the television purchased from Guy and appellant was comparable to the one Cole purchased later.[1] Secondly, and more importantly, other testimony elicited from Cole on cross-examination established not only that he believed the television he purchased from Guy and appellant was at a bargain price, but also that he had an idea that the television might have been stolen. In spite of this testimony, the jury convicted

[1]Appellant later asked Cole if there was a difference in the two televisions, but the court sustained the State's relevancy objection and that ruling is not argued on appeal.

appellant of theft by deception. Since it is not an abuse of discretion to interfere with or limit cross-examination of a witness when it appears the matter has been developed sufficiently and presented clearly to the jury, we find no merit in appellant's argument on this point. See *McCorkle* v. *State,* 270 Ark. 679, 607 S.W.2d 655 (1980).

Appellant also contends that his cross-examination was unduly restricted when he asked the police officer, who took appellant's written statement, if he believed appellant when "he said he didn't receive anything." The trial court sustained the State's objection based on irrelevancy. The court's ruling was correct for at least two reasons: (1) it is the function of the trier of fact to determine what portions of the statement are to be believed and what portions are to be discredited. *Core* v. *State,* 265 Ark. 409, 578 S.W.2d 581 (1979); and (2) the question was argumentative and called for the witness to state a conclusion as to appellant's belief. *Dillard* v. *State,* 260 Ark. 743, 543 S.W.2d 925 (1976).

III. EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION

We first note appellant's argument that the trial court erred in denying appellant's motion for directed verdict at the close of the State's case-in-chief. This argument is unavailing because his motion was not renewed at the conclusion of all the evidence and he introduced evidence (including his own testimony) after the denial of his motion. See *Chandler* v. *State,* 264 Ark. 175, 569 S.W.2d 660 (1978), and *Wiley* v. *State,* 268 Ark. 552, 594 S.W.2d 57 (Ark. App. 1980). Thus, as we were required to do in *Wiley,* we now judge the sufficiency of the evidence on the entire record. In doing so, we view the evidence in the light most favorable to the appellee. *Pope* v. *State,* 262 Ark. 476, 557 S.W.2d 887 (1977).

Mike Cole testified that on June 16, 1981, he was at his place of employment and heard from other employees that there were two men parked in his company's driveway, and that they had some televisions for sale. One of the men sat in a car while the other was talking to employees about the

televisions. Cole said that the man related the televisions were "leftover freight" from a Tulsa truck and that he wanted $150 a piece for them. Cole unloaded the televisions from the men's car after the man sitting in it backed the car near a company service truck. After Cole and the other employee paid their money, the two men left. Cole then unwrapped the televisions only to find two "old, dilapidated" televisions. He contacted the Fort Smith Police Department and gave Detective James Davis a description of the two men and what occurred. On June 21, 1981, appellant and Guy were arrested, and on the same day, appellant gave the police his written statement of his involvement in the crime.

Since we related the relevant text of appellant's statement in Point I, it is unnecessary to repeat those portions. Suffice it to say, appellant's statement established his connection with the crime which occurred on June 16, and though he denied receiving anything from Guy in return except a tank of gas, appellant's statement clearly related his knowledgeable participation in the theft scheme. While it is true the appellant's version at trial differed from his prior statement and Detective Davis' testimony, the resolution of those differences was a matter for the jury.

Affirmed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from that portion of the majority opinion which holds that the trial court did not abuse its discretion in denying a continuance. I am fully aware of the heavy burden that the appellant bears in trying to persuade an appellate court to reverse a trial court's denial of a continuance. However, a review of what transpired at the time of the motion, rather than what was ultimately elicited from the witness stand, makes it clear that the trial court should have granted the continuance.

Before the selection of the jury, the defense counsel informed the trial court that appellant's codefendant was

not present for trial, and that the codefendant's testimony would be necessary to properly defend the appellant. The defense counsel said:

> Judge, I would like to speak up at this time. The prosecutor has mentioned something. There is an interdependency of testimony in this case. I expect that Mr. James Guy would have offered an *alibi* for my client, Charles Christian, and his lack of being able to testify may be prejudicial to my client. *I anticipated that James Guy would have taken all the liability for the charges in this case.* [T. 21, emphasis added.]

The defense counsel renewed his motion for a continuance before the trial began. The defense counsel said:

> Your Honor, I would like to renew my motion for a continuance on the same grounds, the failure of Mr. Guy to appear and offer an alibi, testimony for my client Charles Christian. Further, I would like to move for a continuance in regard to the absence of Mr. James Guy. I understand from the bonding company that he has called at 8:46 this morning to the bonding company but not myself, and that he is having motor problems in Morrilton, Arkansas and that he has promised the bondsperson that he will be here as soon as he can get transportation.
>
> THE COURT: Overruled. [T. 25]

The majority's opinion is critical of the defense counsel's use of the term "alibi." The opinion defines alibi as "a defense which is commonly understood to place a defendant at another place at the time of the commission of the alleged offense." However, another acceptable definition of alibi is "to offer an excuse". Webster's Third New International Dictionary, 1976. It is clear from the context in which the word "alibi" was used, that the defense counsel intended it to mean "to offer an excuse".

The majority's opinion goes on to say that if the defense counsel intended to show that the appellant did not possess

the necessary culpable mental state to be guilty of the crime charged, then the defense counsel failed to proffer any testimony or evidence. The Uniform Rules of Evidence, Rule 103 (a) (2), Ark. Stat. Ann. § 28-1001 (Repl. 1979), states:

> In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer *or was apparent from the context within which the questions were asked.* [Emphasis added.]

The substance of the evidence was obvious, at least to me. Defense counsel was requesting a continuance because the codefendant's testimony would show that the appellant had no knowledge of the crime.

The presence of the codefendant was very material to the appellant's defense. The testimony of the codefendant was to be offered not on a collateral issue, but on the central issue of whether the appellant was guilty of the crime charged. The testimony of the codefendant would have tended to prove that the appellant had no knowledge of the crime charged. As was said in *Blackwell* v. *State,* 42 Ark. 273 (1883):

> What influence it might have had upon the jury, if admitted, we do not know. We can not undertake to say that they would have convicted appellant, if the excluded evidence had been admitted. It is deemed safer to award a new trial.

The Arkansas Rules of Criminal Procedure, Rule 27.3, Ark. Stat. Ann. Vol. 4A (Supp. 1981), 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.

In determining whether to grant the continuance, the

trial court must consider numerous factors, some of which are:

(1) Whether other continuances have been granted;

(2) the length of the requested delay;

(3) whether the requested delay is for legitimate reasons;

(4) whether the motion was timely filed;

(5) whether the defendant contributed to the circumstances giving rise to the requested delay;

(6) whether the denial of the delay would result in prejudice to the defendant's case of a material or substantive nature;

(7) whether the delay would be consistent with the fair, efficient, and effective administration of justice;

(8) the likelihood of procuring attendance of the witness in event of postponement; and

(9) the consent of opposing counsel.

No one of these factors is a prerequisite to the granting of a continuance, but they are factors to be considered by the trial court in deciding whether to grant the continuance. The question of whether a continuance should have been granted is within the discretion of the trial court, and the burden is on the appellant to show that there has been an abuse of discretion. *Thorne* v. *State,* 269 Ark. 556, 601 S.W.2d 886 (1980); *Golden* v. *State,* 265 Ark. 99, 576 S.W.2d 955 (1979); *Kelley* v. *State,* 261 Ark. 31, 545 S.W.2d 919 (1977); *Thacker* v. *State,* 253 Ark. 864, 489 S.W.2d 500 (1973).

Under the Arkansas Rules of Criminal Procedure, Rule 27.3, Ark. Stat. Ann. Vol. 4A (Supp. 1981), the requirement of an affidavit is no longer an essential prerequisite for the granting of a continuance, as it was under Ark. Stat. Ann. § 43-1706 (Repl. 1977) and Ark. Stat. Ann. § 27-1403 (Repl.

1979). As long as the requirement of good cause is shown, it makes no difference what method is used. I agree with Chief Justice Fogleman's concurring opinion in *French* v. *State,* 271 Ark. 445, 609 S.W.2d 42 (1980), in which he said:

> Section 27-1403 was made applicable to criminal proceedings by § 190 of the Criminal Code of 1869 [Ark. Stat. Ann. § 43-1706 (Repl. 1977)]. Section 27-1403 was a part of the Civil Code of 1869. We have adopted comprehensive new Rules of Criminal Procedure and of Civil Procedure. Although 27-1403 is not mentioned in the supersession order entered when the Rules of Civil Procedure were adopted, those rules include Rule 40 (b) which merely provides that the court may, upon motion and for good cause shown, continue any case previously set for trial. The Reporter's notes state that the motion for continuance does not have to be in writing. There is no provision in the current Arkansas Rules of Criminal Procedure similar to Ark. Stat. Ann. § 43-1706. I do not see how § 27-1403, at least as applied to criminal cases, can be said to have survived.

Further, even if for some reason Ark. Stat. Ann. § 43-1706 (Repl. 1977) and Ark. Stat. Ann. § 27-1403 (Repl. 1979) should still be in existence and controlling, no affidavit was required in the case at bar, since the State did not require defense counsel to support his motion for a continuance by affidavit. *See, Venable* v. *State,* 177 Ark. 91, 5 S.W.2d 716 (1928).

The majority has decided that the probable testimony of the absent codefendant, when viewed in the light of appellant's statement and the other evidence against him, would not have helped him. I thought that the weighing of evidence and the inferences to be drawn from it, were the province of the jury, not the appellate courts. I would reverse and remand for a new trial.

Ted QUEEN *v.* ROYAL SERVICE COMPANY, Employer, SILVEY COMPANIES, Insurance Carrier, HARTFORD INSURANCE COMPANY, Insurance Carrier

CA 82-19 645 S.W.2d 343

Court of Appeals of Arkansas
Opinion delivered September 15, 1982
[Supplemental Opinion on Rehearing delivered February 2, 1983.]

Holmes, Holmes & Trafford, by: *Winfred A. Trafford,* for appellant.

Bridges, Young, Matthews, Holmes & Drake, for Royal Service Company and Hartford Insurance Company, appellees.

R. T. Beard, III, for Silvey Companies, appellee.

FLETCHER LONG, JR., Special Judge. The Appellant, Ted Queen, brings this appeal from a determination of the Workers' Compensation Commission that Appellant was not entitled to any additional compensation from Appellee, Silvey Companies, by reason of an injury received by Appellant on or about November 27, 1977, and that the Appellant was not entitled to benefits from Appellee, Hartford Insurance Company, by reason of an injury sustained on June 15, 1979. We agree with the findings of the Commission as to the November 27, 1977, injury but disagree with the findings of the Commission as to the June 15, 1979, injury.

The Appellant, Ted Queen, was injured on or about November 27, 1977, while an employee of Royal Service Company. He injured his right knee and back. The Appellee, Silvey Companies, paid certain medical, permanent partial disability and temporary total disability benefits as a result of that injury. The Claimant contends that certain additional medical bills and temporary total disability should be paid as a result of this injury. The record contains no substantial evidence to support the Appellant's contention in this regard.

The second aspect of this case arises from the fact that on June 15, 1979, while he was allegedly an employee of Royal Service Company, Claimant sustained additional injuries as a result of an automobile accident. As a result of this accident the Appellant has had back surgery and at the time of the hearing was still in a period of temporary total disability.

The Appellant and his wife owned all of the stock of Royal Service Company, a corporation engaged in mechanical and electrical contracting which is the employer herein. The Appellant contends that at the time of the June 15, 1979, automobile accident he was an employee of Royal Service

Company and therefore entitled to compensation from their insuror, Appellee, Hartford Insurance Company. Appellant testified and it is not rebutted that on June 15, 1979, he was in the process of taking job statements to Little Rock. He went by a residential job to check progress done by other contractors to see when he would be able to complete his part of the job. He was then to go to Benton to see a plumber about helping him with a large commercial job. Approximately seven (7) miles out of Sheridan another car caused him to pull towards the edge of the road and to lose control of his vehicle resulting in the accident and injury. He testified that he was in a pickup truck owned by Royal Service Company. The Appellee, Hartford Insurance Company, has contended and the full Commission agreed that Appellant, Ted Queen, was not an employee of Royal Service Company but because of his sole control of the company and of his own acitivites, and because of his large stock ownership of the Company he was the alter-ego of Royal Service Company. In support of this position the Appellees and the full Commission cite 1C Larson, *The Law of Workmen's Compensation* § 54.22 (1980):

> Substantial, majority, and even sole stock ownership as such does not of itself defeat employee status. But when preponderant stock ownership is so used that the stockholder is for practical purposes the alter ego of the corporation, the compensation acts, which are inclined to be realistic rather than technical, will often disregard the corporate entity and treat the stockholder as the employer.

No Arkansas cases have been cited supporting or adopting this statement of law from Larson's. As a matter of fact, in *Aerial Crop Care, Inc.* v. *Landry,* 235 Ark. 406, 360 S.W.2d 185 (1962), a case in which the crop dusting corporation employed three laborers plus the three owner-officers of the corporation, President, Vice-President, and Secretary, our Court held that the owner-officers of the corporation were employees of the corporation for the purposes of having sufficient employees to require coverage of the Compensation Act. Likewise, in *Brook's, Inc.* v. *Claywell,* 215 Ark. 913, 224 S.W.2d 37 (1949) the Arkansas Supreme Court held that the President of the Defendant

Company who was working in a dual capacity gave the company a total of five (5) companies — again for the purposes of holding that the injured employee was covered by the Compensation Act.

Ark. Stat. Ann. § 81-1320 (a) (Repl. 1976) provides:

> Waiver of Compensation. No agreement by an employee to waive his right to compensation shall be valid, and no contract, regulation, or device whatsoever, shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this Act [§§ 81-1301 — 81-1349], except as specifically provided elsewhere in this Act. Provided, however, that any *officer of a corporation* or *self-employed employer* who is not a subcontractor and who owns and operates his own business may by agreement or contract exclude himself from coverage or waive his right to coverage or compensation under this Act. (emphasis supplied)

By the terms of the contract of insurance with Hartford, Ted Queen was a covered employee and under these circumstances we believe that the above cited Statute renders Arkansas Law different from the analysis hereinabove set out in Larson's.

The Appellant, Ted Queen, had not elected to exclude himself from coverage. It matters not whether Ted Queen was the "alter ego" of Royal Service Company because if he was then he would become a "self-employed employer" and therefore entitled to coverage unless "by agreement or contract" excluded from coverage.

Arkansas Law simply allows a self-employed employer or an officer of the corporation by not contractually excluding himself from coverage to be covered under our compensation law.

In arriving at this decision we are not unmindful of the fact that single stockholder corporations are allowed under Arkansas Law and that in these single stockholder corporations the sole stockholder may also elect to include himself as an insured employee. Under the reasoning from Larson's all of these contracts for insurance would be questionable.

The decision of the full Commission is affirmed as to Appellee, Silvey Companies, and reversed and remanded as to Appellee, Hartford Insurance Company, with directions to the full Commission to assess the compensation due Appellant, Ted Queen, as a result of the June 15, 1979, accident.

The attorneys for Appellant, Ted Queen, shall be allowed fees of $250.00 for services at the Appellate Court level and $100.00 at the Commission level.

GLAZE, J., not participating.

Supplemental Opinion on Rehearing
delivered February 2, 1983

PER CURIAM. Hartford's petition for rehearing contends that the applicability of Ark. Stat. Ann. § 81-1320 (a) (Repl. 1976), was not raised before the Commission and that the Commission has not decided whether appellant's injury arose out of and in the course of his employment.

Since the question of coverage of the Act was before the Commission, we think the applicability of Section 81-1320 was necessarily also before the Commission.

We agree, however, that Hartford denied at the hearing before the law judge that appellant's injury arose out of and in the course of his employment and that the issue was not decided by the Commission. Therefore, that issue and the amount of any compensation due are both to be determined by the Commission on the remand.

GLAZE, J., not participating.

PINE BLUFF PARKS AND RECREATION
v. Lorenzo PORTER

CA 82-169 639 S.W.2d 363

Court of Appeals of Arkansas
Opinion delivered September 22, 1982

Jerry G. James, Public Employee Claims Division, Arkansas Insurance Department, for appellant.

Whetstone & Whetstone, by: *Bud Whetstone,* for appellee.

GEORGE K. CRACRAFT, Judge. Pine Bluff Parks and Recreation, a department of the City of Pine Bluff, appeals from that portion of a decision of the Arkansas Workers' Compensation Commission which found that it was reasonable and necessary that its injured employee, Lorenzo Porter, be maintained in a facility designed as a residence for paraplegics and in directing it to pay a portion of a stipulated rental for his unit in that facility. Appellant maintains that the finding of the Commission that it was reasonably necessary for appellee to reside there is not supported by substantial evidence and that our Workers' Compensation Law makes no provision for the payment of rent for an injured employee.

It was stipulated before the Commission that on October 21, 1976, appellee was an employee of the appellant and that on that day he sustained a compensable injury which rendered him totally and permanently disabled. It was agreed that the employer had accepted the case as one of permanent disability and had paid all reasonable and necessary medical, surgical, hospital, nursing home and related expenses with the exception of the request for maintaining appellee in a project for paraplegics and quadraplegics known as "Our Way."

The appellee's testimony was that at the time of his injury he was living in Pine Bluff with his wife and seven children in a home which rented for $30 per month. After his injury he was not permitted to return to that home due to marital differences and could not have in any case because the doors and bathrooms were too small and a ramp would have to be built. He further stated that if he did live in that house he would be required to have assistance for various activities which he could not attend to himself.

After his injury the appellee was treated at various

hospitals and clinics and unsuccessfully attended a program of rehabilitation. For nine months he was maintained in a nursing home where all of his basic needs were tended to before returning to the Hot Springs Rehabilitation Program. After leaving there he lived at a private residence for approximately two months where the rent was $90 a month. A friend assisted him with difficulties encountered by his condition but he had to leave there because he was not able to functon properly in that dwelling.

He stated that he had no control of bowel or bladder and that at any time he needed to relieve himself he had a bowel movement. This required him to transfer himself from a wheelchair to the commode which would have to have an elevated seat along with bars on the sides. The bathroom needed to be large enough for him to maneuver his wheelchair into a position stable enough for him to transfer back and forth without falling. Other difficulties were encountered in bathing and showering because he has no muscular support in a sitting position. He was required to take a bath while sitting in the wheelchair or in the shower chair with someone else's assistance.

His difficulty was further complicated by the fact that the doorways in most dwellings are not wide enough to accommodate a wheelchair and that he cannot get up and down steps and required a ramp. He further stated that location of furniture was a problem in maneuvering a wheelchair and doors and hallways had to be at proper angles. While in Hot Springs he had rented a house and the employer had erected a ramp and widened some doors, provided him with a wheelchair and some rails for use in the bathroom facility on which he could raise and lower himself. They had also provided him with a special commode seat, hospital bed, and a trapeze bar for the bed, furnishing everything of that nature that he had requested. He testified that he was required to leave there because he was unable to pay the rent of $175 a month and the owner had indicated to him that the rent would be raised. At that time he became aware of and sought residence in a facility known as "Our Way."

"Our Way" is a building containing 144 apartments designed exclusively to meet the needs of persons with mobility impairment. The building is architecturally barrier free. All stairs have been replaced by ramps and the floor plan is designed for maximum mobility in wheelchairs. Doorways are widened, light switches and thermostats lowered, countertops and counters are all lowered to be accessible to persons in wheelchairs. All showers are large enough for the occupant to bathe himself while sitting in a chair or on a built-in bench. The shower heads are designed for persons with these particular problems. All toilet fixtures are designed to meet the needs of persons confined to wheelchairs. A special intercom system similar to the nurse call system in a hospital has been installed. Emergency cords are located throughout the building. Attendants are on duty at all hours to provide those kinds of assistance peculiar to paraplegics.

There are no doctors or nurses regularly on duty at this facility but those services are available on call. The facility provides three vans equipped with wheelchair lifts in order to take the residents where they need to go in Little Rock. There is a small charge for this service. Attendants are also on duty because of the propensity of paraplegics to fall from a chair or to need some assistance in transferring from wheelchair to bed, toilet or shower. They make regular checks to determine that all occupants are accounted for. The only requirement for admission to the facility is the existence of the mobility impairment and the person's potential independence in taking care of most of his physical needs.

The rent for the apartment occupied by the appellee, which is set by the Department of Housing and Urban Development, was $268 a month. The rent of the occupants is subsidized according to income. After the subsidy formula had been applied the total cost for the use of the apartment for this appellee was $102 per month.

There was testimony from Dr. John Bowker, who had been following appellee's situation for several years. After decribing the facilities available at "Our Way" Dr. Bowker

concluded that the cost of maintaining appellee in that institution was justified because of the special conditions. Dr. Bowker emphasized the desirability of making available the attendant care should the need arise. He further pointed out that falls from chairs resulting in fractures were not uncommon for paraplegics and that the availability of such a system was crucial to the maintenance of such a person in an independent living project. Dr. Bowker concluded that the appellee's living in this facility was preferable to nursing home care.

There was testimony from the administrator of "Our Way" who himself was a quadraplegic and had worked with people with mobility impairment for a number of years. He concluded that if appellee was not maintained in that institution his alternative would be to have nursing home care or home modification and necessary support services from other persons, which would not be required in this facility.

At the conclusion of all the evidence the Administrative Law Judge made the following finding of fact:

> When the testimony is reviewed in this case along with the medical testimony as quoted, I feel there is little doubt but that the requested program for the claimant is reasonable and necessary under the provisions of § 11 under the Arkansas Compensation Law.

He further found that "the greater weight of the evidence included in the record in this case supports the proposition that respondent should be liable for the difference in the rent previously paid by the claimant and his rent at 'Our Way'." These findings and conclusions were affirmed and adopted by the Full Commission and appellant was directed to pay the difference in claimant's previous rent of $30 per month and that which he is now required to pay at "Our Way."

The appellant first contends the evidence does not support the finding of the Commission that the maintenance of appellee in the "Our Way" facility was reasonable and necessary. We find no merit to this contention.

The scope of our review of decisions of the Workers' Compensation Commission is well established. On appeal we are required to review the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative value in favor of its order. We will affirm a decision of the Commission if it is supported by substantial evidence. The issue is not whether this court would have reached the same result as the Commission on this record or whether the testimony would have supported another result. The question here is solely whether the findings are supported by substantial evidence. *Bankston* v. *Prime West Corporation,* 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981). From our review of the record we conclude that the finding of the Commission that the requested program was reasonable and necessary is supported by substantial evidence.

The appellant next contends that the Commission erred in directing that appellant pay a portion of the rent at "Our Way" because Ark. Stat. Ann. § 81-1311 (Supp. 1981) makes no provision for payment of rent. We conclude that the Commission did err in this order, but not for the reason advanced by the appellant. It is apparent from the findings and conclusions of the Commission that it recognized that, although "Our Way" did supply appellee with apparatus and other services which § 81-1311 makes the employer's obligation, it was aware that appellee also received services in that facility for which the employer had no statutory obligation. The appellant does not question its obligation to furnish ramps, rails, wheelchairs, widened doors, special commodes and shower facilities and other apparatus required by the appellee. It has done so freely and without question at other places where he has resided. It does assert, and the Commission appears to have recognized, that it has no obligation to furnish custodial care, lodging or other non-medical services such as housekeeping. While it is apparent that this difference was recognized we conclude that the Commission took the wrong approach in its apportionment by considering the rent paid on the dwelling occupied by appellee at the time of the injury as a factor. As it was found that housing him at "Our Way" was reasonable and necessary, his rental at his former abode lost all

significance. What was to be apportioned was the cost of maintaining him at his present location.

We conclude that upon finding that it was reasonably necessary for appellee to be housed at "Our Way," the Commission should have made a determination of the portion of the cost attributable to those services and apparatus which are covered by § 81-1311 and that portion attributable to services for which the employer was not liable. The rental on his former home might have been a relevant factor had the apparatus and other services been furnished there.

While we find no cases from our own jurisdiction directly in point we note that our court has recognized apportionment of included and non-included services in the home nursing cases. In *Pickens-Bond Const. Co.* v. *Case,* 266 Ark. 323, 584 S.W.2d 21 (1979) the Supreme Court held that, in determining the value of in-home nursing services rendered by a wife to her disabled husband, those services attributable merely to housekeeping and personal tasks which the claimant is unable to perform are to be excluded and that it was a function of the Commission to differentiate between the two based on the evidence in each particular case. By analogy we conclude that the same rule of apportionment between the value of apparatus and other services required to be furnished under § 81-1311 and the total cost of all services furnished should apply in the circumstances of this case. This case is remanded to the Commission with directions to make a determination as to what portion of the total cost to appellant at the "Our Way" facility is attributable solely to those services and apparatus required to be furnished by the employer under § 81-1311 and to enter its award against the appellant in that amount. In all other respects the order of the Commission is affirmed.

Remanded.

Dulsa R. PULCHER *v.* UNIVERSITY OF ARKANSAS, ARKANSAS INSURANCE DEPARTMENT, PUBLIC EMPLOYEE CLAIMS DIVISION

CA 82-222 639 S.W.2d 367

Court of Appeals of Arkansas
Opinion delivered September 22, 1982

James F. Miller, for appellant.

Jerry G. James, Public Employee Claims Division, Arkansas Insurance Department, for appellee.

LAWSON CLONINGER, Judge. In this workers' compensation case appellant, Dulsa R. Pulcher, contends that her husband, Frank Pulcher, now deceased, suffered a compensable injury while working as a custodian for appellee, the University of Arkansas. The Arkansas Workers' Compensation Commission found that appellant had failed to meet her burden of proof by a preponderance of the evidence.

The issue on appeal is not whether this court would have reached the same result as the Commission, or whether the record would have supported a finding contrary to the one made, but rather the issue is whether the record supports the finding which the Commission did make. *Herman Wilson Lumber Company* v. *Hughes,* 245 Ark. 168, 431 S.W.2d 487 (1968).

When we view the record in the light most favorable to the decision of the Commission, which we must do on appeal, we must hold that there is substantial evidence in the record to support the conclusion of the Commission.

Mr. Pulcher worked as a custodian in Ozark Hall, and arrived for work at 5:00 p.m. on June 27, 1980. At 7:00 p.m. he was observed by a co-worker sitting in the supply room drinking coffee and rubbing his head. In response to questions, Mr. Pulcher said that he had taken aspirins for a headache, and that he had not fallen or bumped his head. At 7:30 p.m. Mr. Pulcher was seen by another co-worker on the second floor of the Science Engineering Building, across the street from Ozark Hall, staggering and holding onto a water fountain. He stated that he wanted to use the phone which was located in the office and was there for the workers to use.

Mr. Pulcher's co-workers believed he had a heart attack and they attempted to revive him with CPR. After some delay an ambulance was called and Mr. Pulcher was taken to a hospital. His condition was diagnosed as an Acute Subdural Hematoma. Surgery was performed to remove the hematoma and clip a bleeding artery. Mr. Pulcher died on October 4, 1980, without regaining consciousness.

Dr. Vincent B. Runnels, who performed the surgery, testified that Mr. Pulcher died as a result of a fall, and ruled out a heart attack or a stroke as a cause of the fall. Dr. Runnels testified that the fact that there were no visible marks or bruises on Mr. Pulcher was of no significance; that a scalp can be cut to pieces and have no brain injury, and that the converse is also true. Dr. Runnels, of course, could not say what caused the fall or that the fall was job-related.

Appellant had the burden before the Commission of establishing affirmatively by a preponderance of the evidence that her husband sustained an accidental injury arising out of and during the course of his employment. The testimony of Dr. Runnels that Mr. Pulcher's death was caused by trauma is convincing, but there is no other evidence of a fall or a blow to the head, and there is a total absence of evidence that Mr. Pulcher's injury was job-related.

The decision of the Workers' Compensation Commission is affirmed.

CORBIN and COOPER, JJ., dissent.

David TIMMS *v.* William F. EVERETT, Director of Labor, and THE TALLEY CORP.

E 82-113 639 S.W.2d 368

Court of Appeals of Arkansas
Opinion delivered September 22, 1982

Appellant, *pro se.*

Alinda Andrews, for appellees.

DONALD L. CORBIN, Judge. Claimant, David Timms, was found ineligible for unemployment benefits because he voluntarily left his last work without good cause connected with the work. We reverse and remand.

Ark. Stat. Ann. § 81-1106 (a) provides in part as follows:

> [A]n individual shall be disqualified for benefits . . . [i]f he voluntarily and without good cause connected with work, left his last work.
>
> Provided no individual shall be disqualified under this subsection if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification; . . . .

Claimant was employed as a machinist with the Talley Corporation in Newbury Park, California, making $6.50 per hour. Claimant's wife was pregnant but planned to leave Arkansas to join claimant in California. Claimant testified that his wife fell and asked him to come home because she

was afraid she might have injured the baby. In his written claim for benefits, claimant stated that there was no one to take care of his wife. Claimant asked his employer for a leave of absence but was informed that it could not be granted in less than two weeks after application was made. He then quit and returned to Arkansas.

"Even though appellant was the only witness at the hearing, the testimony of a party cannot be taken as undisputed. However, such testimony cannot be arbitrarily disregarded; there must be some basis for disbelieving it." *Butler* v. *Director of Labor,* 3 Ark. App. 229, 624 S.W.2d 448 (1981). We find nothing in the record to refute claimant's contention that he was faced with a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification.

In its decision, the Board of Review made a finding that claimant had not furnished the employer with a medical statement concerning the necessity of his return to Arkansas. Ark. Stat. Ann. § 81-1106 (a) does not require an individual to offer medical proof of a personal emergency to his employer; it requires the individual to make reasonable efforts to preserve his job rights. This court has held that an individual may preserve his job rights by requesting a leave of absence from his employer. *Valentine* v. *Barnes,* 1 Ark. App. 308, 615 S.W.2d 386 (1981), *Morse* v. *Daniels,* 271 Ark. 402, 609 S.W.2d 80 (1980), *Turner* v. *Daniels,* 270 Ark. 418, 605 S.W.2d 465 (1980).

We reverse and remand with directions to award benefits.

Mary M. ORSINI *v.* COMMERCIAL NATIONAL BANK, Guardian of the Estate of Stacy Renee ORSINI et al

CA 82-23 639 S.W.2d 516

Court of Appeals of Arkansas
Opinion delivered September 29, 1982
[Rehearing denied October 27, 1982.]

Thurman & Capps, Ltd., by: *Rita W. Gruber*, for appellant.

Wallace, Hilburn, Clayton, Calhoon & Forster, Ltd., by: *Robert L. Roddey* and *Paula J. Jamell*, for appellee, Commercial National Bank; and *Davidson, Horne, Hollingsworth & Arnold*, for appellee, Union Life Insurance Co.

MELVIN MAYFIELD, Chief Judge. In May of 1974, a divorce decree was entered in Pulaski Chancery Court between Ronald Orsini and Mary Linda Orsini. The decree contained this provision:

> Husband agrees to maintain life insurance upon his life with the minor child, Stacy Renee Orsini, as the named beneficiary, in the approximate sum of Fifty Thousand Dollars ($50,000.00).

At that time there were two $25,000.00 policies on Ron Orsini's life and the beneficiary of each policy was Stacy Orsini, the minor daughter of Ron and Mary Linda. By March of 1981, when Ron Orsini died as a result of a homicide, the beneficiary of each policy had been changed to Mary M. Orsini, whom Ron married in 1976. A suit was filed by Commercial National Bank, Guardian of the Estate of Stacy Renee Orsini, to collect the proceeds of the policies; the insurance company paid the money into the registry of the court; and Mary M. Orsini filed an answer to the guardian's suit alleging that the funds held by the court should be paid to her as the named beneficiary of the policies.

The trial court found in favor of the guardian on the basis that Stacy was a third-party beneficiary of the property settlement agreement incorporated into her parents' divorce decree and as such received a vested interest in the proceeds of the policies. The court also held that the beneficiary change was in violation of the agreement and decree; that it constituted a breach of Ron's fiduciary relationship to Stacy; and that a constructive trust should be impressed upon the proceeds of the policies.

Appellant Mary M. Orsini cites *Dinwiddie* v. *Metropolitan Life Insurance Co.,* 204 Ark. 677, 163 S.W.2d 525 (1942), and other cases, and argues that where a policy authorizes the insured to change the beneficiary, the beneficiary has no vested interest in the proceeds of the policy during the life of the insured. She says 5 Couch, *Cyclopedia of Insurance Law* § 28:41 (2 ed. 1960) states that it is only where the divorce decree requires an irrevocable beneficiary designation that the beneficiary cannot be changed. She also points out that the provision in the divorce decree in this case does not specifically identify any insurance policy or company and indicates only an approximate amount of insurance; and she contends *Allen* v. *First National Bank of Ft. Smith,* 261 Ark. 230, 547 S.W.2d 118 (1977), and *Walden* v. *McCollum,* 172 Ark. 291, 288 S.W. 386 (1926), require a holding that there is a lack of specificity necessary to create a vested interest in the proceeds of the policies here involved. While the appellant concedes there might be a cause of action against Ron Orsini's estate for breach of contract, she claims that Stacy has no interest in the insurance proceeds which allows them to be paid directly to her guardian.

The guardian admits that, as a general rule, a beneficiary does not have a vested interest in the insurance proceeds where the policy authorizes the insured to change the beneficiary, but says circumstances may arise which would establish an equitable interest in the proceeds. In support of that statement the guardian cites *Reilly* v. *Henry,* 187 Ark. 420, 60 S.W.2d 1023 (1933), which quotes with approval from *Shoudy* v. *Shoudy,* 55 Cal. App. 344, 203 P. 433 (1921), which held that a husband's agreement to maintain a policy for his first wife as long as she remained single, gave her an equitable interest of which she could not be divested by the mere changing of the name of the beneficiary of the policy.

Other cases cited by the guardian impose a constructive trust on the insurance proceeds in situations like the one involved in the case at bar.

For example, *Richards* v. *Richards,* 58 Wis.2d 290, 206 N.W.2d 134 (1973), is a case where the insured, contrary to a

divorce decree, made his second wife the beneficiary of his policy instead of his children by his first wife. The court held that the children were "equitably entitled to the proceeds of the insurance policy and that a constructive trust should be imposed on the proceeds for their benefit." The trust was imposed even though the second wife was not guilty of fraud "positive or constructive." The court said:

> Accordingly, we conclude that Jack Richards' wrongful conduct, in violation of the divorce decree, furnishes a proper foundation for the impressing of a constructive trust upon the insurance proceeds which may be followed and recovered from Patricia Richards, who was not a bona fide purchaser.

In *Gutierrez* v. *Madero,* 564 S.W.2d 185 (Tex. Civ. App. 1978), the court imposed a constructive trust on the proceeds of an insurance policy where the beneficiary was changed to the husband's mother, contrary to a divorce decree which provided that he would keep "in full force and effect the present policy of life insurance with the Veterans Administration" for the benefit of his minor children. The court said:

> In the present case, Mary Madero was the recipient of the insurance proceeds due to the wrongful beneficiary designation by Rudy Gutierrez. Her rights as a gratuitous transferee are inferior to the equitable rights of the minor children. It would be unjust to allow Mary Madero to benefit from the wrongdoing of Rudy Gutierrez at the expense of the children's rights under the divorce decree. The provisions of the divorce decree should control the disposition of the proceeds of an insurance policy between these contending beneficiaries.
>
> . . . .
>
> Equity regards as done that which ought to have been done. The imposition of a constructive trust on the insurance proceeds for the benefit of the minor children is necessary to place the parties in the position

they would be in had Rudy Gutierrez not violated the divorce decree.

The appellant argues that the guardian has not established a breach of a "confidential or fiduciary duty or unconscionable conduct on the part of the appellant," but, as *Simonds* v. *Simonds,* 45 N.Y.2d 233, 380 N.E.2d 189 (1978), said, one of the purposes of a constructive trust is to prevent unjust enrichment; and the court added, "Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched. . . . Innocent parties may frequently be unjustly enriched."

We hold in this case that the property settlement agreement and its incorporation into the divorce decree constitute sufficient evidence to support the finding that Stacy was a third-party beneficiary of the agreement. *Howell* v. *Worth James Construction Co.,* 259 Ark. 627, 535 S.W.2d 826 (1976).

We also hold that the language in the agreement and decree was specific enough for the trial court to find, under all the facts and circumstances in evidence, that the two policies here involved were intended to be maintained with Stacy as the named beneficiary. *Lock* v. *Lock,* 8 Ariz. App. 138, 444 P.2d 163 (1968).

And we hold that the law and evidence justified the chancellor in impressing a constructive trust on the proceeds of the insurance policies to prevent unjust enrichment from resulting because of Ron Orsini's failure to keep Stacy as the named beneficiary.

Affirmed.

GLAZE, J., not participating.

Charles WALKER *v.* J & J PEST CONTROL and AETNA INSURANCE COMPANY

CA 82-123 639 S.W.2d 748

Court of Appeals of Arkansas
Opinion delivered September 29, 1982

David J. Potter, for appellant.

Thomas M. Bramhall, for appellees.

DONALD L. CORBIN, Judge. This is a well-briefed case of first impression. Claimant, Charles Walker, appeals an order by the full Commission which denied his motion for rehearing on the basis of newly discovered evidence. We affirm.

This claim arose out of a claim for medical benefits and workers' compensation disability benefits related to an alleged injury to appellant by exposure to pesticides. In an opinion filed September 26, 1979, Administrative Law Judge Newbern Chambers found that appellant had failed to prove, by a preponderance of the evidence, that his disability arose out of and in the course of his employment.

Appellant appealed to the full Commission and the opinion of the Administrative Law Judge was affirmed on appeal. Thereafter, appellant filed a petition for rehearing on the ground that there had been newly discovered evidence. There was some question as to whether appellant asked for a hearing on the petition for a rehearing, but, in any event, the full Commission wrote a letter denying the petition for rehearing and stated that it was possible that the motion would be more properly filed as a motion to remand from the Court of Appeals. The implication in the letter of the full Commission was that the full Commission did not base its decision on the merits of the petition for rehearing, but rather, felt as if they had no jurisdiction to entertain a petition for rehearing. This matter was thereupon appealed to the Court of Appeals and the case was reversed and remanded to the full Commission so that the full Commission could take appropriate steps to decide the issues raised by the petition for rehearing on the merits.

The full Commission entered an order on February 18, 1981, remanding this case to an Administrative Law Judge for the purpose of conducting a hearing on the merits of appellant's motion for rehearing. The order of the full Commission limited the question to be decided in this particular hearing to that of newly discovered evidence. The Commission in its order described the purpose of this hearing as follows:

> Without unduly limiting claimant in his presentation of evidence at the hearing on his motion, or ruling out any pertinent matters, certainly the evidence to be adduced at the hearing on the motion should go to the central question of whether such evidence is indeed newly discovered as that term is generally understood in a jurisprudential sense. This inquiry will invoke of course the question, among others, of whether the evidence alleged to be newly discovered could, or should with reasonable diligence, have been discovered and presented at an earlier juncture of the proceeding.

A hearing was held on April 2, 1981, and thereafter the deposition of Dr. Dale Peters was taken on April 30, 1981, the

deposition of Harold King was taken on April 29, 1981, and the deposition of Dr. William J. Rea was taken on May 22, 1981. The entire record prior to the hearing in April of 1981 was made a part of the record for this particular hearing. The Administrative Law Judge rendered an opinion on September 4, 1981, finding that:

> The claimant has failed to prove, by a preponderance of the evidence, that the evidence alleged to be newly discovered is, in fact, newly discovered evidence as that term is generally understood in a jurisprudential sense. The evidence which the claimant now seeks to introduce could or should have been available at an earlier point had the claimant exercised reasonable diligence. The evidence which the claimant seeks to present upon rehearing is material evidence, but untimely.

Earlier in this case, a hearing was held on June 20, 1979, where medical reports by Dr. W. R. Keadle, a general practitioner in Glenwood, Arkansas, and Dr. Bruce Waldon, an Assistant Professor of Medicine at the University of Arkansas for Medical Sciences, were introduced into evidence. These physicians related the symptoms of claimant to his exposure to pesticides.

Thereafter, Dr. Waldon's deposition was taken and he reversed his original position. He testified that there was no objective evidence from the test he performed on Mr. Walker that chemicals in the pesticides caused claimant's problem. He found no causal relationship between the pesticides and Mr. Walker's complaints. He testified that his opinion was further substantiated by the fact that any problems caused by the pesticides would have dissipated within days or at most weeks after his last exposure. Dr. Keadle, after reviewing Dr. Waldon's deposition, could not reach an opinion one way or another as to whether Mr. Walker's complaint was related to pesticide exposure.

Claimant was denied benefits by the Administrative Law Judge. The case was eventually submitted to the full Commission on November 27, 1979. On January 10, 1980, the full Commission denied Mr. Walker benefits.

On November 15, 1979, claimant, unbeknownst to his attorney, saw Dr. Dale W. Peters in Dallas, Texas, who diagnosed his illness as pesticide poisoning. Claimant said nothing to anyone of this visit until he visited with his present attorney about a related products liability case on January 10, 1980. A medical report dated January 11, 1980, prepared by Dr. Dale W. Peters, indicated that claimant suffered from exposure to pesticides. Mr. Walker denied that Dr. Peters told him at his November 15, 1979, examination that he diagnosed his condition as being caused by pesticide poisoning. However, Dr. Peters, in a deposition taken April 30, 1981, testified that he did tell him. He further testified that his diagnosis was substantiated as of December 13, 1979, when he received the results of tests of Mr. Walker's blood samples taken November 15, 1979.

In *Eddings* v. *Big Jim Service Center, Inc.*, 404 N.Y.S.2d 441, 62 A.D.2d 1119 (1978), the claimant appealed a decision of the Workmen's Compensation Board denying her application to reopen her claim. The Board's decision was affirmed. The Court stated:

> Here, claimant seeks to have her case reopened on the basis of newly discovered evidence, and yet it is undisputed that the alleged new evidence was discovered by her attorney almost two months before the board's decision denying her death benefits. Nonetheless, no attempt was made to apprise the board of this evidence prior to the issuance of its decision on January 22, 1976, and the failure of the claimant or her attorney to so act in this regard justified the board's later refusal to reopen the case.

Here, appellant in his oral argument conceded that the November 15, 1979 examination by Dr. Peters and the verification by Dr. Peters of his initial diagnosis by the results of Mr. Walker's blood samples would not come under any definition of newly discovered evidence. He argues that this information was common as to other medical histories related in other physician's findings. He stated that the February, 1981, medical report of Dr. William Rea, an associate of Dr. Peters in Dallas, firmly established newly

discovered medical evidence. Dr. Rea was a cardiovascular specialist with a sub-specialty in environmental aspects of cardiovascular disease. He testified in his deposition that until his tests were completed on February 17, 1981, he could only make a suspected diagnosis of chemical sensitivity with an immune deficiency.

The problem we are faced with is the absence of any legislation that would allow the reopening of this case other than Ark. Stat. Ann. § 81-1323 (b) (Repl. 1976) and Rule 14 of the Arkansas Workers' Compensation Commission.

Ark. Stat. Ann. § 81-1323 (b) (Repl. 1976) provides:

> (b) Investigation — Hearing. ... If an application for review is filed in the office of the Commission within thirty (30) days from the date of the receipt of the award, the full Commission shall review the evidence or, if deemed advisable, hear the parties, their representatives and witnesses, and shall make awards, together with its rulings of law, and file same in like manner as specified in the foregoing. A copy of the award made on review shall immediately be sent to the parties in dispute, or to their attorneys. The full Commission may remand to a single member of the Commission or a referee, any case before the full Commission for the purpose of taking additional evidence. Such evidence shall be delivered to the full Commission and shall be taken into consideration before rendering any decision or award in such case.

Rule 14[1] of the Rules of the Arkansas Workers' Compensation Commission contains the following language:

> Introduction of Evidence. All oral evidence or documentary evidence shall be presented to the designated representative of the Commission at the initial hearing on a controverted claim, which evidence shall be

[1]The text of this Rule was incorporated verbatim into Section 27 of the Act [Ark. Stat. Ann. § 81-1327 (c)] by Act 290 of 1981. This provision will no longer appear as a Rule effective March 1, 1982.

> stenographically reported. Each party shall present all evidence at the initial hearing. Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or Commission. A request for a hearing for the introduction of additional evidence must show the substance of the evidence desired to be presented.

We believe that all of the evidence which appellant alleges is "newly discovered evidence" was within the knowledge of appellant before the decision of the full Commission on January 10, 1980, and before the case was submitted to the Commission on November 27, 1979.

Until the Legislature acts, we adopt the rule that absent a showing that the Workers' Compensation Commission acted arbitrarily and capriciously, or abused its discretion, a determination made by the Commission not to reopen a case will not be disturbed. Accordingly, we make no such finding in the instant case and we affirm.

Affirmed.

COOPER, J., dissents.

Ruby COOSENBERRY *v.* McCROSKEY SHEET METAL and TRANSAMERICA INSURANCE CARRIER

CA 82-165 639 S.W.2d 518

Court of Appeals of Arkansas
Opinion delivered September 29, 1982
[Rehearing denied October 27, 1982.]

Cortinez & Lamb, by: *Robert R. Cortinez,* for appellant.

Hall, Tucker & Lovell, for appellees.

TOM GLAZE, Judge. This case is another in a series of Workers' Compensation Commission decisions concerning our rehabilitation law, Ark. Stat. Ann. § 81-1310 (f) (Supp. 1981). Here, the appellant appeals the Commission's decision denying her entitlement to a rehabilitation evaluation.

On February 6, 1980, appellant sustained a compensable injury. Her healing period ended on March 11, 1981, leaving her with a 10% physical impairment to the body as a whole. In May, 1981, appellant's employer asked her to return to work, offering her a higher paying job that was tailored to her physical limitations. She declined the new job and instead requested an evaluation for rehabilitation purposes.

The Commission found that the medical and other evidence submitted by the appellant had failed to prove that her injury and resulting impairment prevented her from returning to her previous job, to the new job offered by her employer, or to other employment similar to her prior job.

The thrust of appellant's argument is that since she sustained a permanent disability and duly filed her request for rehabilitation, the Commission was compelled to order a rehabilitation evaluation. We cannot agree. Such an interpretation of our rehabilitation law would mean that the Commission has no discretion to determine whether a claimant is a bona fide candidate for rehabilitation. Obviously, there are employees who have sustained permanent-partial disabilities yet are not viable candidates for rehabilitation. When these situations arise, the Commission is not automatically required to order an evaluation at the employer's expense merely because the employee requests it.

Although § 81-1310 (f) does not specifically mention evaluation reports, it does provide for the Commission to determine if a proposed program of vocational rehabilitation is reasonable in relation to the disability sustained by the employee. The statute also alludes to a period of time during which the parties may explore rehabilitation potential. The Commission's role, as defined in § 81-1310 (f), requires the exercise of its discretion when approving or disapproving a rehabilitation program. Before doing so, the

Commission must first decide if the claimant is a candidate for rehabilitation.

This case is distinguishable from our recent case of *Moro, Inc.* v. *Davis,* 6 Ark. App. 92, 638 S.W.2d 694 (1982). In *Moro,* the claimant requested a rehabilitation evaluation. At the time of the initial request, no evidence was presented to substantiate that he was a candidate for rehabilitation. Later, the claimant did establish he was a candidate, but the employer continued to categorically deny claimant's need for rehabilitation. Therefore, we upheld the Commission's finding that the employer had controverted all rehabilitation benefits.

As was true in *Moro,* an employer risks the controversion of all rehabilitation benefits when the evidence substantiates the need for a rehabilitation evaluation, but the employer assumes an inflexible position against it. Here, appellant never established that she was a candidate for rehabilitation. In fact, she had been psychologically and medically released to return to work, but she refused to work under any conditions. The evidence shows that if she had returned to work, she would have received a 20% increase in wages. Therefore, we find there is substantial evidence to support the Commission's finding that appellant failed to show entitlement to a vocational rehabilitation evaluation.

Affirmed.

REST HILLS MEMORIAL PARK, INC. and GRIFFIN-LEGGETT, INC. *v.* CLAYTON CHAPEL SEWER IMPROVEMENT DISTRICT NO. 233

CA 81-318 639 S.W.2d 519

Court of Appeals of Arkansas
Opinion delivered September 29, 1982

[redacted]

Wallace, Hilburn, Clayton, Calhoon & Forster, Ltd., by: *Larry C. Wallace* and *Janet L. James*, for appellants.

Townsend & Townsend, by: *Willis V. Townsend*, for appellee.

JOHN CHARLES EARL, Special Judge. This Appeal involves a condemnation of lands owned by the Appellants, Rest Hills Memorial Park, Inc. and Griffin-Leggett, Inc. (collectively referred to hereinafter as "Rest Hills"). In 1976, Appellee formed Clayton Chapel Sewer Improvement District No. 233 of Pulaski County, Arkansas (hereinafter referred to as "District"). Although Appellants' lands are not within the District, the Appellee's sewer lines run across the Appellants' lands in three easements in order to connect to the sewer treatment plant which serves the sewer district. The Trial Court determined that the easements constituted a total of 1.7 acres taken and that Rest Hills was entitled to $34,494.32, representing the value of this 1.7 acres, with interest thereon at the rate of six percent (6%) per annum from the date of taking. Much of the Trial Court record is devoted to testimony concerning the elevation of lands taken. The Chancellor found that the State Health Department will not allow burials on lands below an elevation of 247′ Mean Sea Level (MSL). Of the total lands condemned by the District, .43 acres lie above 247′ MSL surface contour and 1.27 acres lie below such elevation. In a cemetery enterprise, land which is suitable for division and sale as individual burial plots is much more valuable to the landowner than land which cannot be used for such purposes. The Chancellor found that the land currently available for burial use had a value of $49,964.62 per acre and the Chancellor applied this value to .43 acres of the condemned lands with surface contour elevations higher

than 247′ MSL. The remaining 1.27 acres of the condemned property was not viewed as being suitable for burials, and was valued at $5,500.00 per acre.

Appellants have urged that the Chancellor, by failing to value the entire 1.7 condemned acreage as burial property, failed to award damages to the Appellants based upon the highest and best use of their land. Appellants further urge that the Chancellor committed error in the amount of interest allowed on the judgment. We agree.

It has long been the rule that when one's property is taken under the law of eminent domain, just compensation to the owner is measured by the difference in the value of the land, when put to its highest and best use, immediately prior to the taking and immediately after the taking. *Arkansas State Highway Commission* v. *Maus,* 245 Ark. 357, 432 S.W.2d 478 (1968); *Myers* v. *Arkansas State Highway Commission,* 238 Ark. 734, 384 S.W.2d 258 (1964); *State ex Rel Publicity and Parks Commission* v. *Earl,* 233 Ark. 348, 345 S.W.2d 20 (1961). Further, in determining the highest and best use of the land taken, the Court may consider all uses to which the land is adapted and might be put and may award compensation upon the basis of its most advantageous and valuable use. *U.S.* v. *620.00 Acres of land, more or less, situate in Marion County, Arkansas,* 101 F. Supp. 686 (W.D. Ark. 1952). In determining future uses, the Court may not engage in speculation and conjecture but must be shown with some degree of certainty that the use of the land will change in the not too distant future. *Arkansas State Highway Commission* v. *O & B, Inc.,* 227 Ark. 739, 301 S.W.2d 5 (1957).

The Chancellor properly found with some degree of certainty that .43 acres of the total 1.7 acres taken could be used for burial purposes in the reasonably near future and should be valued at a rate suitable for burial property. This finding was based upon testimony presented in the Trial Court and reflected in the record that although the .43 acres is not currently used for burial purposes, it is currently suitable for such use. Further, the record reflects that the remaining 1.27 acres taken had been cleared and sodded, had

been platted and planned for burials, and had been approved by the proper cemetery authorities for cemetery use.

From a review of the transcript, it seems that both parties agree that the total 1.7 acres taken was intended to be used for burials. The disagreements presented on appeal are: (1) whether the total 1.7 acres could be legally used for burial purposes; and (2) whether some parts of the 1.7 acre area taken would be suitable for burials in the not too distant future, since it lay in varying degrees below 247′ MSL.

However, before reaching either of these issues, it must be determined whether 247′ MSL refers to the surface of the property or the floor of the grave. The Chancellor found that the .43 acres with an elevation of 247′ MSL and above were currently suitable for burial property. Appellee has urged on appeal that the 247′ MSL requirement refers to the *floor* of the grave and not to the *surface* elevation of the property. However, after reading the transcript of the Trial Court proceedings, it is clear that this elevation referred to the *surface* contour and the elevation of the surface was the subject to the parties' arguments below.

It is further noted that Appellee has not questioned the finding that the .43 acres at or about 247′ MSL *surface* elevation is suitable for burials, thus strongly indicating Appellee's agreement that any lands with *surface* elevations of 247′ MSL and above may be used for burials. If the reference were as Appellees argue on appeal, then surely their appeal would have included, at least, a part of the valuation of the .43 acres.

As regards Appellants' ability to legally use the entire 1.7 acres for burial purposes, the only impediment seems to be that 1.27 acres is currently below 247′ MSL, since the entire tract is currently approved for cemetery use. We find the Appellee's reference to a letter from the State Health Department unpersuasive as, in our view, it applies to a recommendation for future rules. The record reflects no evidence that the State Health Department, the Corps of Engineers or the necessary authorities or agencies would prohibit raising the level of the 1.27 acres in dispute which

are currently below 247′ MSL. We find undisputed evidence that of the lands condemned, 1.27 acres below 247′MSL can, in fact, be raised to the 247′level and that such act on the part of the cemetery owner is legally permissible. It also appears from a review of the proceedings below that Appellants are continually raising the surface level of low-lying cemetery lands with excess dirt displaced by burials. Indeed, the Chancellor below recognized this fact and the testimony appears undisputed that it is less expensive for the Appellants to use excess earth in this manner as opposed to paying someone to haul it away.

Appellants rely upon the *St. Agnes* rule of cemetery appraisal which was set out in *St. Agnes Cemetery* v. *State,* 163 N.Y.S.2d 655, 3 N.Y.2d 37 (1957), in which the Court held that if land taken is an integral though unused portion of a well-established cemetery in which there have been no interments and no sale of graves, the property should be appraised on the basis of its value for cemetery purposes if such value can be arrived at without resorting to speculation. Appellants urge that the *St. Agnes* rule of damages should apply in this particular condemnation where the cemetery is a well-established business, the lands taken are very near lands in which burials have already been made, and the lands taken will be used for burials in the near future.

The cases which follow the *St. Agnes* rule have held that the condemned portion of a cemetery should be valued as having burial purposes if the land is held by the landowner for definite future cemetery use as a part of an established cemetery enterprise and if the value as burial property can reasonably be arrived at. *Mt. Hope Cemetery Association* v. *State of New York,* 203 N.Y.S.2d 415, 11 A.D.2d 303 (1960); *State ex rel* v. *Barbeau,* 397 S.W.2d 561 (Missouri, 1965); *Graceland Park Cemetery* v. *City of Omaha,* 173 Neb. 608, 114 N.W.2d 29 (1962); *Cemeterio Buxeda* v. *People of Puerto Rico,* 196 F.2d 177 (1st Cir., 1952). The *St. Agnes* method of cemetery appraisal is adopted as the general rule in condemnation of cemetery property in Arkansas.

In arguing the Chancellor correctly refused to value the

1.27 acres as burial property, Appellee District cites *Laureldale Cemetery Company* v. *Reading Company,* 303 Pa. 315, 154 A. 372 (1931), which is an exception to the general rule, properly applied, when valuation of property for future cemetery use is too speculative. *Laureldale* involved a valuation of condemned property based upon non-cemetery use since the part taken was not being used for burials, was some 600 feet from existing graves and was not certain to be used for burials in the near future. The Laureldale Cemetery was only three and one-half years old at the time of taking. The Court in *Laureldale* held that it was too speculative to attempt to place the higher burial value on the condemned portion of the cemetery when the cemetery was so new as to make a projection of the future sales of individual grave sites uncertain. We find the *Laureldale* theory was properly applied in *Diocese of Buffalo* v. *State of New York,* 300 N.Y.S.2d 328, 24 N.Y.2d 320 (1969), wherein that Court held that where a cemetery consists of so much land that the portion retained after the taking is so large that it would be 88 years before the property would be fully utilized for gravesites that the owner would be better advised to put the land to another use, then the land should be appraised for non-cemetery purposes.

In relying on the *Laureldale* theory, Appellee District has pointed out some facts that must be analyzed and resolved here. After the taking Appellants are left with 108.566 acres of the 110.266 owned by them and approximately 61.02 acres may never be used for burials and may never yield income. This fact, on its face, would seem to impose the *Laureldale* rule of evaluation. However, the record reflects undisputed testimony that 61.016 acres of the land retained (none of which embraces the condemned 1.7 acres) is swamp land known as Trammel Lake. The U.S. Corps of Engineers prohibits the filling of this 61.016 acres (which would be necessary in order to be used for burial purposes) because it falls within a federally protected area. The Trial Court stated in its Findings of Fact and Conclusions of Law that the Federal Wetland Act prohibits raising the level of the 60.016 acres located in this swamp and that it could not be used for burials. Although Appellants hold title to Trammel Lake it cannot be used for burials and is not

considered by them a part of the cemetery proper. Thus, these facts do not support Appellee's contention that *Laureldale* is applicable in this case.

The record reflects that all of the area condemned by the District is outside the swamp area and is presently available for use as burial property with the exception of 1.27 acres which lie below 247′ MSL elevation. The record further reflects that approximately 1800 cubic yards of dirt are displaced each year by burials and that this excess is presently carried to low lying portions of the cemetery. It is easily seen that this practice results in raising the elevation of certain lands in the cemetery to a level which would then be suitable for burials. Appellee's brief reflects that to raise the area of the easements by 4 feet, to 247′ MSL (some of which is apparently only a few inches below that level) would require 8,382 yards of fill. Given 1800 yards of fill a year the testimony reflects is presently being removed from new graves, a basic calculation would show that this 1.27 acres could be totally raised to the 247′ MSL in 4 years and 8 months, based upon the past and current rate of burials within the Appellants' cemetery. Clearly, the *St. Agnes* method of valuation would apply to the Appellants' situation where all of the lands condemned would be available for burial sites in this short period of time. This Court agrees with the Court in *St. Agnes* when it said that the question to be answered is "what has the owner lost? not, what has the taker gained?"

The Chancellor, in his Findings of Fact and Conclusions of Law, recognized the possibility that the lands below 247′ MSL elevation could be raised to a higher level and be suitable for burials; however, he went on to say that "the award for such a taking must be based upon present conditions". In view of the Court's finding that lands taken below 247′ MSL could be raised and the undisputed testimony of the Appellants in the record that such would be done, it was error for the trial court to award a value of $49,964.62 per acre to .43 acres taken and $5,500.00 per acre for the remaining 1.27 acres taken. An award of damages for land taken may be based upon prospective utilization of the land if such proposed use is fairly certain and if the land can

be valued as such without resorting to speculation. *Arkansas State Highway Commission* v. *O & B, Inc., supra; U.S.* v. *620.00 Acres of Land, More or Less, supra; Arkansas State Highway Commission* v. *Watkins, supra.* Based upon the record and the Chancellor's findings that the lands condemned are part of an established cemetery enterprise and, although not currently *used* for burial purposes, will be *suitable* for such use, the highest and best use of all the land condemned is for cemetery purposes and thus an award must be based upon that use. We find, therefore, that the entire 1.7 acres taken by the Appellee District should be valued as burial property and that the Appellants are entitled to $49,964.62 per acre for the entire 1.7 acres condemned by the Appellee.

The second issue raised on this appeal pertains to the proper rate of interest on a judgment for damages in condemnation actions.

The original decree was signed by the Chancellor on May 29, 1981, and contained no provision for interest on the award. Appellants then filed a Motion for an Amendment of the Decree seeking interest at the rate of Ten Percent (10%) from the date of taking. On June 24, 1981, the Chancellor amended the May 29, 1981, decree to provide for interest from the date of taking at Six Percent (6%) per annum.

The Chancellor properly found that: (1) Appellants were entitled to interest on the full award from the date of taking which was the date of the Order of Entry; and, (2) if the landowner does not have the use of the money during this time, to deny him interest would be to deny him just compensation, *Housing Authority of the City of Little Rock* v. *Rochelle,* 249 Ark. 524, 459 S.W.2d 794 (1970). The question now before us is what rate of interest that award shall bear from the date of taking. Ark. Stat. Ann. § 29-124 provides "*shall* be allowed to receive interest at the rate of Ten Percent (10%) per annum on any judgment". (emphasis added) This language is mandatory barring discretionary reduction by the Trial Court. Appellee urges that prejudgment interest is limited by *Ark. Const.* Art. 19, Sec. 13 to 6% per annum. We agree. Further, Appellee urges that it is

within the Chancellor's discretion, according to Ark. Stat. Ann. § 29-124, to also reduce postjudgment interest to 6%. With this we also agree. Thus, we are squarely presented with the issue of whether the Trial Court actually exercised its discretion to override the mandatory language of this statute.

In stating his reasons for providing for 6% interest, the Chancellor below stated:

> "The only reason why I am providing 6% is that I am attempting to follow the Highway Department's statute, although I am well aware that it does not apply. It is the only one I know of that has any provision for interest on the award."

A similar occurrence is reported in a 1976 case, *Dunn Roofing Company* v. *Brimer,* 259 Ark. 855, 537 S.W.2d 164 (1976). In that case, counsel submitted a precedent for judgment reciting a 10% rate. The Court, in its opinion, stated:

> "For more than a century, the interest rate upon judgments was 6%, but in 1975, the legislature increased the rate to 10%, with a proviso that the Trial Judge, in his discretion, may reduce the rate to not less than 6%. Ark. Stat. Ann. § 29-124. Here counsel submitted a precedent for judgment reciting a 10% rate. The Judge reduced it to 6% explaining in a letter that he understood the legal rate to be 6% in the absence of a contract for a higher rate. No other explanation of the reduction appears in the record. Hence, it does not appear that the Court exercised its discretion with knowledge of the 1975 statute. Consequently, we think that the rate should be fixed at 10%, as the statute provides, not because the Trial Judge abused his discretion, but because he was not apparently aware of the leeway open to him." 259 Ark. 855 at page 857.

In the instant case, it clearly appears that the Chancellor was not aware that he must affirmatively exercise his discretion to override the mandatory provision for 10%

interest in Ark. Stat. Ann. § 29-124 which applies to all judgments except those involving condemnation by the State Highway Department. *Arkansas State Highway Commission* v. *Scott,* 264 Ark. 397, 571 S.W.2d 607 (1978). To follow an inapplicable statute or do the "logical thing" is not sufficient in the absence of an indication that an exercise of discretion was the basis for that act. We do not find any place in the record of the proceedings where the Trial Court truly exercised its discretion to override the mandatory language of the statute. We therefore hold that Appellant's judgment should bear interest at the rate of 6% from the date of the Order of Entry to the time of judgment and at the rate of Ten Percent (10%) from the date of the lower court's judgment until satisfaction.

This Court will not remand Chancery causes for further proceedings and proof when it can plainly see from the record what the rights and equities of the parties are, but will render such a decree as ought to have been rendered below. *Walt Bennett Ford, Inc.* v. *Pulaski County Special School District,* 274 Ark. 208, 624 S.W.2d 426 (1981); *Ferguson* v. *Green,* 266 Ark. 556, 587 S.W.2d 18 (1979).

We therefore render such decree as ought to have been rendered by the Chancellor below on May 29, 1981. In doing so, we reverse in part and affirm in part the Chancellor's decision, and hold that the Appellants are entitled to judgment in the sum of $84,939.85 with interest thereon at the rate of 6% per annum from the date of the Order of Entry (January 9, 1980) to the date of judgment and interest at the rate of 10% per annum from the date of judgment (May 29, 1981) until satisfied.

MAYFIELD, C.J., and CRACRAFT, J., dissent.

COOPER, J., not participating.

GEORGE K. CRACRAFT, Judge, dissenting. I am in complete agreement that the law applicable to this case is as stated by the majority and I agree that the so-called "St. Agnes rule" of cemetery appraisal is a sound one when applied in the proper case. If the land condemned is an

integral, though unused, portion of a well established cemetery the property should be appraised on the basis of its value for cemetery purposes, but there are several limitations to this rule. *St. Agnes* and *Mt. Hope Cemetery Association* point out some of them. It is not enough that the condemned area lie within the confines of a well established cemetery. It must be further shown that the area condemned was "available" and "suitable" for that use before it should be valued the same as areas presently being utilized. Another limitation imposed on this rule, as stated by the majority, is that the condemned area's value as burial property must be capable of reasonable ascertainment without resorting to speculation. A third limitation on this rule is set forth in *Laureldale Cemetery Co.* v. *Reading Company* and *Diocese of Buffalo* v. *State of New York,* also cited by the majority. The time at which the tract will be utilized for burial purposes must not be so indefinite as to render the area incapable of present evaluation for the intended purpose.

While the majority appear to have recognized that these three limitations are valid, in my view they have chosen to ignore two of them in this case. The record shows that .43 acres of the condemned land lay in an area that was presently "available and suitable" for burial purposes. It was perfectly proper for the trial court to value that area as burial lots. On the other hand, 1.27 acres lay in varying depths beneath the elevation at which they could be utilized for burials under existing regulation. In my view this tract was not shown to be presently either "available" or "suitable" for burial. Its value, therefore, was not the same as the other area and I depart from the majority's conclusion that it was.

As stated by the majority some of the 1.27 acres in issue was required to be raised by 4 feet. Some of it was only a few inches below the required level. There was evidence that it would take a total of some 8,382 cubic yards of dirt to raise the entire area to the required level. The majority calculate that at the current rate of 1,800 yards displacement per year the result could be accomplished in four years and eight months. There is, however, nothing in the record on which the *cost* of removal of the displaced dirt could be calculated. Based on practical considerations, I also question the

accuracy of their rather speculative conclusion on *de novo* review that the area would be suitable for burial immediately upon completion of the loose earth fill. I recall no evidence tending to prove that it would.

The majority passed by the cost problem by simply stating that the testimony indicates that it would be cheaper for appellee to use the displaced dirt for this purpose than to haul it to another location. It is obvious to me — and must have been to the chancellor — that even in hallowed ground displaced dirt will not move, pack, slope or sod itself. There will be labor and other cost incurred by appellee in moving it. It is noted that the dirt was to be moved to the fill area on a grave by grave basis. The expense and man hours required to move it would be greater, therefore, than if all the dirt were moved at one time or in larger truckloads. It is a matter of common knowledge that a wheelbarrow full of loose dirt will not permanently fill a hole the size of the container. After each heavy rain additional dirt would have to be moved to that site unless the packing process has been accomplished. The difficulties are compounded when as here the dirt-fill is on a slope where erosion must be considered.

In my view the burden was upon the appellee to show to the satisfaction of the court the cost of placing this land in condition for its highest and best use in order that the court might make the proper mathematical deduction for the cost from the established market value of other burial lands. It is my further view that as appellee failed to meet the burden or even introduce evidence bearing on the point, the chancellor's unwillingness to speculate on those costs ought to be sustained by this court. There was no evidence before the chancellor at the trial nor for us on *de novo* review from which the cost of accomplishing this result can be ascertained.

The cost factor might have been minimal. On the other hand it might have been very substantial. The task might have been accomplished in a short period of time or it might not have been accomplished for years. I can't tell from the record what the answers are and I do not understand how the majority has been able to do so.

I would conclude that appellee has failed to sustain its burden of proving the fair market value of its property for burial purposes in its present condition and left that determination to sheer speculation. Absent that proof I agree with the Chancellor that the 1.27 acres could not be valued as burial lots.

I am authorized to state that Chief Judge Mayfield joins in this dissenting opinion.

Richard D. BAILEY and Henry WRIGHT *v.*
Doug SIMMONS and Brooks GRIFFIN

CA 82-218 639 S.W.2d 526

Court of Appeals of Arkansas
Opinion delivered October 6, 1982

Porter & King, by: *Durwood W. King,* for appellant Bailey.

Garland Q. Ridenour, Ltd., by: *Garland Q. Ridenour,* for appellant Wright.

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

GEORGE K. CRACRAFT, Judge. Richard D. Bailey received a compensable injury while working as a carpenter for Henry Wright in the construction of a dwelling on lands owned by Doug Simmons and Brooks Griffin. He contended that at the time of his injury Wright was an uninsured subcontractor of the appellees and that the appellees were therefore liable to him under the provisions of Ark. Stat. Ann. § 81-1306 (Repl. 1976). The Full Commission, reversing the findings of the Administrative Law Judge, found that Wright was not a subcontractor of the appellees but was an independent contractor and solely liable to the appellant under the Act. In reaching this conclusion the Commission ruled that before an independent contractor could be found a "subcontractor" within the meaning of § 81-1306, it must first be established that the one sought to be held liable as "prime contractor" was contractually obligated to a third person for the work being performed by the independent contractor. Appellants Bailey and Wright do not seriously contend that Wright was not an independent contractor. The main thrust of their argument is that the Commission did not apply the correct rule in determining that he was not also a "subcontractor." We do not agree.

In determining whether one is an independent contractor there are many factors to be considered. Whether or not one stands in that status is a question of fact to be determined by the trier of fact. We cannot say that the findings of the Commission are not supported by substantial evidence or that reasonable minds could not have reached that same conclusion.

The evidence was not seriously disputed. The appellee Simmons is a banker and Griffin is a farmer. They jointly purchased a tract of open land and developed it into a subdivision known as Brookwood in the City of West Helena. All of the lots but two had been sold to other individuals. Houses were built on some lots by their owners and other lots were still vacant. Appellees then determined to build houses on the two remaining lots for sale. They contracted with Henry Wright to build and paint the houses. Appellant Bailey was working for Wright on one of the houses when he was injured. The house had not been sold when the injury was sustained.

Under the contract Wright was to supply the labor and, although he selected the materials to be used, they were paid for by appellees. Wright was to be paid an agreed price based on square footage. The price was fixed in the contract and the time taken in completion would not affect it. Wright determined the hours and days that he and his employees would work and he hired and paid all of his employees. Each week he would collect a draw on his contract in order to pay his workers. He and his employees supplied all of their own tools. Wright was free to leave the job at any time and was permitted to have other jobs in progress. He testified that Griffin would come to the site on occasion and could have made recommendations as to changes in the plans but there was no evidence that Griffin attempted to supervise Wright or his employees in any manner.

Bailey testified that he was employed and paid by Wright who also furnished his tools. He had seen Simmons and Griffin at the site but they never gave him any instructions. The testimony of Bailey's father, also an employee of Wright, was substantially the same.

These facts would amply support the finding of the Commission that Wright was an independent contractor rather than a subcontractor unless, as appellant contends, the Commission applied an erroneous rule of law. In reaching its conclusion the Commission stated that under our decisions, in order to have a subcontractor arrangement, the person sought to be charged as "prime contractor" must

have been contractually obligated to another for the work being done at the time of the injury.

Ark. Stat. Ann. § 81-1306 (Repl. 1976) in partinent part is as follows:

> *Subcontractor.* — Where a subcontractor fails to secure compensation required by this Act . . . the prime contractor shall be liable for compensation to the employees of the subcontractor.

The Supreme Court in *Hollingsworth & Rockwood Ins.* v. *Evans,* 255 Ark. 387, 500 S.W.2d 382 (1973) recognized the distinction between a subcontractor and an independent contractor:

> There is, of course, a considerable difference between a subcontractor and an independent contractor. In *Black's Law Dictionary* a subcontractor is defined as:
>
> "One who takes portion of a contract from principal contractor or another subcontractor. * * * One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance."
>
> In *Gaydos* v. *Packanack Wood Dev. Co.,* 166 A.2d 182, at page 184, the New Jersey Court defined a subcontractor in a workmen's compensation case as follows:
>
> "A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted to perform. In other words, subcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor."

In the case now under review the Commission found that the appellees were constructing these houses to offer them for sale. It also found that at the time appellees

contracted with Wright they were under no contractual obligation to deliver to a buyer a home which conformed to agreed plans and specifications. They were not farming out to Wright any part of work they were contractually obligated to perform. Had they contracted with Wright pursuant to a developer-vendor contract with a third person to erect a specific house the issue would be quite different. *Clendening* v. *London Assurance Co.,* 206 Tenn. 601, 336 S.W.2d 535 (1960).

We conclude that this is the distinction made by the Supreme Court in its supplemental opinion on rehearing in *Lofton* v. *Bryan,* 237 Ark. 376, 373 S.W.2d 145 (1963) (Supplemental Opinion on rehearing in 237 Ark. 642, 375 S.W.2d 221 [1964]). In the *Lofton* case Dierks Forrest, Inc. contracted with Bryan to cut and deliver pulpwood from certain lands owned by Dierks. Bryan was paid a stipulated price per cord, was expected to furnish his own labor and equipment and was permitted to perform the contract without any supervision or control by Dierks. Lofton, an employee of Bryan, was injured while cutting the pulpwood. The Supreme Court affirmed the decision of the Commission, finding that Bryan was an independent contractor and not a subcontractor of Dierks. On motion for rehearing it was contended that the case was controlled by *Huffstettler* v. *Lion Oil Company,* 208 Fed.2d 549. The court in its opinion on rehearing made the following distinction between the two cases:

> There it was held that the operator of a bulk plant who distributed Lion products to retailers who had *contracted* with Lion to sell the company's products, was not an independent contractor but a subcontractor . . . .
>
> In the case at bar it is not shown that Dierks had any contract with a third person in connection with the timber, and therefore, it cannot be said that one who is getting out the timber for Dierks is a subcontractor.

In its discussion of *Huffstettler* the court referred to its earlier decisions of *Hobbs-Western Co.* v. *Craig,* 209 Ark.

630, 192 S.W.2d 116 (1946) and *Brothers* v. *Dierks,* 217 Ark. 632, 232 S.W.2d 646 (1950), pointing out that in both those cases on which *Huffstettler* was based the court had found the "prime contractor" to be contractually bound to perform the work in which the subcontractor's employee was engaged at the time of the injury.

The Commission found that Simmons and Griffin were not contractually bound to any third person in connection with the work being done by Wright and his injured employee and exercised no control over either of them. We conclude that both findings are supported by substantial evidence and that the Commission properly applied the law as previously declared by our Supreme Court to those facts.

Affirmed.

FRATERNAL ORDER OF EAGLES, and FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* Wayne KIRBY

CA 82-137 639 S.W.2d 529

Court of Appeals of Arkansas
Opinion delivered October 6, 1982

Joe Benson, for appellants.

H. David Blair, for appellee.

JAMES R. COOPER, Judge. This is a workers' compensation case. Appellee was chairman of the Board of Trustees of the Fraternal Order of Eagles in Midway, Arkansas. As a trustee and chairman, he was required to attend meetings, oversee the general business activity of the lodge, and to take care of the lodge building. He was paid $1.00 per year. Appellee was injured on March 19, 1980, when he suffered a high voltage electrical shock while he was inspecting the roof of the lodge building for leaks. The administrative law judge found that the activity that appellee was doing at the time he was injured was expected and routine, and was an important part of the successful operation of the lodge. He further found that the injury arose out of and in the course of appellee's employment. The full Commission affirmed the administrative law judge's opinion, adopting it as their own. From that decision, comes this appeal.

On appeal, the appellants argue that there is no substantial evidence to support a finding that appellee was an employee at the time of the injury, or that the injury was causally connected to the incident.

In workers' compensation cases, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable. Ark. Stat. Ann. § 81-1323 (c) (Supp. 1981); *Hughes* v. *Hooker Bros. & McKenzie Road Service, Inc.,* 237 Ark. 544, 374 S.W.2d 355 (1964). The Workers' Compensation Act, Ark. Stat. Ann. § 81-1301 *et seq.* (Repl. 1976) is remedial legislation that is to be

liberally construed in favor of the claimant. It is the Commission's function to determine where the preponderance of the evidence lies, but in doing so, doubtful cases are to be resolved in favor of compensation. *Aluminum Co. of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976); *McGehee Hatchery Co.* v. *Gunter,* 237 Ark. 448, 373 S.W.2d 401 (1963); *Williams* v. *National Youth Corps,* 269 Ark. 649, 600 S.W.2d 27 (Ark. App. 1980). The rule of liberal construction applies to the factual determination of whether the injured person is an employee. *Liggett Const. Co.* v. *Griffin,* 4 Ark. App. 247, 629 S.W.2d 316 (1982).

On appeal, we are required to review the evidence in the light most favorable to the Commission's decision and to uphold that decision if it is supported by substantial evidence. In order to reverse a decision of the Commission, the appellate court must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.,* 2 Ark. App. 185, 618 S.W.2d 573 (1981); *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1980).

Arkansas Statutes Annotated § 81-1302 (a) (Repl. 1976) defines "employer" as any individual, partnership, *association,* or corporation carrying on any employment. "Employment" is defined according to whether the employer has the minimum number of employees in order to subject that employer to the requirements of the Workers' Compensation Act. Ark. Stat. Ann. § 81-1302 (c) (Repl. 1976). Arkansas Statutes Annotated § 81-1302 (b) (Supp. 1981) defines "employee" as:

> [A]ny person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession or occupation of his employer. The term "employee" shall also include a sole proprietor or a partner who devotes full time to the proprietorship or partnership and who elects to be

> included in the definition of "employee" by filing written notice thereof with the Division of Worker's Compensation . . . .

Ordinarily, whether a person is an "employee" can be determined by the position that person occupies and its relationship to the alleged employer. However, in those cases where a person occupies more than one position, it becomes necessary to consider the type of work that was actually being done by that person at the time of his injury. *See, Brook's Inc.* v. *Claywell,* 215 Ark. 913, 224 S.W.2d 37 (1949).

In 1B A. Larson, The Law of Workmen's Compensation § 54.21 (1979), Professor Larson discusses the circumstances under which a corporate officer can be found to be an employee and then states:

> With very little difficulty, the courts also extended coverage to corporation officers when their duties were of a *supervisory character,* such as those of a foreman, superintendent of construction, superintendent of a department, and even, with near unanimity, a *general manager,* since these are all jobs that, in ordinary circumstances, would make the holder an employee. [Emphasis added.]

This Court has quoted the above section with approval in *Continental Ins. Co.* v. *Richard,* 268 Ark. 671, 596 S.W.2d 332 (Ark. App. 1980), and *Benefield Real Estate* v. *Mitchell,* 269 Ark. 607, 599 S.W.2d 445 (Ark. App. 1980).

We believe that the standard we have applied to corporate officers is likewise applicable to the executive officers of associations, at least where the sole question is whether the officer is an "employee".[1]

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[1]We realize that the liability of members in a partnership and an association are similar in some ways, and that a partner cannot be an "employee" of a partnership, unless an election has been made to be included as such under the definition. *See, Brinkey Heavy Hauling Co.* v. *Youngman,* 223 Ark. 74, 264 S.W.2d 409 (1954); Ark. Stat. Ann. § 81-1302 (b) (Supp. 1981). However, it is not argued before this Court that the

At the time of injury, appellee and the roofer were on the roof of the lodge building attempting to find a leak in the roof. While examining the roof, appellee came in contact with an air conditioning unit. The appellee suffered an electrical shock from the unit, and immediately left the roof. The type of work that appellee was performing at the time of his injury, is generally associated with the duties of a general manager. Therefore, we affirm the Commission's decision which finds that the appellee was an employee.[2]

Appellants next argue that there is no substantial evidence that appellee's injury was causally connected to the incident. This argument is primarily based on the testimony of Dr. Claude Cooper, a specialist in internal and cardiovascular medicine. He indicated that he was not sure exactly why the mitral valve in appellee's heart malfunctioned when it did. He indicated that he believed that there was a possibility that it was related to the electrical shock that appellee received. Dr. Cooper also testified that a number of things could cause the mitral valve to malfunction, and that appellee had a preexisting disease of the mitral valve.

Our scope of review on this issue is limited to a determination of whether substantial evidence exists to support the Commission's decision. When the testimony of Dr. Cooper is considered, along with the lack of previous symptoms and the time sequence of events, we cannot say that fair-minded persons could not arrive at the conclusion the Commission reached. *See, American Can Company* v. *McConnell,* 266 Ark. 741, 587 S.W.2d 583 (Ark. App. 1979). Even if there were a clear conflict in the medical testimony, which is not present in the case at bar, the resolution of such

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appellee cannot be an "employee" of the association because at once he is an employer and an employee, and thus a contradiction of liability. It should be pointed out that the *Youngman* case was decided by the Arkansas Supreme Court in 1954, with four justices in the majority and three justices dissenting.

[2]The only argument presented in this Court against appellee's status as an employee, was that he was performing executive or supervisory duties at the time of his injury. No question has been raised as to the existence of a "contract of hire."

conflicts is for the Commission, not this Court. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981).

Affirmed.

CRACRAFT, J., concurs.

Carolyn RAINBOLT *v.* William F. EVERETT, Director of Labor and FIRST NATIONAL BANK

E 82-99 639 S.W.2d 532

Court of Appeals of Arkansas
Opinion delivered October 6, 1982

David R. Goodson, for appellant.

Thelma Lorenzo, for appellees.

JAMES R. COOPER, Judge. This is the second time that this case has been before us. In the first case, *Rainbolt* v. *Everett,* 3 Ark. App. 48, 621 S.W.2d 877 (1981), the appellant appealed from a finding that she voluntarily quit her last employment in order to accompany her spouse to a new place of residence but did not immediately enter the new labor market and become available for suitable work. We reversed the Board of Review's decision, holding that the "Employment Security Division may be estopped to deny that appellant made an immediate entry into the labor market because of the apparent representations of its agent." However, consistent with the procedure used by the Arkansas Supreme Court in *Foote's Dixie Dandy, Inc.* v. *McHenry,* 270 Ark. 816, 607 S.W.2d 323 (1980), we remanded the case in order to allow the State the opportunity to present evidence in order to rebut appellant's estoppel defense. The reason that we allowed the State the opportunity to present additional evidence was because this was the first case in which the doctrine of estoppel had been applied to the State where a claimant was seeking unemployment benefits. The State was justified in the lower proceeding in relying solely on the theory that estoppel could not be applied to the State, and therefore there was no reason for the State to present evidence to contradict appellant's estoppel defense.

On remand, three issues remained open. They were estoppel, registration and reporting requirements, and whether the appellant had been doing those things which a reasonably prudent individual would be expected to do to secure employment. The reason these last two issues were left open was because the Appeal Tribunal and the Board of Review had no reason to consider these issues, since they denied unemployment benefits on another ground. Apparently, these are two issues which may be considered by the Appeal Tribunal even if it reverses the Agency's original grounds for disqualification.[1] *See, Teegarden* v. *Director,*

[1]Whether this type of action by the Appeal Tribunal will survive a challenge based on procedural due process is open to debate. *See, Teegarden, supra* (Dissenting opinion).

Ark. Employment Sec., 267 Ark. 893, 591 S.W.2d 675 (Ark. App. 1979).

After this case was remanded, the Appeal Tribunal conducted a hearing, at which the State produced Mr. Keith Johnson and elicited testimony from him regarding the facts giving rise to appellant's estoppel defense. Mr. Johnson testified that he did not remember any conversation with appellant at her initial interview. Mr. Johnson testified that his standard procedure was to set a date for appellant to return in order to view a film concerning her unemployment benefits and to give her literature regarding her unemployment benefits, if he had the literature.

The Board of Review, after reviewing the testimony at the second hearing, discussed Mr. Johnson's testimony in its findings of fact and conclusions of law section of its opinion. Then the Board said:

> The Court of Appeals stated that the sole question involved is whether this claimant immediately entered the labor market. The Board must find that she never left the area in question since her move only involved a distance of 20 to 21 miles. The Paragould job market is considered to be a part of the job market included in the Jonesboro area. It is further noted that in the reply from the employer on 501.3 Notice of Claim Filed Form that "Employee quit of own accord indicating unwillingness to drive distance of approximately 22 miles from home to work". The Board must find that this claimant quit her job for personal reasons.

The issue on which the Board denied appellant her unemployment benefits was not open to the Board on remand. We said in the first case:

> The Agency, Appeal Tribunal, and Board of Review specifically found that appellant did quit to accompany her spouse to a new place of residence, so that issue is not before us. The sole question involved is whether she immediately entered the labor market . . . .

While the Board of Review is not a court, it was created by the legislature and endowed with quasi-judicial functions. The doctrine of *res judicata* applies to administrative proceedings when the agency is acting in a judicial capacity and resolves disputed issues properly before it, which the parties have had an adequate opportunity to litigate. *United States* v. *Utah Const. & Min. Co.,* 384 U.S. 394, 86 S. Ct. 1545, 16 L.Ed.2d 642 (1966); *Andrews* v. *Gross & Janes Tie Co.,* 214 Ark. 210, 216 S.W.2d 386 (1949). Therefore, it also seems appropriate to apply the law of the case doctrine to administrative proceedings, when they involve quasi-judicial functions.

Our opinion in the first case became the law of the case. Under that doctrine, issues which were decided or issues which could have been raised on appeal are conclusively adjudicated and can no longer be litigated by the parties. *See, Ferguson* v. *Green,* 266 Ark. 556, 587 S.W.2d 18 (1979); *Ouachita Hospital* v. *Marshall,* 2 Ark. App. 273, 621 S.W.2d 7 (1981). On remand, the Board was restricted to the three issues which we said remained open.

This case is once again remanded to the Board of Review. On remand, the Board is directed to decide the issue of estoppel on the existing record, without additional hearings or the submission of affidavits, and to certify the record of its decision to this Court within thirty days from the date of this decision. Of course, copies of that decision must be sent to the attorneys of record and any party not represented by counsel, in order that the aggrieved party may file a timely notice of appeal.

Reversed and remanded.

Sherry BICE *v.* Doug BICE

CA 82-36 639 S.W.2d 534

Court of Appeals of Arkansas
Opinion delivered October 6, 1982

Bullock, Hardin & McCormick, by: *William R. Bullock,* for appellant.

Mobley & Smith, for appellee.

LAWSON CLONINGER, Judge. In 1974 appellant, Sherry Bice, was granted a divorce from appellee, Doug Bice, in the Chancery Court of Pope County, and appellant was awarded custody of the parties' minor child. Appellee was ordered to pay into the registry of the court the sum of $26.25 per week for the support of the minor child.

On December 12, 1980, appellant filed her petition asking that appellee be cited for contempt for his failure to make child support payments as ordered by the decree of divorce. The trial court declined to hear the matter of alleged delinquent child support for the reason that appellee had made payments of child support directly to appellant and appellant had accepted the payments.

We feel that the trial court was in error in refusing to enforce the order for child support, and we reverse and remand.

The evidence shows that appellant made an effort to have the direct payments recorded at the clerk's office, even when she lived out of town, and when appellant told appellee to have the payments recorded he told her to do it. The decree directs appellee to make payment through the registry of the court, and equity does not demand that appellant suffer a forfeiture for appellee's violation of the decree.

No local court rule is set out in the record in this case, but statements made by the parties' attorneys, in the presence of the trial judge, indicate that the trial court has a local rule that the court would not entertain a petition for a citation when any payments are made outside the registry of the court.

Uniform Rules for Circuit and Chancery Courts, Rule 12, provides that those rules may be supplemented by a local

court if such supplemental rules do not conflict with the Uniform Rules and a copy is filed with the Clerk of the Supreme Court. It follows, of course, that no local rule can be in conflict with any statute, Supreme Court Rule, or case law.

Entitlement to payment of either alimony or child support vests in the person entitled to it, as the payments accrue, as the equivalent of a debt due. *Sage* v. *Sage,* 219 Ark. 853, 245 S.W.2d 398 (1952). As a general rule, an ex-spouse is entitled to judgment for all past due installments of alimony awarded by a decree of divorce, not barred by the statute of limitations, unless equity cannot lend its aid because of the actions or conduct of the ex-spouse seeking judgment. *Bethell* v. *Bethell,* 268 Ark. 409, 597 S.W.2d 576 (1980). In the case presently before the court, child support payments are involved, and the rule would apply in equal or greater force than it would in alimony cases.

The trial court had no authority to remit the accumulated payments in the circumstances of this case. The trial court is directed to allow appellant to prove the amount of unpaid installments not barred by the statute of limitations by any relevant and competent evidence, and to allow appellee to prove any payments made outside the registry of the court by relevant and competent evidence.

Reversed and remanded.

AETNA CASUALTY & SURETY CO.
v. Joyce A. DYER

CA 82-119 639 S.W.2d 536

Court of Appeals of Arkansas
Opinion delivered October 6, 1982

Ray Baxter, P.A., by: *Ray Baxter*, for appellant.

Barnes, Laney, Gaughan & Singleton, by: *Hamilton H. Singleton*, for appellee.

DONALD L. CORBIN, Judge. Procedurally, this is a bizarre case. Joyce A. Dyer, claimant, was employed by General Dynamics when she sustained a compensable injury on August 17, 1977. Appellant, Aetna Casualty & Surety Company, was the insurance carrier for the company and provided medical benefits and temporary total disability benefits during the period of time that claimant was off work.

Claimant sustained another compensable injury on September 28, 1979, approximately sixteen months after returning to work. In the meantime, General Dynamics had

changed insurance carriers and was covered by The Insurance Company of North America (INA).

On January 8, 1980, a hearing was held at which only the claimant and INA were present. Aetna had no knowledge of the injury to claimant on September 28, 1979, and had no notice of the January 8, 1980, hearing. The Administrative Law Judge ruled the injury sustained by the claimant on September 28, 1979, was a recurrence and not an aggravation. He dismissed INA and made Aetna a party. He directed that Aetna be furnished a copy of the transcript of the testimony and, upon receipt of same, Aetna was given fifteen days in which to state its position.

Aetna's claim representative testified that he received a copy of the transcript about January 30, 1980, and wrote a letter dated February 2, 1980, taking the position that the claim against Aetna was barred by the statute of limitations.

On March 24, 1980, Aetna requested a hearing. It was held on April 3, 1980, before a different Administrative Law Judge. It appears from the record that Aetna did not receive a copy of the January 10, 1980, decision and was not aware of its existence until the time of the second hearing. INA was present and contended that by virtue of the January 10, 1980, opinion any claim against INA was barred by the doctrine of *res judicata.* Aetna, in addition to raising the statute of limitations defense, argued that INA should remain a party and proof should be allowed as to whether claimant had sustained an aggravation or recurrence.

The Administrative Law Judge set aside the decision of the Administrative Law Judge rendered on January 10, 1980, finding an aggravation and ordered INA to pay benefits.

On February 9, 1981, the full Commission held that the second Administrative Law Judge had no authority to set aside the decision of the first Administrative Law Judge. It remanded the case for a third hearing to determine if any liability existed on the part of Aetna.

At the third hearing, the Administrative Law Judge

stated that the effect of the full Commission's opinion of February 9, 1981, was to reinstate the January 10, 1980, opinion by the first Administrative Law Judge which found that claimant's current condition was a recurrence of the August 17, 1977, injury and that she did not sustain an aggravation of her condition on September 28, 1979.

The procedural problems involved in this case started at the first hearing. When it became apparent to the Administrative Law Judge at the hearing of January 8, 1980, that a third party was to be brought in, he should have continued the case until Aetna could be properly notified and made a party to the claim. But this did not take place and the bottom line is that Aetna has been deprived of procedural due process. *Pritchett* v. *Director of Labor,* 5 Ark. App. 194, 634 S.W.2d 397 (1982), *McBride* v. *Daniels,* 269 Ark. 705, 600 S.W.2d 425 (1980).

By appearing at the second hearing on April 3, 1980, Aetna was accorded procedural due process of law. However, the full Commission reversed that decision and remanded for proceedings to determine if any liability existed on the part of Aetna. The problem of procedural due process as to Aetna arose again because, at this third hearing, the Administrative Law Judge limited the issue to whether Mrs. Dyer's claim against Aetna was barred by the statute of limitations. He never addressed the issue of liability. The polestar of procedural due process is the opportunity to be heard and is an essential requisite of due process of law in judicial proceedings.

Appellee argues that Aetna should have appealed the January 10, 1980, decision. However, Aetna had no standing to appeal that decision since it was not a party.

Accordingly, we reverse and remand with directions for a hearing to be held to determine the rights of the claimant as against Aetna for any compensable injury she may have sustained on September 28, 1979, while in the employ of General Dynamics.[1]

[1]For a similar result with a similar set of facts, see *State Dept. of Highway* v. *Burgess Construction Co.,* 575 P.2d 792 (Alaska 1978).

Reversed and remanded.

GLAZE and COOPER, JJ., dissent.

TOM GLAZE, Judge, dissenting. I dissent. In arriving at its decision, the majority assumes the Commission was correct in finding that the Administrative Law Judge's decision filed January 10, 1980, was final. I cannot agree.

In *Cooper Industrial Products* v. *Meadows,* 269 Ark. 966, 601 S.W.2d 275 (Ark. App. 1980), we found a Commission's order not final and appealable. In so doing, we adopted the following rule:

> For a judgment to be final and appealable, it must in form or effect: Terminate the action; operate to divest some right so as to put [it] beyond the power of the court to place the parties in their former condition after the expiration of the term; dismiss the parties from the court; discharge them from the action; or conclude their rights to the matter in controversy. *Allred* v. *National Old Line Insurance Company,* 245 Ark. 893, 895-896, 435 S.W.2d 104 (1968) quoting *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W.2d 605 (1967).

Cooper Industrial Products at 969, 601 S.W.2d at 277.

The primary issue in this case is whether the claimant's condition is due to a recurrence of the August 17, 1977, injury or to an aggravation of her condition which occurred on September 28, 1979. If it were a recurrence, Aetna Casualty was liable for benefits, but if it were an aggravation, INA must pay. In his January 10 opinion, the Judge, acting on evidence presented by only the claimant and INA, found that the injury was a recurrence. At the same time, the Judge dismissed INA and directed Aetna Casualty to be made a party to the proceeding. The Administrative Law Judge's order dated January 10 neither terminated the proceeding nor concluded the parties' rights to the matters in controversy. In short, the proceeding merely *continued* in order for the Administrative Law Judge to determine whether the

claimant was entitled to benefits from Aetna — this time without INA as a party.

The January 10 order by the Administrative Law Judge simply did not end this controversy or any separable branch of it. Rather, it is an attempt to try a claim piecemeal which involves one major issue that affects three indispensable parties, *viz.*, INA, Aetna and the claimant, Dyer. Obviously, Dyer has little interest in whether INA or Aetna pays her benefits so long as they are paid. Both INA and Aetna should have been afforded the opportunity to offer evidence in support of their respective contentions as well as to present rebuttal evidence if necessary. Until such a hearing is conducted, neither an Administrative Law Judge nor the Commission can decide the respective parties' rights in a manner which will finally terminate this proceeding.

In accordance with the foregoing, I would find that the January 10 Administrative Law Judge's order was not final, and that the Judge has continuing jurisdiction to proceed in this cause in a manner which would properly terminate it. This would include joining both INA and Aetna as parties so that each can present fully whatever evidence is necessary to conclude its respective rights in controversy. I believe the Judge's earlier dismissal of INA was necessarily without prejudice, and since the Commission erred in finding the January 10 order final, its subsequent decisions on appeal should be set aside and held for naught.

COOPER, J., joins in this dissenting opinion.

Ronald OSTERHOUT *v.* William F. EVERETT, Director of Labor, and VALMAC INDUSTRIES

E 82-157 639 S.W.2d 539

Court of Appeals of Arkansas
Opinion delivered October 6, 1982

Appellant, *pro se.*

Thelma Lorenzo, for appellee.

DONALD L. CORBIN, Judge. This is an unemployment compensation case in which appellant has appealed from the denial of benefits by the Board of Review. Appellant was denied benefits under the provisions of Ark. Stat. Ann. § 81-1106 (a) for the reason that he voluntarily quit his last job without good cause connected with the work. We affirm.

The record reveals no dispute as to the controlling facts as found by the Board of Review. On January 13, 1982, the appellant gave his notice that he would resign as of January 22, 1982. Appellant stated that he submitted his resignation because he had been convicted of a felony and needed $750.00 to continue his defense. He was attempting to obtain the money by resigning in order to receive payment for accrued vacation time. On January 18, 1982, the court hearing his criminal case found claimant to be an indigent and ordered that state funds be used to continue appellant's appeal thereby removing appellant's necessity to resign. Appellant informed his employer that he wanted to withdraw his resignation but the employer refused. The employer informed claimant that his resignation had been accepted.

"In appellate review under Ark. Stat. Ann. § 81-1107 (d) (7) making the findings of the Board of Review, as to the facts, conclusive, if supported by evidence and in the absence of fraud, and confining judicial review to questions of law, we must give the successful party the benefit of every inference that can be drawn from the testimony. We are

required to view the testimony in the light most favorable to the successful party, if there is any rational basis for the board's findings based upon substantial evidence." *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W.2d 954 (1978), *Rose* v. *Daniels,* 269 Ark. 679, 599 S.W.2d 762 (1980).

The sole question to be addressed here is one of first impression in this state. The issue is whether an employee who voluntarily resigns his employment without good cause connected with the work is entitled to unemployment benefits if he attempts to withdraw his resignation prior to his last day of employment with that employer.

Our research has disclosed that this issue has been addressed in other jurisdictions. The Supreme Judicial Court of Maine in *Guy Gannett Publishing Co.* v. *Maine Employment Security Commission,* 317 A.2d 183 (1974), summarized the decisions in the states of Pennsylvania, Connecticut and Louisiana on this issue. Additionally, we note that New Jersey has also decided this question in *Nicholas* v. *Board of Review,* 171 N.J. Super. 36, 407 A.2d 1254 (1979).

Although the Arkansas Employment Security Law is remedial in nature and must be liberally construed, *Harmon* v. *Laney,* 239 Ark. 603, 393 S.W.2d 273 (1964), the Act must be given an interpretation in keeping with the declaration of state policy, *Little Rock Furniture Mfg. Co.* v. *Commissioner of Labor,* 227 Ark. 288, 291, 298 S.W.2d 56 (1947). Ark. Stat. Ann. § 81-1101 (Repl. 1976) sets forth the State's public policy of setting aside unemployment reserves to be used for the benefit of persons *unemployed through no fault of their own.* We cannot say that appellant has become unemployed through no fault of his own since it was appellant's own action of resignation which set in motion the chain of events which ultimately resulted in his unemployment.

We adopt the reasoning of the Supreme Judicial Court of Maine in *Guy Gannett Pub. Co.* v. *Maine Employment Security Commission, supra,* which stated:

A resignation, when voluntary, is essentially an un-

conditional event the legal significance and finality of which cannot be altered by the measure of time between the employee's notice and the actual date of departure from the job. An employer who accepts an unequivocal notice of resignation from an employee is entitled to rely upon it, to the extent of preparing in one manner or another for the employee's absence, unless, of course, the employer chooses to return to *status quo* by rehiring the employee, or accepting a retraction of the notice.

Absent such action by the employer, however, we are unable to say that a resignation matures *only* upon the final, physical exit of the worker from the job site. Were this the case, the employer would be unable to hire a replacement or otherwise adjust his work force except at his peril, subject to the wishes of an indecisive employee.

We affirm the decision of the Board of Review.

Anne Seamans GOOCH *v.* Billy Ray SEAMANS

CA 82-151 639 S.W.2d 541

Court of Appeals of Arkansas
Opinion delivered October 6, 1982

Wilson, Grider & Castleman, by: *Murrey L. Grider,* for appellant.

Burris & Berry, for appellee.

TOM GLAZE, Judge. This case involves a petition to modify a decree of divorce wherein appellant requested permission to remove the parties' children from Arkansas to Oklahoma. The trial court denied appellant's petition, and she filed this appeal. We reverse.

In *Ising* v. *Ward,* 231 Ark. 767, 332 S.W.2d 495 (1960), the Supreme Court announced the general rule that the parent having custody of a child is ordinarily entitled to move to another state and to take the child to the new domicile. (*See also, Antonacci* v. *Antonacci,* 222 Ark. 881, 263 S.W.2d 484 [1954], in which the court permitted the mother to take the parties' child from Arkansas to California).

Here, the parties were divorced in 1978, and appellant was awarded custody of their two children, ages eight and ten years. Appellant has since remarried, and her husband is employed and resides in Elk City, Oklahoma. Appellant brought this action to obtain permission of the court to move to Oklahoma with the children. Both children expressed a willingness to go. In fact, appellant told the children that if they did not like it in Oklahoma, they could return and live with their father. Except for the visitation

difficulties which are created by the move to Oklahoma, we find nothing in the record which supports the trial court's denial of appellant's removing the children from the state. Concerning any visitation problems attendant to the move, appellant informed the court that she would cooperate in working out reasonable visitation arrangements so the children can see their father. Therefore, we reverse and remand this cause to the trial court to grant appellant's petition to remove the children to Oklahoma and to establish reasonable visitation privileges for the appellee.

We find no merit in appellee's contention that the trial court's action concerning appellant's petition was premature since his counterclaim seeking custody was pending and undecided. Although the best interests of the children and judicial economy may be served by considering all custody and visitation issues at the same time, there are often reasons why the court may find it impossible to do so. We find nothing in the record which reflects the court abused its discretion in acting on appellant's petition and delaying action on appellee's counterclaim for custody.

Reversed and remanded.

SMITH'S STORE *v.* Atha Lee KIRKER

CA 82-182 639 S.W.2d 751

Court of Appeals of Arkansas
Opinion delivered October 13, 1982

[redacted]

Larry Hartsfield, for appellant.

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty,* for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal by an uninsured employer from an award of the Arkansas Workers' Compensation Commission.

In an opinion filed June 11, 1980, an administrative law judge held that appellee Atha Lee Kirker sustained an accidental injury on January 26, 1979. The law judge held that appellee was temporarily totally disabled through May 25, 1979, and had sustained a permanent partial disability of at least 10% to the body as a whole. All reasonable medical expenses were ordered paid and determination with regard to additional disability was held in abeyance pending the results of an evaluation for possible vocational rehabilitation. This award was not appealed.

Another hearing was held in April of 1981 and on November 5, 1981, an administrative law judge filed an opinion on that hearing. The opinion held that due to the appellant's failure to timely pay the benefits allowed by the opinion of June 11, 1980, a 20% penalty should be imposed pursuant to Section 19 (f) of the Workers' Compensation Law, Ark. Stat. Ann. § 81-1319 (f) (Repl. 1976). The opinion also found that appellee had sustained a permanent partial disability of 35% to the body as a whole. (This was a 25% disability allowance added to the 10% allowed in the opinion of June 11, 1980.)

Appeal was taken from the November 5, 1981, award and the Full Commission affirmed and adopted that award on February 9, 1982. It is from the February, 1982, decision of the commission that this appeal comes.

The appellant, Smith's Store, first contends that the 35% permanent partial disability award is in error. In that regard, the appellee, Mrs. Kirker, testified that she had a partial ninth grade education, and no particularized skills. She said that her injury resulted in surgery for the removal of a herniated disc and that when her doctor released her to return to work on May 25, 1979, she did not return to work for Smith's Store, but worked six to seven weeks as a cashier at a club, a month at a garment factory, and four days at a shoe factory, before being forced to quit in each instance by continued back and leg pains. Because of pain and discomfort she was unable to perform certain household tasks and social activities that she was able to perform prior to the injury.

Concerning vocational rehabilitation, Mrs. Kirker testified that she had difficulty in meeting with her counselor regularly due to her physical condition and inclement weather, but they had discussed retraining for a bank teller's position. She indicated she was pursuing a bank teller's position *at minimum wage* in the Salem, Missouri, area for on-the-job training, and stated she felt she would be able to do this work within the limitations of her physical condition and that hopefully the teller job would be offered to her soon.

It is well settled that the commission's award of permanent partial disability for loss of use of the body as a whole is to compensate the injured employee for functional or anatomical disability and loss of the use of the body to earn substantial wages, *Glass* v. *Edens,* 233 Ark. 786, 346 S.W.2d 685 (1961). The functional or anatomical loss percentage is fixed by the commission based on the medical evidence in the record, *Arkansas Best Freight System, Inc.* v. *Brooks,* 244 Ark. 191, 424 S.W.2d 377 (1968). In the instant case, Mrs. Kirker's doctor said her anatomical loss was 10% to the body as a whole.

The wage loss disability — or the degree to which the injury affects the ability to obtain or hold employment — is fixed by the commission based on a consideration of the employee's age, education, experience, and other matters affecting wage loss. *Oller* v. *Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In the instant case, the commission fixed Mrs. Kirker's wage loss disability at 25% to the body as a whole.

Appellant has argued that, because appellee may secure a teller's position at a salary higher than her previous wage with appellant, appellee has not suffered a wage loss. This ignores the fact that 25% of the 450 weeks which the compensation law assigns to the body as a whole amounts only to 112.5 weeks, and at the time of the April, 1981, hearing the appellee had already suffered a substantial wage loss during the two years since her May, 1979, release to return to work. In addition, while appellee testified she hoped to be offered the teller's position, there was no assurance she would actually obtain the position. Considering all the evidence in the record, we cannot say the commission, having the advantage of its own superior knowledge of industrial demands, limitations, and requirements, erred in awarding appellee 35% permanent partial disability, *Oller, supra.*

The appellant also contends that the commission erred in granting the appellee a 20% penalty on the benefits not timely paid pursuant to the June 11, 1980, award. (This appeal does not involve any penalty for failure to pay the additional 25% disability fixed by the November, 1981, award.)

The June 11, 1980, award ordered the payment of temporary total disability from injury on January 26, 1979, through the end of the healing period on May 25, 1979, and 10% permanent partial disability to the body as a whole. The first payment of any of these items was on September 22, 1980, when appellee's attorney was paid $500.00 by appellant. At that time all the items ordered paid by the June, 1980, award were much more than 15 days past due. Section

19 (f) of the Workers' Compensation Law, Ark. Stat. Ann. § 81-1319 (f) (Repl. 1976) provides:

> If any installment, payable under the terms of an award, is not paid within fifteen (15) days after it becomes due there shall be added to such unpaid installment an amount equal to twenty (20) per centum thereof . . . .

In view of the above statute and the fact that the payments provided by the June, 1980, award were past due before any payment was made, the commission had the authority to assess a 20% penalty on the benefits allowed by the June, 1980, award. The penalty, however, as fixed by the November 5, 1981, opinion of the law judge and affirmed by the commission applies only to the temporary total disability and the 10% permanent partial disability. The penalty allowed by Ark. Stat. Ann. § 81-1319 (f) does not apply to medical bills and attorney fees. *Model Laundry & Dry Cleaning* v. *Simmons,* 268 Ark. 770, 596 S.W.2d 337 (Ark. App. 1980); *Frank J. Rooney, Inc.* v. *Pitts,* 268 Ark. 911, 597 S.W.2d 120 (Ark. App. 1980).

The record reveals that the entire amount owed on the June, 1980, award was listed in a writ of execution issued by the Jackson County Circuit Clerk pursuant to Ark. Stat. Ann. § 81-1325 (c) (Repl. 1976). By agreement, some payments were paid on that amount and appellant argues that appellee forfeited or waived her right to ask for the penalty when she agreed to allow appellant to make those installment payments. This contention might warrant further consideration if appellant had timely paid the installments as agreed, but payments were not made as promised. The writ of execution was eventually levied and the award was finally paid shortly before the second hearing in April of 1981.

Appellant calls our attention to adverse economic conditions in the farming industry between June 11, 1980, and April 8, 1981, and says that Smith's Store, a farm supply business, was also adversely affected. Contending that both this court and the commission have the discretionary power

to refuse to assess the penalty, appellant says that, in fairness and equity, it should not be assessed.

If it is a matter of discretion, we find no abuse in that regard by the commisson and, since the evidence supports the commission's decision, we find no reason why it should not be affirmed.

Affirmed.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I agree with the result reached by the majority but for an additional reason. Appellant argued that appellee might secure a job at a higher salary than appellant paid her and that appellee therefore suffers no wage loss. The majority correctly points out that appellee has no assurance she will obtain the job she seeks. Meanwhile, appellee has lost wages for the two-year period since she was released to return to work.

I note that even had appellee obtained a new job at the same wage as she had received previously, this fact alone would not negate entitlement to lost wages. As the Supreme Court recognized in *Abbott* v. *C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968), the fact that a claimant earns as much money after as before an injury does not necessarily mean that the claimant has the "capacity" to earn that much. Thus, the record, as is, supports a wage loss for the appellee. But even if appellee had acquired another job at the same or higher salary, this fact *alone* is not sufficient to set aside a wage loss finding by the Commission if there is other evidence to support its finding of incapacity as that term is defined in Ark. Stat. Ann. § 81-1302 (e) (Repl. 1976), and considered in *Abbott, supra.*

Jeannie SMITH *v.* STATE of Arkansas

CA CR 82-54 640 S.W.2d 805

Court of Appeals of Arkansas
Opinion delivered October 13, 1982
[Rehearing denied November 17, 1982.*]

*MAYFIELD, C.J., would grant rehearing.

Dowd, Harrelson & Moore, by: *Gene Harrelson,* for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant, Jeannie Smith, was convicted by jury verdict of conspiring to commit capital murder in violation of Ark. Stat. Ann. § 41-707 (Repl. 1977), and received a sentence of seventeen years in prison.

The charge stemmed from the shooting death of appellant's husband, Wade K. Smith, which occurred on March 14, 1979 in Miller County. The appellant was alleged to have conspired with Fred Bloch, Linda Bloch and Larry Welch, whereby Larry Welch would cause the death of Wade K. Smith for money to be paid by appellant.

In a totally unrelated event, the state charged John L. Young and Allen Rogers with the murder of Wade K. Smith

and with conspiracy to murder Smith. The alleged conspiracy between Young and Rogers had no connection or relationship with the charges against appellant.

Appellant alleges numerous errors in the trial court and since we find merit in two of her points for reversal, we will discuss those points likely to arise in the retrial of the case.

First, appellant argues that the trial court erred in allowing oral statements of appellant into evidence following an alleged illegal arrest.

Appellant was arrested at a Houston, Texas airport at approximately 6:00 a.m., August 15, 1980, on a Texas fugitive warrant issued by a justice of the peace upon oral assertions by a Bowie County, Texas deputy sheriff that appellant was wanted on an Arkansas warrant. Appellant's position is that the arrest was illegal because no written affidavit or complaint was filed by the deputy sheriff, and that any statement given by appellant in the hours following the arrest would be inadmissible.

It is not necessary to determine whether the arrest was lawful, because, in any event, the appellant's oral statements were not tainted by the arrest. In *Sanders* v. *State*, 259 Ark. 329, 532 S.W.2d 752 (1976), the Arkansas Supreme Court held that pursuant to *Brown* v. *Illinois*, 422 U.S. 590 (1975), an illegal arrest will not vitiate every confession made subsequent thereto. A confession which is made by an act of free will unaffected by the initial illegality will not be excluded at trial. This determination of the voluntariness of a confession must be answered on a case-by-case basis, applying the standard of *Wong Sun* v. *United States*, 371 U.S. 471 (1963); i.e., "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

In the instant case, the evidence shows that appellant was read her *Miranda* rights at the airport and was transported by automobile from the airport to the home of a

Texas magistrate. A stop was made at a sheriff's sub-station to call the judge, and while there appellant asked that her sister be notified about what had occurred and what to do with her children and her car. The message was phoned in by a Texas officer at the sub-station. At no time did appellant ask to speak to an attorney. Within an hour after her arrest appellant appeared before the magistrate. The magistrate advised appellant of her *Miranda* rights and appellant indicated that she understood those rights. She did not request to see an attorney.

Appellant was then driven by automobile to Texarkana, Texas, and on the way, they stopped for breakfast. Appellant was advised that she had been implicated in the murder of Wade Smith by statements made by Linda Bloch. Appellant stated that what Linda Bloch said was true about arranging for the murder of Wade Smith. Appellant asked to talk to the Miller County prosecuting attorney, and the prosecuting attorney again reminded her of her *Miranda* rights. Appellant then indicated her involvement in helping set up the murder and related a previous attempt that had failed. Appellant then asked to speak to her attorney about extradition, and she talked with her attorney for some 45 minutes. At 3:00 p.m. appellant was taken before a Bowie County magistrate where bond was set.

In *Pearson* v. *State,* 414 S.W.2d 675 (Tex. 1967), the Court of Criminal Appeals of Texas held that every confession following an illegal arrest is not ipso facto inadmissible. The confession must be tainted by an illegal arrest. In *Pearson,* the court held that the state had shown by clear and convincing evidence that the connection between the arrest and the statement had become so attenuated as to dissipate the taint. The court noted that defendant had been taken within twenty-three minutes after arrest before a magistrate who informed defendant of his constitutional rights and afforded the defendant an opportunity to obtain assistance of counsel. Furthermore, the court found that the record did not show that defendant had been held incommunicado for an extended period of time, denied food or drink, or critically deprived of his capacity for self-determination.

Based upon the facts of this case, the trial court properly ruled as admissible the oral statements of appellant since they were freely and voluntarily given and not the product of an illegal arrest. The illegal taint, if any, was removed by the appellant being advised of her *Miranda* rights on three occasions; being taken before a Texas magistrate within an hour of her apprehension; being provided with breakfast and her family being advised where she was; and by being granted access to her attorney upon request. There is no evidence that the improper arrest, if improper, was exploited by the state to elicit a statement.

Second, appellant argues that the trial court improperly permitted Linda Bloch to testify concerning statements of another co-conspirator. We agree that Linda Bloch's testimony was inadmissible, because she was permitted to testify concerning what Fred Bloch told her after the object of the conspiracy was completed.

Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), Rule 801 (d) (2) (v) provides:

> A statement is not hearsay if: . . . it is . . . a statement by a co-conspirator during the course and in furtherance of the conspiracy.

The statements made by Fred Bloch to Linda Bloch related the details of the murder, which had been related to Fred Bloch by Larry Welch, after the death of Wade Smith, and Fred Bloch then told Linda Bloch of Larry Welch's flight from the state.

Appellee argues that the conspiracy continued after the death of Wade Smith by actions concealing the identity of the actual murderer. That argument was clearly rejected in *Krulewitch* v. *U.S.*, 336 U.S. 440 (1949), which held that a statement made by a co-conspirator after the central aim of the conspiracy is made is not admissible and that the exception to the hearsay rule does not extend to concerted action to conceal the crime. Therefore, we hold that this point merits a reversal.

Third, appellant argues that the trial court improperly refused to allow the introduction of a videotaped confession of John Young. The court did allow a transcription of the tape to be read into evidence, and the transcription itself was introduced as an exhibit, but the court refused to admit the videotape itself. Appellant attempted to introduce the videotape in order to impeach the testimony of John Young, and in an effort to permit the jurors to determine firsthand from the videotape the demeanor of John Young and allow the jury to test his credibility while making the confession. Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), Rule 804 (b) (3), provides that a statement against interest is not excluded by the hearsay rule if the declarant is unavailable as a witness and the statement tends to subject him to criminal liability.

Under Rule 804 (a) (3), a witness is "unavailable" if he testifies to a lack of memory on the subject matter of his statement, and John Young testified to a lack of memory concerning his alleged confession. Inasmuch as the trial judge admitted the statement into evidence for the purpose of impeachment, and that finding conforms to Uniform Rule 804, the only question we are concerned with is whether the videotape itself is admissible. Rule 1001 (2) of the Uniform Rules of Evidence defines "photograph" to include videotapes, and Rule 1002 provides that to prove the content of a photograph, the original is required except as otherwise provided by rule or statute. We hold that the videotape is admissible. The tape is the original evidence of John Young's statement, and the transcribed statement taken from the tape was a substitute. Appellant was entitled to have the original evidence of the statement introduced.

Fourth, appellant argues that the trial court erred in refusing to hear defense motions because they were not timely filed, or alternatively, the court abused its discretion in refusing to grant a continuance. We do not review this point, since it is unnecessary in light of the fact that there will be a new trial. *See Patterson* v. *State,* 267 Ark. 436, 591 S.W.2d 356 (1979).

Fifth, appellant argues that the court erred in refusing

to allow Officer Bolton's testimony concerning statements of John Young about the contents of Wade K. Smith's truck. During John Young's confession, he apparently made statements to Officer Bolton concerning the contents of the truck. This statement was not introduced into evidence, and the statement by Mr. Young was apparently lost by the sheriff's office. At any rate, it was not introduced into evidence and furthermore was not within the statements of John Young presented at the hearing for an offer of proof. During cross examination, counsel for the defense attempted to ask Officer Bolton questions concerning John Young's statement. The state objected to the testimony on the basis that it was hearsay. Counsel for the defense cited Rule 804 (b) (3) of the Uniform Rules of Evidence, which is an exception to the hearsay rule if the declarant is unavailable as a witness and the statement tends to subject him to criminal liability. However, this rule also provides:

> A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

This rule was discussed at length in the case of *Welch* v. *State*, 269 Ark. 208, 599 S.W.2d 717 (1980). The question is whether the trial judge abused his discretion in finding that the statement was not clearly shown to be trustworthy. Trustworthy means deserving of confidence; dependable; reliable.

In the instant case, the trial judge never made a preliminary finding as to the trustworthiness of the statement. In fact, the trial judge did not give a basis for excluding the statement when requested by counsel. Since this case is to be remanded back to the trial court for a new trial on other points, if this situation arises again on a new trial, the trial judge should make a determination regarding whether or not there are corroborating circumstances which clearly indicate the trustworthiness of the statement pursuant to Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, Rule 804 (b) (3).

Appellant's sixth point for reversal is that the court erred in denying defendant's motion to disqualify Deputy Prosecuting Attorney Charles Walker. The prosecuting attorney, Jim Gunter, was present when appellant made oral statements indicating her guilt at the Texarkana Sheriff's Office. Consequently, Mr. Gunter was called as a witness for the state to relate the conversation he had with appellant at the time. Mr. Gunter withdrew as counsel for the state and Charles Walker was appointed to try the case for the state as deputy prosecuting attorney. Appellant filed a motion to disqualify the deputy from trying the case because he was a law partner of Mr. Gunter's. Appellant argued that any of the prosecuting attorney's deputies were disqualified and that a special prosecutor should be located.

This issue was answered in the case of *Ford* v. *State,* 4 Ark. App. 135, 628 S.W.2d 340 (1982). In that case it was held that a trial court did not abuse its discretion in failing to disqualify the entire staff of a prosecuting attorney who was to appear as a witness in a criminal trial. Pursuant to *Ford, supra,* we hold that it was not an abuse of discretion for the trial judge to refuse to appoint a special prosecutor in this case when the prosecuting attorney was to be a witness.

Appellant's seventh point for reversal is that the court erred in refusing to allow appellant to call Deputy Prosecuting Attorney Kirk Johnson as a witness. Appellant attempted to call Mr. Johnson as a witness to testify to a phone call he allegedly received from Wade Smith two days before he was killed, advising him that he wanted to speak with him. The purpose of this testimony would be to show that Wade Smith was to implicate John Young and Allen Rogers in a charge of rape and consequently, give them a motive for murder. This would, in turn, tend to exonerate appellant from guilt. However, this statement was clearly hearsay and properly excluded under Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, Rule 801 and Rule 802 (Repl. 1979). We hold that this does not come within any of the exceptions to the hearsay rule and appellant has not cited us to any rule. The trial judge's decision to exclude this statement was proper on the basis that it was hearsay not within any exception.

This case is reversed and remanded for a new trial.

MAYFIELD, C.J., dissents.

GLAZE and CORBIN, JJ., would also reverse as to Point 6.

CRACRAFT, J., not participating.

MELVIN MAYFIELD, Chief Judge, dissenting. The majority opinion holds that this case should be reversed for two reasons: (1) a co-conspirator's statement made after the conspiracy ended was introduced into evidence, and (2) a videotaped confession of a witness was not allowed into evidence.

I do not think the case should be reversed for either reason.

Appellant was charged with capital murder, Ark. Stat. Ann. § 41-1501 (Repl. 1977), and with conspiracy to commit capital murder, Ark. Stat. Ann. § 41-707 (Repl. 1977). She was found guilty of the conspiracy charge which only requires an agreement with someone to aid in the planning or commission of the crime and an overt act in pursuance of the conspiracy.

There was testimony by Linda Bloch that appellant told Linda that appellant's husband, Wade Smith, abused her and her children; that there was a $100,000.00 life insurance policy on Wade's life; that it would be worthwhile if someone killed him; and that she wanted to know if Linda's husband, Fred, would do something about it.

Linda testified that she told Fred about appellant's statement and as a result there was a discussion between appellant and Fred, with Linda present, in which Fred agreed to get in touch with someone who would do the job. Linda said Fred called Larry Welch, with whom Fred had been in prison, and Larry came to Texarkana from California and stayed at the Bloch home. An attempt on Wade Smith's life failed and Larry went back to California.

Later, Linda was present when Fred and appellant discussed making a second attempt on Wade's life. They agreed it would be done at Wade's farmhouse and that appellant would pay $10,000.00 to have it done. Linda said appellant gave Fred money for Larry's expenses to come back to Texarkana; that he arrived on a Tuesday and that same day Linda drove Fred and Larry out to Wade's farmhouse for them to look it over; and that the next morning Fred and Larry got up early and left the house.

Linda testified that Fred was supposed to meet Wade at the farmhouse that morning to help Wade with some doors and, at Fred's request, she called Wade and told him Fred would be a little late but would be there. Later that morning Larry called her and said it was "okay" which was a planned signal that meant Wade had been killed. She then went to appellant's place of business and told her that Larry had called and appellant gave Linda a package to give Fred, Linda testified that Fred had told her that the package would be the money appellant was to pay for Wade's killing.

This evidence was sufficiently connected by other evidence in the record, especially appellant's statement made shortly after arrest, so as to be admissible under Uniform Evidence Rule 801 (d) (2) (v) and the cases of *Patterson* v. *State,* 267 Ark. 436, 591 S.W.2d 356 (1979) and *Smithey* v. *State,* 269 Ark. 538, 602 S.W.2d 676 (1980). Both appellant's brief and the majority opinion concede this. But what they contend was inadmissible is Linda's testimony that two days after Wade Smith's funeral Fred told her that Larry told him that Larry got in the back window, waited in the hallway for Wade, and when Wade came in the house Larry shot him.

I submit that the admission of that evidence is not prejudicial error. All it can prove is that Larry in fact killed Wade and that was not even necessary for appellant to be guilty of conspiracy. Without that evidence, there was evidence *conceded to be admissible,* that Larry killed Wade. And as proof that there was no prejudice, the jury did not find appellant guilty of capital murder and fixed her sentence for conspiracy at only seventeen years instead of the

maximum of fifty years which it could have fixed. Ark. Stat. Ann. §§ 41-707 and 41-901 (Repl. 1977).

In *Weber* v. *State,* 250 Ark. 566, 466 S.W.2d 257 (1971), the court said if the testimony objected to was inadmissible it certainly had not been demonstrated that it was prejudicial and, therefore, no error could have occurred. In *Martin* v. *State,* 248 Ark. 188, 451 S.W.2d 453 (1970), the court said that the admission of evidence showing motive was not prejudicial in a prosecution for second degree murder where the defendant was convicted of the lesser offense of voluntary manslaughter in which motive is not a necessary element.

The court's refusal to admit the videotaped confession involved the testimony of a witness by the name of John Young who was called to the stand by the defense. This man was asked if he murdered Wade Smith and he said he did not. He admitted, however, that he had previously given a statement in which he stated he did kill Smith but testified that he was forced to make the statement by the police who locked him up in jail, without a phone call or lawyer, and who hit him in the mouth and "stuff like that."

A statement by Young had been videotaped and this was offered in evidence by appellant and overruled by the court. I fail to see any reversible error in the trial court's refusal to admit the tape.

In *Donnelly* v. *United States,* 228 U.S. 243, 273, the United States Supreme Court said:

> In this country there is a great and practically unanimous weight of authority in state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate the accused.

As *Donnelly* explained, such evidence is "mere" hearsay. Under Uniform Evidence Rule 801, however, a prior statement is not hearsay and may be considered as substantive evidence in a civil case *but this is not true in a criminal case* unless the prior statement was made under oath and subject to the penalty of perjury. *David* v. *State,* 269

Ark. 498, 601 S.W.2d 864 (1980); *Hackett* v. *State,* 2 Ark. App. 228, 619 S.W.2d 687 (1981); Uniform Evidence Rule 801 (d) (1) (i).

Since it is not even contended that the videotape was given under oath, it clearly was not admissible as substantive evidence from which the jury could find that John Young in fact killed Wade Smith.

It is true that a prior inconsistent statement may be admitted for the limited purpose of impeaching a witness. *Comer* v. *State,* 222 Ark. 156, 257 S.W.2d 564 (1953); *Hackett, supra.* But here Young admitted that he said in his previous statement that he killed Wade Smith. In that situation there was no necessity for proving the prior statement and it was therefore not admissible either by videotape or by typed transcription. *Humpolak* v. *State,* 175 Ark. 786, 300 S.W. 426 (1927). If, however, the statement was admissible, the typed transcription was introduced and I would not reverse this case just so a jury could view a videotape which, at most, could only prove that John Young was untruthful. Uniform Evidence Rule 403 provides that even relevant evidence may be excluded upon considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I would affirm.

Tommy Elliott FREEMAN *v.* STATE of Arkansas

CA CR 82-55 640 S.W.2d 456

Court of Appeals of Arkansas
Opinion delivered October 13, 1982
[Rehearing denied November 10, 1982.]

James E. Smedley, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant, Tommy Elliott Freeman, was found guilty by jury verdict of aggravated robbery, a violation of Ark. Stat. Ann. § 41-2102 (Repl. 1979), and sentenced to ten years imprisonment.

For reversal appellant contends that his in-court identification by the state's witnesses was the result of an illegal and suggestive lineup while appellant was under illegal arrest. Appellant argues that there was no probable cause for his warrantless arrest and that his identification by the state's witnesses should have been suppressed.

We find no reversible error.

The charge against appellant stems from an armed robbery of the Southwest Branch of the First National Bank of Little Rock shortly after 11:00 a.m. on February 25, 1981. The evidence showed that three young black males wearing ski masks robbed the bank and fled in an automobile. The robbers were seen abandoning their automobile on a parking lot near the bank when a packet planted in the stolen

money exploded and released tear gas. One of the robbers ran to the edge of witness John Dunn's yard adjacent to the parking lot, and at trial Mr. Dunn positively identified appellant as the person who ran by his yard. Hidden cameras in the bank photographed the robbers in the act of committing the robbery.

Appellant argues that Dunn's in-court identification was tainted by an impermissibly suggestive lineup conducted on March 9, 1981, four days after appellant's arrest. The police officer who conducted the lineup told Dunn that a suspect was in the lineup, and after Dunn had viewed the six persons in the lineup Dunn said, "Is Number 3 your suspect?" and the officer replied, "Yes."

If there are suggestive elements in the identification procedure that make it all but inevitable that the witness will identify one person as the criminal, then the procedure is so undermined it violates due process of law. *Foster* v. *California,* 394 U.S. 440 (1969); *James and Elliott* v. *State,* 270 Ark. 596, 605 S.W.2d 448 (1980). The state had the burden of establishing by clear and convincing evidence that, in the absence of counsel, the courtroom identification was based upon independent observation rather than upon a constitutionally infirm lineup procedure. *Rowe* v. *State,* 271 Ark. 20, 607 S.W.2d 657 (1980).

In *Foster* v. *California, supra,* the accused, who was close to six feet tall, stood out from the other two men in the lineup who were no more than five feet, six inches tall. Definite identification by the only eyewitness occurred only after a second lineup consisting of five men was held a week or ten days later, at which lineup the accused was the only person who had also appeared in the first lineup. The Court held that the identification procedure made it all but inevitable that the witness would identify the accused whether or not he was in fact the right person.

In the trial of the instant case no mention was made of the lineup in the direct examination of Mr. Dunn. His lineup identification, as was the case in *Rowe* v. *State, supra,* was brought to the attention of the jury on cross-examina-

tion. In this case, as in *Rowe,* the courtroom identification of appellant by Mr. Dunn was positive and unequivocal. Whether the identification was correct was a question for the jury to determine.

There was no element of undue suggestiveness present when the total circumstances of the lineup are considered. In *U.S.* v. *Gambril,* 449 F.2d 1148 (D.C. Cir. 1971) the Court indicated that telling a witness that a suspect is in the lineup is not absolutely impermissible. The Court recognized that the witness realizes that he would not be asked to view a lineup if a suspect were not present; what the witness is told may be only one factor to consider in reviewing the total surrounding circumstances. The logic employed by the Court in *Gambril* is persuasive, and we consider what the witness in this case was told as only one factor in the total circumstances.

Mr. Dunn testified that he had selected appellant as the person he had seen prior to saying anything to the police officer, and he also stated that his selection would have been the same regardless of what the officer said. The lineup was not impermissibly suggestive, and it certainly was not "all but inevitable" that Dunn would identify any person in the lineup as the person he had seen before.

Appellant contends that the in-court identification of appellant by Dunn and three bank tellers should be suppressed on the grounds that all of the identifications were the result of an illegal arrest. We find sufficient evidence in the record to support a finding that there were reasonable grounds for the arrest of appellant without a warrant. Arkansas Rules of Criminal Procedure, Rule 4.1 (a) (I) provides that a law enforcement officer may arrest a person without a warrant if the officer has a reasonable cause to believe that such person has committed a felony. The police knew that appellant's automobile had been used as the getaway car: the automobile was observed at the time it was abandoned by the robbers; and evidence of the robbery as well as papers identifying appellant as the owner were found in the automobile. The police had a general description of appellant furnished by Dunn and three bank tellers, and the

hidden camera photographs of the robbers had been viewed by all the witnesses.

On appeal, the legality of an arrest is presumed and the burden of establishing illegality is on the appellant. *Thorne* v. *State,* 274 Ark. 102, 622 S.W.2d 178 (1981). In *Bailey* v. *State,* 238 Ark. 210, 381 S.W.2d 467 (1964), the Arkansas Supreme Court ruled evidence admissible which was obtained after appellant's arrest without a warrant. The court stated that "... After finding Bailey's identification folder at the scene of the crime, there were certainly grounds to form the belief that he had committed the act." In the case of *Ellingburg* v. *State,* 254 Ark. 199, 492 S.W.2d 904 (1973), appellant had been convicted of larceny in the taking of a television set. The police, after establishing the fact that the crime had been committed, arrested appellant without a warrant after coming into possession of a pawn ticket representing the television set issued to appellant. In affirming appellant's conviction, the court found the arrest legal, and observed that "information coming to officers must rise above mere suspicion of criminal activity in order to constitute probable cause for arrest, but it need not be tantamount to that degree of proof sufficient to sustain a conviction."

The record indicates that at the time of the lineup one of the bank tellers, Pat Burns, requested that the person in the lineup repeat the words which one of the robbers spoke to her at the time of the robbery, and at trial Mrs. Burns testified that she identified appellant by his voice. Appellant cites no authority to support his charge that the voice identification was suggestive, and he argues only that it was improper because the in-court identification was the product of the lineup and not her recollection of events that transpired during the robbery. Inasmuch as we hold that the lineup was not tainted by an illegal arrest, the voice identification was proper. There has, in fact, been no allegation that the lineups viewed by the bank tellers were unfair, other than the charge that they were tainted by an illegal arrest.

We find no reversible error and we affirm.

GLAZE and COOPER, JJ., dissent.

Raymond HAMPTON *v.* STATE of Arkansas

CA CR 82-70 639 S.W.2d 754

Court of Appeals of Arkansas
Opinion delivered October 13, 1982

Donald E. Bishop, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. This is a criminal case in which appellant was convicted of second degree murder. For reversal, appellant advances three arguments.

POINT I

THE COURT ERRED IN PERMITTING EVIDENCE OF THE DEFENDANT'S PRIOR FELONY CON-

VICTION WHICH WAS MORE THAN TEN YEARS OLD.

The appellant argues that the trial court should have sustained his objection to exclude the following testimony elicited from appellant on cross-examination:

> Q. Mr. Hampton, is it not a fact that you could not have legally possessed this weapon on the date in question?
>
> A. True.
>
> Q. Why is that?
>
> . . .
>
> A. Because I done ten months in Missouri State Penitentiary in 1969.

Appellant contends this testimony related to a burglary conviction which occurred more than ten years before the present murder charge and was therefore inadmissible under Rule 609 of the Uniform Rules of Evidence. The State argues the testimony elicited from appellant on cross-examination was admissible under Rule 404 (b) to show he illegally possessed a handgun, a fact which bore on appellant's state of mind the night of the shooting. Rule 404 (b) provides:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court previously has pointed out the difficulty in applying Rule 404 (b). *Price* v. *State,* 267 Ark. 1172, 599 S.W.2d 394 (Ark. App. 1980), *aff'd,* 268 Ark. 535, 597 S.W.2d 598 (1980). In *Price,* we explained our interpretation of the Rule when deciding whether evidence of other offenses should be admitted. We said:

> In our view, the rule should be interpreted to exclude evidence of other offenses when its only purpose is to show the accused's character or some general propensity he might have to commit the particular sort of crime in question. It should not be interpreted to exclude evidence of other offenses when that evidence is probative of the accused's participation in the particular crime charged. If it is probative of his participation the only remaining question should be whether it is so prejudicial that it should be excluded because the prejudice brought about by exposition of other offenses is not sufficiently balanced by the probative value of the evidence on the facts sought to be proved. See, Rule 403.

267 Ark. at 1176, 599 S.W.2d at 396-97.

In affirming *Price,* the Arkansas Supreme Court held that Rule 404 (b) clearly permits testimony of other criminal activity "if it has relevancy independent of a mere showing that the defendant is a bad character." 268 Ark. 535, 538, 597 S.W.2d 598, 599 (1980). The Supreme Court added that once the independent relevancy of "other crimes evidence" is established, that "other crimes evidence" ought to be scrutinized under the substantial prejudice rule of 403, whether or not defendant raises that issue. *Id.*

In the case at bar, opposing, conflicting testimonies were given that both the appellant and the victim were out to get one another. Testimony was heard that each made threats to the other, each was the aggressor, and each was innocent. There were witnesses who testified that appellant had displayed a pistol and had threatened to kill the victim, both the day of and before the shooting incident. Appellant countered this testimony by claiming that he had a pistol in his truck on the night of the shooting because earlier that day he and his wife had gone to the dump to shoot it.

At trial, appellant relied upon justification as a defense as defined under Ark. Stat. Ann. § 41-507 (Repl. 1977). Consequently, evidence tending to explain his conduct or state of mind was admissible. See *Brockwell* v. *State,* 260 Ark. 807, 815, 545 S.W.2d 60, 66 (1976).

The State presented testimony that appellant repeatedly had brandished a revolver and threatened the victim's life before the shooting. It further showed that after these threats appellant went to the victim's residence with a pistol conveniently within reach in his truck. As a felon, appellant knew it was unlawful for him to possess a firearm. It is reasonable to believe this fact would have enhanced his awareness or consciousness of having any firearm in his presence. These factors tend to dispel, or at least to diminish, appellant's contention that a pistol was left inadvertently in his truck because he had been shooting it with his wife earlier in the day. Since he knew it was illegal for him to possess the pistol, it is reasonable to infer that he normally would have had his wife take the pistol, especially since it was purchased by and titled in her name. Because we believe appellant's knowledgeable, illegal possession of a firearm is probative on the issue of whether his acts created circumstances manifesting extreme indifference to the value of human life and causing the victim's death, we find the testimony elicited from appellant was admissible under Rule 404 (b).

We also find that the testimony to which appellant objected is not so prejudicial that it should be excluded under Rule 403 of the Uniform Rules of Evidence. The trial judge carefully considered appellant's objection outside the hearing of the jury. Although he overruled appellant's objection, the judge offered to issue a limiting instruction if appellant so chose, and he proposed to limit any cross-examination on the subject. After the court ruled, the State framed its question to appellant in such a way that the burglary conviction was neither mentioned nor introduced by the State. On these facts, we are unable to say the probative value of appellant's testimony was outweighed by its prejudicial effect.

POINT II

THE COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE PRECLUDING THE INTRODUCTION OF EVIDENCE OF PRIOR SPECIFIC VIOLENT ACTS OF THE VICTIM FOR

THE PURPOSE OF ESTABLISHING WHO WAS THE AGGRESSOR

At trial, appellant proffered the testimony of two witnesses who would have testified that on separate occasions the victim had inflicted injury upon them, and that the victim was the aggressor in each instance. These incidents occurred two and four years prior to the instant shooting. The State moved to exclude any evidence of specific acts of violence by the victim against persons other than the appellant. The State did not object to evidence regarding the victim's general reputation for violence. We find the court correctly excluded this testimony.

The Supreme Court in *Sanders* v. *State,* 245 Ark. 321, 432 S.W.2d 467 (1968), stated the established rule of law that a violent disposition toward others on the part of a victim of homicide cannot be shown by specific acts of aggression and misconduct. *See also, Jones* v. *State,* 1 Ark. App. 318, 615 S.W.2d 388 (1981). Here, appellant fully developed his defense of justification by offering evidence concerning the victim's representation for violence as well as his specific threats toward appellant. The victim's violent acts directed at the two persons whom the appellant chose to call as witnesses concerned instances totally unrelated to appellant. Additionally, the record reflects that appellant had no knowledge of the specific episodes which took place between the victim and the two proposed witnesses. Under these circumstances, the trial court could properly decide that the proffered testimony was not relevant on the issue of justification. *Id.*

We note appellant's reliance on *Smith* v. *State,* 273 Ark. 47, 616 S.W.2d 14 (1981), in arguing the admissibilty of such testimony, but we find *Smith* to be clearly distinguishable on its facts. In *Smith,* the court held the trial court erred when it excluded proffered evidence that one of the victims had shot the defendant on two prior occasions and that both victims had threatened to kill him. These instances clearly

involved the defendant — not others. Therefore, *Smith* does not control because it is not applicable to the facts before us.[1]

POINT III
THE COURT IN DENYING THE MOTION FOR NEW TRIAL BASED UPON IMPROPER CONTACT BY THE STATE WITH THE JURY FOREMAN.

This issue rasied by appellant is devoid of merit. Appellant complains of a conversation between the deputy prosecutor and a juror which took place two days before the trial of the instant case, and involved a criminal case unrelated to appellant's. During the course of the conversation, the prosecutor informed the juror that the defendant, who was acquitted in the earlier criminal case in question, would have been a youthful offender and could have served as little as one-sixth of any time given. In his argument, appellant speculates that this information imparted by the prosecutor to the juror could have affected the juror's decision two days later in appellant's case.

Appellant's case was never mentioned during the conversation in question nor in any future criminal trial — let alone appellant's. The trial court found these facts presented no prejudice to appellant's case, and we agree. These circumstances certainly do not require the application of the presumption of prejudice rule announced in *Remmer* v. *United States,* 347 U.S. 227 (1954), since the situation in *Remmer* involved an alleged improper communication with a sitting juror concerning a matter pending before the jury.

Affirmed.

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[1]In accordance, see *Halfacre* v. *State,* 277 Ark. 168, 639 S.W.2d 734 (1982), which was decided after this Court's opinion was written.

Bobby T. SMITH *v.* Mary Ann SMITH

CA 82-49 640 S.W.2d 458

Court of Appeals of Arkansas
Opinion delivered October 20, 1982

Stephen C. Gardner of *Gardner & Gardner,* for appellant.

Richard L. Peel, for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from that portion of a divorce decree concerning the division of property.

Bobby and Mary Ann Smith were married in 1968 and built a home in Russellville, Arkansas, in 1975. Prior to and throughout the marriage, Bobby had serious health problems which often required the attention and physical assistance of Mary Ann. He has been rated totally and permanently disabled by both the Veterans and the Social Security Administrations.

In October of 1980, the parties separated and Bobby filed for divorce. After about two weeks there was a reconciliation on the condition that Bobby convey his interest in the home to Mary Ann, which he did on November 7, 1980.

The parties separated again in April of 1981 and this time Mary Ann filed for divorce. Bobby filed a counterclaim for divorce and also asked the court to set aside the 1980 deed. He alleged that he did not intend to create a gift of the property to Mary Ann; did not understand the consequences of the conveyance; was gravely ill at the time of the execution of the deed; and that it was executed as a result of coercion, misrepresentation, and undue influence on the part of Mary Ann.

After a trial on the issues, the chancellor granted Mary Ann the divorce and specifically found that the home was not marital property but her separate property.

Ark. Stat. Ann. § 34-1214 (A) (1) (Supp. 1981) provides that at the time a divorce decree is entered, all marital property is to be distributed one half to each party unless the court finds such a division to be inequitable. Section 34-1214 (B) states that "marital property" means all property acquired by either spouse subsequent to the marriage except "(1) property acquired by gift, bequest, devise, or descent" and "(4) property excluded by valid agreement of the parties."

On appeal Bobby contends the trial court erred in holding that the home was not marital property and recites the circumstances surrounding the execution of the deed in support of his contention. He testified that he was involved in an automobile accident a few days after he filed for divorce in 1980 and was hospitalized for three days before he was released and returned to his motel room; that he felt alone, knew he needed help, and wanted appellee back very badly. He testified that he never intended to give his interest in the house to Mary Ann but that he was acting out of desperation and knew that was the only way he could get back into the house where he could get help with his care. He testified that he was in such discomfort that he would have signed anything and that his attorney told him he should agree to whatever it would take to get appellee back.

Appellee testified that when appellant called after his accident, she told him they could try to work it out but that there would have to be some stipulations made because she did not want to be left without anything if he decided to leave again.

Appellant argues that from a review of this testimony, it is evident that Mary Ann was the dominant party in this confidential relationship, and under the authority of *Dunn* v. *Dunn,* 255 Ark. 764, 503 S.W.2d 168 (1973), and *Marshall* v. *Marshall,* 271 Ark. 116, 607 S.W.2d 90 (Ark. App. 1980), she had the burden of proving that the conveyance here was freely and voluntarily executed. He asserts that all of the evidence is to the contrary and that the deed should be invalidated.

We are not convinced that the evidence required the chancellor to set aside the deed in this case. The evidence does not establish that the deed here was executed because appellant was mentally weak or susceptible to influence due to age as in *Dunn* and *Marshall.* The evidence here does establish that the impetus to reconcile was not appellee's but appellant's, who "wanted her back very badly" and that he had the advice of his attorney in effecting the reconciliation.

In *Schichtel* v. *Schichtel,* 3 Ark. App. 36, 621 S.W.2d 504

(1981), this court recognized the validity of reconciliation agreements as an exception under our marital property law. There is no evidence in this case that the property was to belong to the appellee *only* if the reconciliation was successful or that there was an agreement that appellant would regain any interest in the property at any time.

We cannot say the chancellor's decision was clearly contrary to the preponderance of the evidence and we affirm. Civil Procedure Rule 52 (a).

Affirmed.

Etta M. ELERSON *v.* George Franklin ELERSON

CA 82-63 640 S.W.2d 460

Court of Appeals of Arkansas
Opinion delivered October 20, 1982

Floyd M. Thomas, Jr. of *Brown, Compton & Prewett,* for appellant.

George Van Hook, Jr., for appellee.

GEORGE K. CRACRAFT, Judge. On November 18, 1980 a decree was entered in the Chancery Court of Union County granting George Franklin Elerson a divorce from Etta M. Elerson and approving a written property settlement agreement between the parties. The decree was entered on testimony taken in open court and on the appellant's written entry of appearance in which specific reference to the property settlement agreement as a complete settlement was made.

On December 3, 1980 appellant filed a motion seeking to set aside the decree and property settlement, contending

that because the appellee had led her to believe that the divorce action had been dismissed the decree was fraudulently procured. She further contended that during the pendency of the action the parties had become reconciled and lived together as husband and wife under such circumstances as would effect condonation of all marital offenses and abrogation of their settlement. She brings this appeal from the chancellor's order dismissing her petition for want of equity.

According to the record these parties had been having marital difficulties for some period of time prior to their decision in the latter part of June 1980 to obtain a divorce. They then entered into a full and complete property settlement agreement and a suit for divorce was filed in the chancery court by appellee. Appellant's entry of appearance and the property settlement were also filed that same day. The parties had previously agreed that the appellant would move to Milwaukee where she had arranged for a job transfer with her present employer. Under the property settlement agreement appellee would retain the family residence. The parties agreed that the appellant would remain in that residence for two weeks in order to make her moving arrangements. During that period appellee went on vacation visiting with relatives.

The appellant testified that during that two week period she spoke with appellee on the telephone and the parties agreed to a reconciliation. She testified that he then returned to El Dorado and they resumed their marital relationship until November 19th when she was informed that the decree had been entered. She testified that during the period of reconciliation divorce was never again discussed and that appellee agreed to arrange with the attorney to stop the divorce proceeding, leading her to believe that he had done so as a result of their reconciliation. She testified that she was not aware that the divorce action had not been dismissed until the decree was entered by the court.

The testimony of the appellee was in direct conflict as to the events during this period. He testified that they had ceased to have a marriage long before their separation. Their

problems came to a head when it was discovered that their seventeen year old unmarried daughter was pregnant. He testified that appellant became enraged because he would not order the child out of the home. When he refused to do so she left the home and the divorce proceedings were then initiated. The appellee denied that he had ever agreed to a reconciliation. He testified that while he was on vacation after the complaint and agreement had been filed he received word from one of his children that the appellant was in bad emotional condition and was hysterical. At the suggestion of his daughter he called appellant. She informed him that the pregnant daughter had gotten married and that as a result she had developed an emotional problem and thought she was having a heart attack. She informed him that she had changed her plans about moving to Milwaukee and that she was going to the hospital. He stated that he refused her overture toward reconciliation in that conversation.

Upon his return to El Dorado he found that she was still in the house sleeping in one of the extra bedrooms. He denied having agreed at any time to a reconciliation but stated that he only permitted her to remain in the residence because of her physical and mental condition. He admitted that they did share the same bedroom for a "short period" and admitted to having sexual relations with her. He stated that she initiated both the return to his bedroom and the intercourse and that he had consented only because of her severe emotional crisis for which she was then receiving psychiatric treatment. He testified that he had no feelings for her and that when she fully realized this she stormed out of the bedroom and slept elsewhere, subjecting him to the same treatment that had caused them to seek the divorce. He denied ever telling her that he was going to dismiss the lawsuit or that abrogation of the property settlement agreement was ever discussed. He stated that prior to instructing the attorney to proceed with the divorce he had asked her if her emotions were in such a state that she was ready to go through with the divorce. He testified that she responded "Why not?" He stated that he told her when the divorce was going to be submitted and she knew the date. He further testified that on the date the decree was entered he gave her a copy of it and she asked him when he expected her to move.

Appellant first contends that the chancellor should have set the divorce decree aside because the appellee had fraudulently led her to believe that the divorce proceeding had been terminated and that they had become reconciled. In support of her position she relies on *Seay* v. *Seay,* 239 Ark. 1115, 396 S.W.2d 838 (1965) which holds that such conduct does constitute fraud which would justify the vacating of a decree. In *Seay* the court upheld a finding of the chancellor that such fraud was indeed practiced. Here the chancellor made a contrary finding.

While we review chancery cases *de novo,* it is well settled that we will not set aside the findings of a chancellor unless clearly against a preponderance of the evidence, and in making that determination we give due regard to the superior opportunity of the trial court to judge the credibility of the witnesses. Rule 52 (a) Arkansas Rules of Civil Procedure; *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 494 (1981). We cannot say that the chancellor's finding is clearly against a preponderance of the evidence.

Appellant next contends that the trial court erred in not setting aside the decree because the return to the marital bed had effected a condonation of all grounds for divorce set forth in the appellee's complaint. Continued cohabitation after acts constituting marital misconduct have been committed is *evidence* of condonation, but standing alone this is not conclusive. There are exceptions where the health of one of the parties is involved or where cohabitation is continued in hope of receiving better treatment from the other party. *Weber* v. *Weber,* 256 Ark. 549, 508 S.W.2d 725 (1974); *Shirey* v. *Shirey,* 87 Ark. 175, 112 S.W. 369 (1908). Condonation is a conditional rather than absolute remission of the offense, the implied condition being that the offense will not be repeated and that the guilty party shall not in the future commit any other marital offense or, as it is frequently expressed, that the offender will treat the injured party with conjugal kindness. *Coffey* v. *Coffey,* 223 Ark. 607, 267 S.W.2d 499 (1954); *Bridwell* v. *Bridwell,* 217 Ark. 514, 231 S.W.2d 117 (1950); *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S.W. 41 (1925). If the testimony of appellee is believed, and the chancellor did believe it, he would be justified in

applying either of the two exceptions to the rule of condonation. We cannot conclude that his findings are clearly against a preponderance of the evidence.

The appellant next contends that the continued cohabitation after the property settlement agreement at least had the effect of abrogating it. In *Carter* v. *Younger,* 112 Ark. 483, 166 S.W. 547 (1914) and *Dennis* v. *Younts,* 251 Ark. 350, 472 S.W.2d 711 (1971) our court declared the applicable rule as follows:

> Where the parties to a valid separation agreement afterward come together, and live together as husband and wife, where their conduct toward each other is such that no other reasonable conclusion can be indulged than that they had set aside or abrogated their agreement of separation, then such agreement should be held as annulled by the parties to it, and their marital rights determined accordingly.

Our conclusion on the preceding point is dispositive of this argument. The burden of proving the conduct of these parties towards each other was such that no reasonable conclusion could be indulged except that they had set aside their agreement was upon the appellant. The chancellor correctly concluded that the only evidence here which might fit the requirements of that rule was the admission by the appellee that he had sexual relations with appellant during this period. He found, however, no evidence of an agreement to resume the marital relation of husband and wife or to abrogate that settlement. He recalled no testimony from the wife to that effect and none has been pointed out to us. The appellee denied that there had been any reconciliation or an agreement to resume the marital relation. We cannot say that the chancellor's finding was clearly against a preponderance of the evidence.

We affirm.

Edward GREENING *v.* Edward and Jewel NEWMAN

CA 82-46 640 S.W.2d 463

Court of Appeals of Arkansas
Opinion delivered October 20, 1982

Willis V. Lewis and *James Michael Hankins,* for appellant.

Dodds, Kidd, Ryan & Moore, by: *Donald S. Ryan,* for appellees.

LAWSON CLONINGER, Judge. This appeal involves the custody of an eight-year-old child, Holli Elizabeth Greening. After a hearing on the motion for change of custody filed by the father, appellant Edward Greening, the chancellor found that the mother, Karen Greening, had abandoned her rights and was unfit to have custody of the child. The court then found that in the best interest of the child, the maternal grandparents, appellees Edward and Jewel Newman, should have custody.

When the parties were divorced in 1976, the mother, Karen Greening, was awarded custody of Holli Elizabeth, the daughter of the parties, pursuant to a stipulation entered into by the parties. The evidence indicates that Holli Elizabeth is an extremely well adjusted child and has lived with her grandparents, appellees, for more than five years. On April 29, 1981 appellant filed a motion for change of custody, alleging the unfitness of Karen. Karen did not respond to the motion, but her parents, appellees, filed a motion to intervene, alleging the unfitness of both parents and asking that custody of the child be awarded to them. Appellees' motion to intervene was granted and Karen testified in behalf of her parents.

Appellant contends that the trial court erred by placing custody in a third party without specifically finding the father unfit. Arkansas Rules of Civil Procedure, Rule 52 (a) provides that the trial court shall, if requested by a party, in all contested actions tried upon the facts without a jury, find the facts specially, and state separately its conclusions of

law. No request was made of the trial court in this case to find the facts specially, and inasmuch as we try the case *de novo* here, the appellant is not prejudiced. Our determination is that appellees proved by a preponderance of the evidence that appellant was not a fit parent, therefore, the finding of the chancellor that it is in the best interest of the child to continue to live with appellees is not clearly erroneous.

The evidence reveals that appellant began dating Karen when Karen was twelve years old and appellant was nineteen. They were married when Karen was thirteen. There was ample evidence from which the chancellor could have concluded that appellant physically abused Karen, and that Karen was led by appellant into a life of prostitution and drug abuse. There was evidence that appellant had performed homosexual acts on at least two occasions in the presence of Karen. At the close of the testimony the chancellor observed that "There are a lot of things in this case from the testimony that are rather shocking, and a young life was ruined, you might say, and the court is taking all of that into consideration in making its decision." We conclude that Karen's life was the "young life ruined" referred to, and the evidence appears to justify the remark.

There was testimony that appellant had sold LSD to Karen a year before the hearing, but most of the evidence of appellant's misconduct related to incidents which occurred before the divorce of the parties. Appellant argues that the trial court erred in admitting into evidence testimony of incidents occurring prior to the decree of divorce.

The general rule is that if a litigant fails to develop his case fully when it is first heard upon its merits the law does not afford him a second chance by permitting him to bring in additional proof which might have been offered in the first instance. Although the best interest of the child is the controlling point in a child custody case, the Arkansas Supreme Court has held that when a parent fails to produce evidence available to him at one hearing, he cannot rely upon that evidence in a later effort to win a change of custody. *Swindle* v. *Swindle,* 242 Ark. 790, 415 S.W.2d 564

(1967). However, it is also the rule that if the welfare of the child so requires, a decree may be modified without a change of circumstances on the presentation of facts which, although existing at the time of the original decree, were not then presented or considered. *Perkins and Diggs* v. *Perkins,* 266 Ark. 957, 589 S.W.2d 588 (Ark. App. 1979).

In the instant case a consent decree was granted as to the custody of the child, thus the chancellor had never had the opportunity to determine the fitness of the parents. Also, the appellees here were not even parties to the original action. Under the circumstances of this case it was not error for the chancellor to look at conduct prior to the divorce decree in order to determine fitness.

Appellant charges that the chancellor improperly placed the burden of proof on him, the father, as opposed to a third party. A third party who intervenes in a child custody matter has the burden of proving the parents are incompetent or unfit to have custody. *Parks* v. *Crowley,* 221 Ark. 340, 253 S.W.2d 561 (1952). Here, however, the chancellor did not place the burden of proof on appellant. Rather, he made the statement that he was going to hear the entire case and then make his decision. In any event, appellees have sustained their burden of proof in showing that appellant was unfit to have custody.

The judgment of the trial court is affirmed.

Gary JEFFREYS *v.* William F. EVERETT, Director of Labor, and CRESCENT HOTEL

E 82-132 640 S.W.2d 465

Court of Appeals of Arkansas
Opinion delivered October 20, 1982

M. E. Reger, for appellant.

Alinda Andrews, for appellees.

LAWSON CLONINGER, Judge. Claimant, Gary Jeffreys, was disqualified for unemployment benefits by a decision of the Arkansas Board of Review under the provisions of Section 5 (b) (1) of the Arkansas Employment Security Act, Ark. Stat. Ann. § 81-1106 (b) (1) (Repl. 1976), upon a finding that he was discharged from his last work for misconduct in connection with his work. Claimant's maximum potential benefits were also reduced eight times his weekly benefit amount under Section 3 (d) of the Act, Ark. Stat. Ann. § 81-1104 (d) (Supp. 1981). Claimant appeals the decision of the Board, charging that most of the employer's testimony was hearsay, and that there is no substantial evidence to support the decision of the Board.

We find no error and the decision of the Board is affirmed.

At the hearing before the Appeal Tribunal, a representative of the employer appeared, and a portion of her evidence was read from a statement prepared by another employee. However, the representative present, Patsy Van Asten, knew some of the facts relative to claimant's discharge from personal knowledge, and claimant himself testified to facts from which misconduct could be inferred.

It is uncontroverted that claimant was a desk clerk at the Crescent Hotel in Eureka Springs and that he worked a shift from 4:00 p.m. to midnight. He had been discharged in August, 1981 for excessive absenteeism, but was rehired the next month with the warning that unexcused absences and tardiness would not be tolerated. The act which prompted claimant's discharge occurred on December 4, 1981, at which time claimant was four hours late for his shift.

In *Parker* v. *Ramada Inn,* 264 Ark. 472, 572 S.W.2d 409 (1978), the Arkansas Supreme Court stated:

> A single incident of missing work has ordinarily been considered misconduct within the meaning of the Employment Security Laws when the failure to report and appear for work involves a disregard of standards of behavior which the employer has a right to expect.

In addition to the one incident of being four hours late for his shift, the employer representative at the hearing testified that claimant had " . . . been an actor with the Passion Play a great deal of his time away from his duties at the hotel," and at the hearing the following exchange took place:

> Van Asten: What happened to the two weeks in August that you were laid off because of absenteeism?
>
> Claimant: Because of one day missed. Correct?
>
> Van Asten: That's your statement.

Claimant: Is that not right?

Van Asten: No, it isn't right, Gary.

The situation presented a question of fact for the Board of Review, and it is the responsibility of the Board, not this court, to interpret the facts. There was substantial evidence to justify the Board in finding that claimant's conduct involved a disregard of standards of behavior which the employer had a right to expect.

The decision of the Board of Review is affirmed.

Rhett BUTLER et al *v.* ARKANSAS STATE HIGHWAY COMMISSION

CA 82-76 640 S.W.2d 467

Court of Appeals of Arkansas
Opinion delivered October 20, 1982

Wright, Lindsey & Jennings, for appellants.

Thomas B. Keys, Philip N. Gowen and *Charles Johnson,* for appellee.

TOM GLAZE, Judge. This is an eminent domain case. The sole issue on appeal is whether there is substantial evidence to support the jury's verdict. Appellants contend the testimony of appellee's expert had no fair and reasonable basis and was not sufficient to support the award of damages given by the jury. We cannot agree.

Appellants owned approximately 10.7 acres on the northwest corner of Asher Avenue and Thirty-Sixth Street (Boyle Park Road), on which the appellee imposed a permanent easement in October, 1979, affecting .11 acre of the property, a narrow strip along Thirty-Sixth Street. A temporary construction easement was also imposed to construct a bridge over Rock Creek on Asher Avenue.

Because of this construction, there was a loss of access from Asher Avenue to appellants' property, which had frontage on both Asher and Thirty-Sixth Street. The parties agreed that the best use of the property was for commercial purposes, and the evidence tended to show it was ideal for a shopping center site.

At trial, three expert witnesses testified that the market value of appellants' property was diminished by the loss of access to Asher Avenue. One of these witnesses, Mr. Tommy Lasiter, was experienced in the development of shopping centers, and it was his opinion that the property's value was significantly diminished. He did not assign an amount to the loss. Appellants' other two witnesses agreed with Lasiter's opinion and assigned damages in the respective amounts of $77,191 and $101,900. Appellee's expert, Walker Watson, opined that no diminution in value ensued from the loss of access. He limited damages to the .11 acre taken and assigned an amount of $7,500. This same amount was awarded by the jury.

In arguing for reversal, one of the cases relied upon by appellants is *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S.W.2d 738 (1953). The court in *Byars* noted the rule that whether there is substantial evidence to support a verdict is not a question of fact, but one of law. It further stated that because a witness testifies to a conclusion on his part does not necessarily mean that the evidence given by him is substantial, when he has not given a satisfactory explanation of how he arrived at the conclusion. In *Campbell* v. *State,* 265 Ark. 77, 89, 576 S.W.2d 938, 946 (1979), the Supreme Court cited *Byars* when stating the following:

> It is true that we are not required, on appellate review, to accept as substantial evidence the opinion of an expert when it clearly appears that it is opposed to physical facts, common knowledge, the dictates of common sense or is pure speculation. *Easton* v. *H. Boker & Co.,* 226 Ark. 687, 292 S.W.2d 257 (1956).

In view of the rules set forth in *Byars* and *Campbell,* we briefly review the expert testimony given in this cause. In

determining the sufficiency of the evidence to support a verdict, we must view the evidence with every reasonable inference arising therefrom in the light most favorable to appellee, and if there is any substantial evidence to support the verdict, it cannot be disturbed by this court. *See, Arkansas State Highway Commission* v. *Addy,* 231 Ark. 381, 383, 329 S.W.2d 535, 536 (1959).

Appellee's expert witness, Mr. Watson, has been an appraiser for the Highway Department for over twenty-three years and involved in real estate since 1947. Although he had no experience in evaluating shopping centers, his background and experience is essentially the same as two of the expert witnesses who testified on behalf of the appellants. All of the expert witnesses used the same method of appraisal in arriving at damages, but their amounts differed. The basic, underlying disagreement between Watson and the other three experts was that Watson did not believe that the loss of access from Asher Avenue affected the value of the property. In support of his opinion, Watson stated that a part of appellants' property was located in the floodway and could only be used for parking. Watson explained that any improvement on the property would have to be on the higher part of appellants' land which was adjacent to Boyle Park and located away from Asher. For this reason, he concluded the best access to the property is Thirty-Sixth Street (Boyle Park Road) — not Asher. Watson testified that the construction would improve the Thirty-Sixth Street access to appellants' property and provide a closer egress and ingress to any improvements on it. While Watson acknowledged the loss of the Asher access, he believed the major value of Asher is that people can view appellants' property from it but gain access to the property via Thirty-Sixth Street.

The testimony given by Watson was not opposed to the physical facts — although the appellants strongly disagree with the conclusions reached by Watson. He was qualified, without challenge, as an expert to testify concerning specialized knowledge to assist the jury in understanding other evidence and in determining the facts in issue. *See* Unif. R. Evid. 702.

The record reflects no objections concerning any of the matters to which Watson testified as being outside his field of expertise. On cross-examination, appellants' counsel thoroughly questioned him regarding all the facts and data underlying his opinions. In addition, the trial court gave the following instruction applicable to opinion evidence:

COURT'S INSTRUCTION NO. 8

> Much of the evidence introduced in this case has been what is called "opinion evidence." Opinion evidence is not a statement of fact, but is merely a statement of the witness's opinion. It is your duty to determine whether such opinions are correct or erroneous, and in arriving at your conclusions, you should consider the grounds upon which the witnesses based their opinions, their skill, experience, and knowledge of the matters about which they testified; and the reasonableness or unreasonableness of their opinion as viewed in the light of their knowledge and experience, using in this connection your own common sense, knowledge and experiences of life as reasonable and prudent persons.
>
> In weight [sic] the opinion evidence, you should consider whether the expert has explained the factual and logical basis of his opinion and you should not consider his testimony as evidence of value if it is contrary to the physical facts about the property developed during the trial of the case, or if it is not reasonable.

On the facts presented, we cannot say Watson's opinion testimony was without a fair or reasonable basis or that it was insubstantial. If we had been the original fact-finders in the trial of this cause, we may well have believed appellants' expert testimony over that of appellee's. However, we believe that the weight to be given Watson's testimony is clearly within the jury's province to decide, and accordingly we find no error in its decision.

Affirmed.

Marvin HICKMON, d/b/a H & H AUTO SALES
v. Robert BEENE

CA 82-77 640 S.W.2d 812

Court of Appeals of Arkansas
Opinion delivered October 27, 1982

William H. Craig and *John H. Adametz, Jr.,* for appellant.

Andrew L. Clark, for appellee.

GEORGE K. CRACRAFT, Judge. On March 27, 1979, Robert Beene purchased from Marvin Hickmon, d/b/a H & H Auto Sales a 1975 Lincoln automobile under a conditional sale contract. On May 17, 1979, Hickmon repossessed the automobile in Dallas, Texas and returned it to Little Rock. Beene brought this action to recover possession of the motor vehicle asserting that the vehicle had been wrongfully repossessed. Hickmon answered that at the time he repossessed the vehicle the appellee was in default in several material respects. He further contended that as a result of the default he had declared the entire balance due and, deeming the collateral to be insecure, he physically repossessed it and sold it pursuant to the provisions of the Uniform Commercial Code.

The contract in question imposed on the buyer the obligation of paying all installments of principal and interest when due and of procuring and maintaining

insurance against all risk of physical damage to the collateral. It declared that time was of the essence in the performance of all undertakings and that the entire balance should become due and payable without notice if — "(2) At holder's option, if the customer defaults in performing any obligation under this contract or if holder in good faith deems itself insecure . . . holder may, without notice or legal action, peaceably enter any premises where collateral may be found, take possession of it and anything found in it." The contract further provided that the holder should have the remedies of a secured party under the Uniform Commercial Code.

The evidence was in conflict as to whether or not the installment payments due under the contract were in default at the time of the repossession. It was admitted, however, that the appellee had not procured the required insurance on the vehicle and had so informed the appellant. There was also evidence that appellee had driven the vehicle to Texas and had left the car in Texas upon his return to Little Rock. The appellee denied any intent to abandon it but stated that he had left it with responsible persons. The trial court found that the required installments were not in default. It further found that "the facts that the automobile was out of state and not being kept at plaintiff's residence in Arkansas and that there was no physical damage insurance coverage on the automobile were not sufficient grounds for defendant's belief that his security was in jeopardy nor were they sufficient grounds, therefore, for the repossession."

As the trial court found on conflicting evidence that the installments of principal and interest were not in default, appellant concedes that this finding is not clearly erroneous and appeals only with respect to the effect that failure to procure insurance and maintain the car at his place of residence has upon the right to accelerate the debt.

In making his order the special judge was obviously relying upon the "good faith requirement" of Ark. Stat. Ann. § 85-1-208 (Add. 1961) for the acceleration of the maturity date, as that section was applied in the original decision in *Seay* v. *Davis,* 246 Ark. 201, 438 S.W.2d 479 (1969)

which was followed by the Court of Appeals in *Rawhide Farms, Inc.* v. *Darby,* 267 Ark. 776, 589 S.W.2d 210 (Ark. App. 1979). Those cases declare that the good faith requirement of the Commercial Code would apply in any case in which the note provided that it might be accelerated "at the option of the holder." On September 12, 1982, after the learned special judge decided this case and the brief of the appellant had been filed, the Supreme Court handed down its opinion in *Bowen* v. *Danna,* 276 Ark. 528, 637 S.W.2d 560 (1982).

In *Bowen* the Supreme Court points out that in its opinion on rehearing it had modified its original opinion in *Seay* v. *Davis, supra,* leaving the question of the application of the good faith standard for future determination. Supplemental Opinion on Rehearing *Seay* v. *Davis,* 246 Ark. 627, 438 S.W.2d 479 (1969). In modifying *Rawhide Farms* the Supreme Court in *Bowen* answered its reserved question as follows:

> Likewise, we hold that Ark. Stat. Ann. § 85-1-208 is inapplicable where the right to accelerate is conditioned upon the occurrence of an event, such as a lapse of required insurance coverage, which is in the complete control of the debtor. To this extent we modify *Rawhide Farms, Inc.* v. *Darby, supra,* and we affirm the chancellor's refusal to apply the statute.

As the conditional sales agreement now under review did contain a default type acceleration clause rather than one providing for "acceleration at will" we hold that the trial court erred in applying the good faith requirements set forth in Ark. Stat. Ann. § 85-1-208 and reverse and remand this cause for entry of an order consistent with this opinion.

Reversed and remanded.

I. V. STAHL and Neala STAHL, His Wife *v.* Charles A. THOMPSON and Anna Louise THOMPSON, His Wife

CA 82-29 641 S.W.2d 721

Court of Appeals of Arkansas
Opinion delivered October 27, 1982

Howard & Howard, by: *William B. Howard,* for appellants.

C. Joseph Calvin, for appellees.

JAMES R. COOPER, Judge. This is an adverse possession case, in which the sole question on appeal is whether appellees have acquired a prescriptive easement across certain land owned by appellants. Appellees' land is located north of and adjacent to the land of appellants. The southern boundary of appellants' land adjoins a county road. The roads, which are the subject of this lawsuit, may be described as being an inverted "V", with both legs of the "V" touching the county road at the southern boundary of appellants' land and the point of the "V" being a turn-around which touches the southern boundary of appellees' land. Adjacent to, but across the boundary line from the turn-around, is a rent house owned by appellees. It is the existence and status of these roads and the turn-around which is in controversy. (See diagram of tract in appendix to this opinion.)

The appellants claimed that the roads and the turn-around had been used by permission. The appellees claimed that they, and their predecessors in title, had established a prescriptive easement across appellants' land. The trial court found that the roads in question were clearly marked, and that they were readily visible on aerial photographs of the area. He found that the appellants bought the land on which the roads and the turn-around are located in 1973, and that the appellants were placed on notice when they bought the land because the appellees' rent house was located adjacent to appellants' land and the roads led to it. The trial court further found that the land upon which the roads and the turn-around were located was wild, unenclosed, and unimproved, and that the use of the roads was adverse to the interest of appellants. The trial court found that the appellees had established a private easement by prescription over the land of appellants, and that the private easement consisted of the two roads and the turn-around. From that decision, comes this appeal.

No one seriously questions the chancellor's finding that the land in question is wild, unenclosed, and unimproved, although appellees have made much of the fact that the area

south of the county road is improved. In any event, the chancellor's finding on this point is supported by a preponderance, if not all, of the evidence.

The use of wild, unenclosed, and unimproved land is presumed to be permissive, until the persons using the land for passage, by their open and notorious conduct, demonstrate to the owner that they are claiming a right of passage. *Stone* v. *Halliburton,* 244 Ark. 392, 425 S.W.2d 325 (1968); *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S.W.2d 461 (1945); *Boullioun* v. *Constantine,* 186 Ark. 625, 54 S.W.2d 986 (1932). The lapse of time, without more, is insufficient to cause a use which begins as permissive to ripen into an adverse or hostile use. *Harper* v. *Hannibal,* 241 Ark. 508, 408 S.W.2d 591 (1966). However, the length of time that the passageways were used and the circumstances surrounding their use may be sufficient to establish an adverse use. *Armstrong* v. *Cook,* 240 Ark. 801, 402 S.W.2d 409 (1966); *Fullenwider* v. *Kitchens,* 223 Ark. 442, 266 S.W.2d 281 (1954); *McGill* v. *Miller,* 172 Ark. 390, 288 S.W. 932 (1926); *Zunamon* v. *Jones,* 271 Ark. 789, 610 S.W.2d 286 (Ark. App. 1981).

Several witnesses testified as to the existence of the roads for over thirty years. Ray Bishop, appellants' predecessor in title, testified that the eastern leg of the "V" was there when he purchased the land in 1932, and that the western leg of the "V" and the turn-around were established when the rent house was moved in, somewhere around the mid 1940's. He further testified that he did not give permission for anyone to use the roads, and that, as to the western road and the turn-around, "[T]hey just took it on them as though they owned it". He stated that he just moved over and let the road and the turn-around be established so as to avoid trouble.

Appellee Charles Thompson testified that his father had lived in the house from 1957 until 1964, and that from 1964 until the date of this lawsuit, various tenants had occupied the house. He further testified that he regularly used the roads and the turn-around in order to perform various tasks related to the rent house.

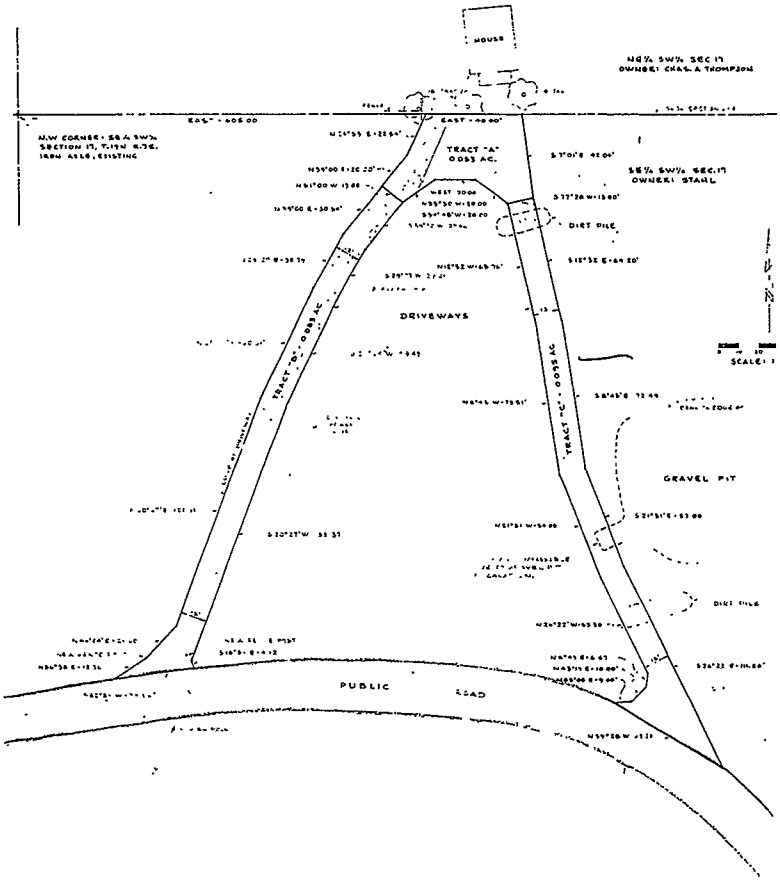
Appellants presented testimony which contradicted that which was presented by appellee, particularly regarding the degree of use. Appellant I. V. Stahl testified that since he had acquired the property, in about 1972, there has been only intermittent use of the roads, while Charles Thompson detailed each tenant who had lived in the house since 1972, including the length of time each one had rented the house and used the road.

Although we review chancery cases *de novo,* we will not reverse the findings of the chancellor unless those findings are clearly erroneous or against a preponderance of the evidence. Rule 52 (a), Arkansas Rules of Civil Procedure; *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981). Where the testimony is in conflict, we are guided by the chancellor's findings, absent an error of law. *Titan Oil & Gas, Inc.* v. *Shipley,* 257 Ark. 278, 517 S.W.2d 210 (1975); *Hall* v. *Clayton,* 270 Ark. 626, 606 S.W.2d 102 (Ark. App. 1980).

The evidence shows that the land in question is wild, unenclosed, and unimproved, and therefore appellees' use of the land is presumed to have begun as a permissive use. The evidence supports a finding that the use of the two roadways and the turn-around became adverse and hostile both because of the length of time they were used, and because of the circumstances surrounding their use. We cannot say that the chancellor's findings were clearly erroneous or against a preponderance of the evidence.

Affirmed.

APPENDIX


HOUSE
NE¼ SW¼ SEC 17
OWNER: CHAS. A THOMPSON
N.W. CORNER - SE¼ SW¼
SECTION 17, T.19N R.7E.
IRON ASSE, EXISTING
TRACT "A"
0.055 AC.
SE¼ SW¼ SEC.17
OWNER: STAHL
DIRT PILE
DRIVEWAYS
TRACT "B" - 0.055 AC
TRACT "C" - 0.055 AC
SCALE: 1
GRAVEL PIT
DIRT PILE
PUBLIC
ROAD

Paul MILLWEE, Executor *v.* Charles R. WILBURN et ux

CA 82-61 640 S.W.2d 813

Court of Appeals of Arkansas
Opinion delivered October 27, 1982

Smith, Stroud, McClerkin, Dunn & Nutter, for appellant.

Pilkinton & Pilkinton, for appellees.

TOM GLAZE, Judge. Appellant filed a suit to cancel a deed and bill of sale executed by the deceased, Ms. Homa McClinton, to the appellees, Charles Wilburn and Leona Wilburn, his wife. The bases of the suit included allegations of Ms. McClinton's mental incapacity, undue influence and overreaching by Charles Wilburn and inadequate consideration paid by appellees. The chancellor dismissed appellant's complaint for want of equity. The primary issue on appeal is whether the chancellor's findings are clearly against the preponderance of the evidence. We find they are not and affirm.

Charles Wilburn was the nephew of Ms. McClinton. Ms. McClinton was a strong-willed woman who lived 89 years. At different periods, Wilburn assisted his aunt in her personal and business affairs. For instance, he looked after her from 1963 until 1973, at which time she became angry with him. At Ms. McClinton's urging, Wilburn resumed assisting her in May, 1979, and continued until she died on November 21, 1979. On May 25, 1979, Ms. McClinton executed a deed and bill of sale in Wilburn's favor. It is this deed that appellant, the executor of Ms. McClinton's estate, seeks to set aside.

I. MENTAL CAPACITY

In *Pledger* v. *Birkhead,* 156 Ark. 443, 455, 246 S.W. 510, 515 (1923), the Supreme Court stated the following test of mental competency to execute a deed:

> If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument.

Appellant had the burden to show that Ms. McClinton lacked the mental capacity to execute the May 25 deed by a clear preponderance of the evidence. *Watson* v. *Alford,* 255 Ark. 911, 503 S.W.2d 897 (1974). Like the trial court, we believe appellant failed to meet that burden. In fact, one of appellant's witnesses was an attorney who drew a will for Ms. McClinton three months after she executed the deed. He testified that she was in good physical and mental condition and that "she had a very bright mind." The attorney also related that he recalled her reciting poetry at length from memory and that she was "totally competent at that point." Another witness, Gordon Broome, stated that he read the deed to Ms. McClinton and asked if it was her desire to convey her property. Broome testified that she said it was, and he then signed and notarized a Bill of Sale. A third witness, Dr. J. S. Andrews (a neuropsychiatrist) testified by deposition. Andrews had examined Ms. McClinton on May 24, 1979, and his opinion was that she would have understood that she conveyed her property by signing and delivering the May 25 deed. The county sheriff, Marlin Surber, testified that he saw Ms. McClinton in the hospital shortly before her death. He said, "I thought she was comparatively as sharp as she ever was.... In characterizing her business wise, I would think that she took care of her business pretty well." We conclude that the evidence strongly supports the trial court's holding that Ms. McClinton possessed the required mental capacity when she executed the deed.

II. FRAUD OR UNDUE INFLUENCE

When it is contended that a deed was obtained by duress or fraud, the law requires that the proof be clear, cogent and convincing before the deed can be set aside. *Davidson* v. *Bell,* 247 Ark. 705, 710, 447 S.W.2d 338, 340 (1969). *See also Baker* v. *Helms,* 244 Ark. 29, 423 S.W.2d 540 (1968) (especially when fraud is alleged, evidence must be clear, strong and conclusive, or clear, cogent and convincing, or clear, unequivocal and decisive). Here, the trial court rejected appellant's contention of undue influence, and found that Ms. McClinton was a very strong-willed person, not the type who would by any means be a victim of undue influence, overreaching or fraud. We believe there is sufficient evidence to support the trial court's finding.

John Hainen, an attorney who had assisted Ms. McClinton in years past, testified that she was "very strong-willed" and "[s]he had seen the world pretty rough, and she was able to face it." In fact, the evidence reflects that she exercised a great deal of independence from others, including Mr. Hainen and her nephew. Ms. McClinton initially became upset with her nephew, Wilburn, in 1973, after he had cared for her personal and business affairs for ten years. She then looked after her own affairs until 1979. However, she engaged her attorney, Mr. Hainen, to assist her by placing his signature on her bank accounts. In 1979, while she was residing in the DeQueen Nursing Home, she apparently became upset with Mr. Hainen and removed his name from her bank accounts. She called Wilburn for help and told him she wanted to leave the nursing home. However, before any arrangements were made, she became ill and was hospitalized. While in the hospital, she signed the deed conveying her property to Wilburn and tore up a will that had been prepared previously by Mr. Hainen. After being dismissed from the hospital, she moved into the Four States Nursing Home in Texarkana, Texas. She became disenchanted with her stay in this nursing home and informed a visiting friend, Mr. Paul Millwee, that she needed his help. She advised Millwee that she did not want Wilburn to receive anything, evidencing her anger against Wilburn once again.

From the foregoing evidence, the trial court concluded that Ms. McClinton frequently changed her mind and attempted to play one person against another in an effort to get her way. We believe such a conclusion fairly could be reached by the court in view of the evidence presented. On the other hand, we fail to see how such evidence could in any way show that Ms. McClinton was unduly influenced or overreached when she deeded her property to Wilburn. The proof shows that the deed was prepared and executed at the insistence of Ms. McClinton. Mr. Broome, the notary, assured himself that she knew what she was doing when she executed the deed and that it was her desire to convey the property to Wilburn. In sum, Ms. McClinton was in no way dominated by anyone. The record reflects she was a strong-willed, mentally competent person who normally prevailed on others to conduct many of her personal and business affairs. On these facts, we are unable to say the court erred in finding that Ms. McClinton was not unduly influenced in the execution of the May 25 deed to Wilburn.

III. INSUFFICIENT CONSIDERATION

The owner of property who is *compos mentis* has absolute dominion over his property and may dispose of it as he sees fit, so long as he does not interfere with the existing rights of others. Absent fraud, accident or mistake, no one can question another's disposition of his own property. *O'Connor* v. *Patton,* 171 Ark. 626, 640, 286 S.W. 822, 827 (1926). When a conveyance is voluntary and absolute on its face, then the question of consideration is immaterial. *Id.; see also Szklaruk* v. *Szklaruk,* 251 Ark. 599, 608, 473 S.W.2d 853, 858 (1971) (chancellor's holding that question of consideration for deed immaterial held not against preponderance of evidence). Inadequacy of consideration does not afford grounds for setting aside a voluntary conveyance. *Leake* v. *Garrett,* 167 Ark. 415, 420, 268 S.W. 608, 609 (1925).

In the deed which Ms. McClinton executed, the recited consideration was as follows:

> Services and expenses already performed and incurred, Love and Affection and Ten and No/100 ($10.00)

Dollars, paid by Charles R. Wilburn and Leone V. Wilburn, his wife.

At the time the deed was executed, Ms. McClinton was also presented with a letter in which Mr. Wilburn promised to care for his aunt in the future. The testimony of Mr. Wilburn and others indicated that he had performed numerous acts for his aunt both before and after the deed was executed. He testified that he intended to pay expenses for nursing home maintenance for his aunt if and when Ms. McClinton's own funds were depleted.

Support deeds are unquestionably valid in Arkansas. *Wood* v. *Swift,* 244 Ark. 929, 940, 428 S.W.2d 77, 82 (1968). When consideration for a deed is a promise to support, then a grantee's intentional failure to support is grounds for a grantor or his executor to bring an action to cancel the deed for failure of consideration. The basis of such action is that the grantee's intent was fraudulent from the outset; the deed was literally *without* consideration because the grantee presumably never intended to support. *Id.*

The facts at bar do not show that Mr. Wilburn failed to carry out his part of the bargain either intentionally or otherwise. The testimony indicated that he was solicitous of his aunt's needs and wishes during her stay at the Four States Nursing Home. In fact, the periods during which Mr. Wilburn did not see to his aunt's needs, specifically 1973 to 1979, were at her instance. During that time, she relied upon Mr. Hainen and others to help her handle her business affairs.

We cannot say that the trial court's finding that adequate consideration existed for the conveyance from Ms. McClinton to Mr. Wilburn was against the preponderance of the evidence.

IV. THE TAPE RECORDING

The appellant alleged that the chancellor erred in refusing to admit at trial a tape recording of Ms. McClinton's statement to Sheriff Marlin Surber made on the

morning before her death. The appellant contends that the recording should have been admitted under Rule 803 (3) of the Uniform Rules of Evidence to show Ms. McClinton's then existing state of mind with regard to her transferring her property to Mr. Wilburn. The tape recording was made six months after the conveyance to Mr. Wilburn. Sheriff Surber himself testified to virtually the same facts as are contained on the tape.

Ms. McClinton's state of mind at the time of her death is not at issue in this case. Rather, her state of mind at the time she executed and delivered a deed to Mr. Wilburn is important. The chancellor's decision not to admit the tape is within his sound discretion, and we cannot find that his exercise of that discretion was erroneous.

Affirmed.

Joe WILSON *v.* CITY OF PINE BLUFF

CA CR 82-26 641 S.W.2d 33

Court of Appeals of Arkansas
Opinion delivered November 3, 1982

Thurman Ragar, Jr., for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was charged with criminal trespass, in violation of Ark. Stat. Ann. § 41-2004 (Repl. 1977). He was convicted in the Municipal Court of Pine Bluff, Arkansas, and he appealed that decision to the Jefferson County Circuit Court. The appellant waived his right to a jury trial. After a trial *de novo,* he was found guilty and was fined $75.00 plus costs. From that decision, comes this appeal.

THE FACTS

On June 13, 1981, two Pine Bluff police officers, in response to radio instructions, went to a residence at 5704 Cheatham Street in Pine Bluff. Upon their arrival, they observed an injured woman being placed in an ambulance for transport to a hospital. The officers entered the residence to investigate the situation.

Inside the residence, the officers found the appellant and an unidentified woman. The officers testified that the woman claimed to live in the residence, and that she wanted the appellant to leave. They stated that the appellant did not respond to the woman's statement concerning her occupancy of the residence, even though he heard it. They further testified that the appellant stated that he was not going to leave the residence.

The officers testified that they explained to the appellant that if the woman wanted him to leave, then he would have to do so, or be arrested for criminal trespass. The

officers verified that the woman did want the appellant to leave, and they requested that he do so on several occasions. The appellant refused to leave, and he was arrested for criminal trespass. The testimony shows that the appellant never claimed any possessory or ownership right to the premises.

THE ADMISSIBILITY OF THE EVIDENCE

Arkansas Statutes Annotated § 41-2004 (Repl. 1977) provides that the offense of criminal trespass is committed when an individual purposely enters or remains unlawfully on the premises of another person. The appellant argues that the only evidence which proved that the premises belonged to another person was the hearsay testimony of the officers concerning the woman's statements, and that this testimony was inadmissible hearsay. The appellant made a timely objection to the testimony, and the trial court ruled that the statements made by the woman, as testified to by the officers, were admissible as an adoptive admission of a party-opponent.

The Uniform Rules of Evidence, Rule 801 (d) (2) (ii), Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides that a statement is not hearsay if the statement is offered against a party and is a statement of which that party has manifested his adoption or belief in its truth. Prior to the adoption of this rule, Arkansas law recognized a "tacit admission" as an exception to the hearsay rule. Under that exception, proof of damaging statements against an accused, made in his presence, were admissible in evidence, on the theory that the jury might find that the silence of the accused in the face of the accusation was a tacit admission. *Burford* v. *State,* 242 Ark. 377, 413 S.W.2d 670 (1967); *Moore* v. *State,* 151 Ark. 515, 236 S.W. 846 (1922). Before hearsay evidence of an implied admission could fit within this exception, it must have been shown that the accused heard the statement, that he understood it, and that he failed to deny it. *Kagen* v. *State,* 232 Ark. 189, 334 S.W.2d 865 (1960).

The sole question in determining whether statements made by another person are admissible against a party as an

admission by silence or acquiescence is whether a reasonable person, under the circumstances, would naturally have been expected to deny them, if the statements were untrue.[1] Some of the factors which should be considered in determining whether a party has impliedly admitted the statements are:

(1) The statement must have been heard by the party against whom it is offered;

(2) it must have been understood by him;

(3) the subject matter must have been within his personal knowledge;

(4) he must have been physically and psychologically able to speak;

(5) the speaker or his relationship to the party or event must be such as to reasonably expect a denial; and

(6) the statement itself must be such that, if untrue, under the circumstances, it would have been denied.

Others factors besides these may need to be considered, depending on the facts of a particular case. *See,* 4 J. Wigmore, Evidence § 1071-1073 (Chadbourn rev. 1972); C. McCormick, The Law of Evidence § 270 (2d ed. 1972).

The Uniform Rules of Evidence, Rule 801 (d) (2) (ii), as adopted by the State of Arkansas, is identical to the Federal Rules of Evidence, Rule 801 (d) (2) (B). The manner in which the federal courts have applied their rule is helpful.

The federal cases indicate that before a statement can fall under the adoption admission rule, the trial court must

[1]Silence by an accused or a claim of his Fifth Amendment right to remain silent made in response to a police accusation during custodial interrogation is inadmissible. *Doyle* v. *Ohio,* 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976). Even silence by an accused in response to incriminating statements made by a third person, while he was in police custody and before he was advised of his Fifth Amendment right to remain silent, is inadmissible. *Kagebein* v. *State,* 254 Ark. 904, 496 S.W.2d 435 (1973).

find that sufficient foundational facts have been introduced so that the jury can reasonably infer that the accused heard and understood the statement and that the statement was such that, under the circumstances, if the accused were innocent he would normally respond. *United States* v. *Fortes,* 619 F.2d 108 (1st Cir. 1980); *United States* v. *Moore,* 522 F.2d 1068 (9th Cir. 1976), *cert. denied,* 423 U.S. 1049, 96 S. Ct. 775, 46 L.Ed.2d 637 (1976). Once a foundation has been established, the question is left to the jury to determine whether the accused acquiesced in the statement.[2] *United States* v. *Moore, supra.*

The procedure used by the federal courts in applying Rule 801 is appropriate to use in applying our rule, since it is entirely consistent with the approach followed in applying the "tacit admission" exception to the hearsay rule under prior Arkansas law. *Moore* v. *State, supra.*

In the case at bar, the testimony indicates that the appellant was present, and in fact was within two feet of the officers and the woman, when the statements were made. Further, he made no comment or objection to the woman's claim of right to occupy the residence. On these facts, adequate foundational facts were presented to the trial court so as to render the statements admissible. The trier of fact could reasonably infer that the appellant heard and understood the woman's statements, and that, had her statements been untrue, he would have responded with either a denial or an explanation.

Preliminary questions regarding the admissibility of evidence are decided by the trial court, and the appellate court affirms such a decision unless it constitutes an abuse of discretion. Uniform Rules of Evidence, Rule 104 (a), (b), Ark. Stat. Ann. § 28-1001 (Repl. 1979); *Derring* v. *State,* 273 Ark. 347, 619 S.W.2d 644 (1981). We hold that the trial court did

[2]Even though a statement may be admissible under the adoptive admission rule, the trial court may still exclude such a statement if he finds that the probative value of the statement is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Uniform Rules of Evidence, Rule 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

not abuse his discretion by ruling that the officer's testimony was admissible.

THE RIGHT OF CONFRONTATION

The appellant also argues that he was denied his constitutional right of confrontation of his accusers by the admission of the woman's statements through the testimony of the police officers. The Sixth Amendment to the United States Constitution[3] and Article 2, § 10 of the Arkansas Constitution assure an accused the right to be confronted with the witnesses against him.

Although the rules of evidence concerning hearsay and the confrontation clause generally safeguard similar rights, the overlap is not complete. A violation of the confrontation clause may be found even though statements were admitted under recognized hearsay exceptions, or a violation of the confrontation clause may not be found even when the statements are admitted in violation of long-established hearsay rules. *California* v. *Green,* 399 U.S. 149, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970). Thus, the determination that the use of an extrajudicial statement is permissible under the rules of evidence does not resolve the constitutional question regarding the right of confrontation. *United States* v. *Rogers,* 549 F.2d 490 (8th Cir. 1976), *cert. denied,* 431 U.S. 918, 97 S. Ct. 2182, 53 L.Ed.2d 229 (1977).

The confrontation clause prevents the state from trying the defendant by using *ex parte* affidavits or depositions in lieu of examination and cross-examination of the witnesses in front of the trier of fact. *California* v. *Green, supra; Mattox* v. *United States,* 156 U.S. 237, 15 S. Ct. 337, 39 L.Ed. 409 (1895).

In the case at bar, it is the appellant's adoptive statement which is being used against him. While what is proved is the extrajudicial statement, the thing that proves it (the thing

[3]In *Pointer* v. *Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965), the United States Supreme Court ruled that the right of confrontation provided to an accused by the Sixth Amendment to the United States Constitution is applicable to the States by the Fourteenth Amendment.

that makes it evidence) is the action of the appellant. By his silence, he adopted the statement as if he had spoken it himself. The reliability of the statement does not depend on the credibility of the third party who is not present in court. The statements were heard by the two police officers, and appellant's reaction to the statements were observed by the officers. Appellant was able to confront these witnesses, and was not denied his constitutional right of confrontation guaranteed by the federal and state constitutions.

The judgment appealed from is affirmed.

Affirmed.

William RILEY, Ed GIBSON and Travis GIBSON
v. DREW COUNTY, Arkansas

CA 82-89 641 S.W.2d 38

Court of Appeals of Arkansas
Opinion delivered November 3, 1982

James W. Haddock, for appellants.

James A. Ross, Jr., County Atty., for appellee.

LAWSON CLONINGER, Judge. In this eminent domain proceeding the Drew County Court acquired a portion of appellants' lands for the widening and paving of an existing

gravel highway designated as State Highway 277. The appellants, William Riley, Ed Gibson and Travis Gibson, filed a claim in Drew County Court seeking to have Drew County move and replace appellants' fences along the right-of-way. The Drew County Court denied the claims, and on appeal to the circuit court, a jury returned a verdict denying the claims of appellants.

The question asked by appellants on this appeal is this: "Is the county liable for the replacement of fences taken in an eminent domain proceeding or does enhanced value cover that also?"

Evidence was presented which indicates that appellants do not want to sell their land and are unable to build new fences for the control of their livestock. However, there was substantial evidence introduced from which the jury could find that the enhanced value of appellants' land amounted to considerably more than the value of the land taken plus the cost of erecting new fences.

Where there is a partial taking of a landowner's property, as is the case here, the rule is that the measure of damages is the difference between the value of the whole land before the appropriation and the value of the portion remaining after the appropriation. *Arkansas State Highway Commission* v. *Fox,* 230 Ark. 287, 322 S.W.2d 81 (1959). In *Cullum* v. *Van Buren County,* 223 Ark. 525, 267 S.W.2d 14 (1954), the Arkansas Supreme Court held that even though a landowner's fence, trees and well were destroyed by the construction of a road, the property owner had received just compensation by virtue of the benefits that his property derived from the establishment of a new road. The concept of enhancement was recognized in that case, and the landowner was disallowed any damages. In the case before the court, the jury considered all the evidence regarding appellants' damages and the enhancement value of the remaining property, and we must conclude that the evidence was sufficient to support the verdict.

Affirmed.

Orin YOUNG *v.* William F. EVERETT, Director of Labor, and H & P APPRAISAL

E 82-67 641 S.W.2d 39

Court of Appeals of Arkansas
Opinion delivered November 3, 1982

Daniel D. Becker, for appellant.

Bruce Bokony, for appellees.

LAWSON CLONINGER, Judge. The Arkansas Board of Review denied unemployment benefits to claimant under the provisions of Section 5 (a) of the Arkansas Employment Security Act, on the grounds that claimant quit his last work without good cause. The Board also found that his base period wages should be reduced 25% under Section 3 (h) of the Act.

On this appeal, claimant contends that his resignation was with good cause because of the breach of the employment agreement by the employer. We agree with claimant's contention.

Claimant was employed as a residential field appraiser for H & P Appraisal in Garland County. When the employer's work was finished in Garland County, some of the employees were given employment, with expenses paid, when the employer's operation was moved to Howard

County. Other employees, including claimant, were offered a job in Howard County but were told that the employer would not pay their out-of-town expenses. Claimant testified that at the time he was hired the employer agreed to provide expenses for any change in location of the job site.

Claimant worked one day in Howard County, by agreement with the employer, to see what his expenses would be. Claimant resigned when he discovered that his wages would not cover his expenses. The only testimony to refute the evidence presented by claimant was a telephone conversation between the employer and an employee of the Employment Security Division. In that conversation, the employer stated that there had been no agreement regarding out-of-town expenses when claimant was hired.

The telephone conversation between the employer and the Agency employee was hearsay, and does not constitute substantial evidence to support the decision of the Board.

In *Smith* v. *Director of Labor,* 276 Ark. 430, 637 S.W.2d 537 (1982), the Arkansas Supreme Court held that hearsay evidence *may* constitute substantial evidence, but the court did not say that *any* hearsay would do so. The same conclusion was reached in *Bockman* v. *Arkansas State Medical Board,* 229 Ark. 143, 313 S.W.2d 826 (1958), relied upon in *Smith* v. *Director,* but in *Bockman* the evidence which the court found to be substantial consisted of affidavits and certified copies of court decisions.

Under these facts the reported telephone conversation does not rise to the dignity of substantial evidence, and since that item of evidence was the only evidence upon which the Board could have based its decision, we must hold that claimant is entitled to benefits.

Reversed.

MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I agree with the majority that there is no substantial evidence in this

case to support the decision of the Board of Review. My reason for agreeing is based upon the fact that there is no showing of when or how the employer's statement got into the record and upon the fact that neither the appeals referee nor the board even mentioned the statement in their decisions.

I recognize, however, that the Supreme Court of Arkansas has held that hearsay evidence alone may constitute substantial evidence. *Smith* v. *Everett,* 276 Ark. 430, 637 S.W.2d 537 (1982). Therefore, my agreement to reverse is limited to the facts in this case.

Betty Lou Dale CURRENCE (WALDEN) *v.* Elwood Earl CURRENCE

CA 82-80 641 S.W.2d 40

Court of Appeals of Arkansas
Opinion delivered November 3, 1982

Ronald J. Bruno & Associates, for appellant.

Hale, Lee & Green, by: *Milas H. Hale,* for appellee.

DONALD L. CORBIN, Judge. Appellant, Betty Lou Dale Currence Walden, filed a motion asking that appellee, Elwood Earl Currence, be cited for contempt for failure to abide by a clause in their property settlement agreement. The clause provided that appellee "agrees to be responsible for the college expenses of the child so long as the child maintains a reasonable academic level of achievement." The trial court ruled that appellee was not required to pay the college expenses beyond four years. We reverse.

The parties' son, Jerry, enrolled in the architectural program at the University of Arkansas at Fayetteville, seeking a Baccalaureate Degree of Architecture. He began the program in 1977 and has maintained a B average. Appellee testified that he knew that Jerry was going to enter the architectural degree program at the time he executed the property settlement agreement but didn't check to find out that it lasted longer than four years. Appellee was not willing to pay college expenses beyond four years.

The appellee did not limit his obligations to his son by contracting for a four-year college education. Here, appellee knew his son was entering an architectural program. It customarily takes five to six years to finish the baccalaureate degree requirement in architecture. Baccalaureate degree requirements are not measured in years but by semester hours.

On the facts, we construe the provision as requiring the appellee to pay the college expenses of his child until the child has successfully completed his required course of study to obtain a baccalaureate degree in his chosen field of study. The son must be diligent in his pursuit of the Baccalaureate Degree in Architecture and maintain a reasonable academic level of achievement. See *Armstrong* v. *Armstrong,* 248 Ark. 835, 454 S.W.2d 660 (1970), *Murphy* v. *Morris,* 200 Ark. 932, 141 S.W.2d 518 (1940).

We reverse and remand with directions to the trial court to enter an order in keeping with this opinion.

Reversed and remanded.

COOPER, J., concurs.

Bob WHITE and Doris Sinclair WHITE *v.*
Jack GLADDEN and Carol GLADDEN

CA 82-71 641 S.W.2d 738

Court of Appeals of Arkansas
Opinion delivered November 10, 1982
[Rehearing denied December 8, 1982.*]

*COOPER, CORBIN & GLAZE, JJ., would grant rehearing.

Jeff Duty, for appellants.

Claude M. Williams, Jr., for appellees.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a non-jury trial in circuit court. The parties made an oral agreement for appellants to lease two rooms for one year in a building owned by appellees. The consideration for the agreement was that appellants would make certain improvements to the building. Appellants moved office furniture and equipment into the two rooms and opened a real estate office. About three months later, the appellees told appellants that the terms of the lease had been violated and that the lease was cancelled. When appellants left the building at the end of the day, appellees changed the locks and locked appellants out.

Separate and apart from the lease, appellants loaned appellees a forklift for use in lifting material to the roof of a house which appellees were either building or repairing.

At the time of trial appellants had removed their property from the building and had regained possession of their forklift. The trial court found that the lease was unlawfully terminated and awarded appellants damages in the amount of $1,157.88 for labor, expenses, and damages to the property left in the building. The court found that the loan of the forklift was a gratuitous bailment, that appellees

were obligated to return the machine upon demand, and that they breached that obligation. Appellants were given damages in the amount of $325.00 for the detention of the forklift and $551.91 for physical damage which occurred to it while in appellees' possession. The court also awarded appellants $500.00 as punitive damages.

In this appeal the appellants question the sufficiency of the $325.00 allowed as damages for detention of the forklift. To determine how the trial judge arrived at this figure we note there was evidence that appellees got the forklift about the middle of January and that appellee Jack Gladden testified he used it "a little bit the latter part of January by putting up lumber on top of my building." He also said he used it "around the first part of February" and testified he used it a total of about five hours. After that he moved it back up the "holler" and got it out of sight of the public.

Shortly after appellants were "locked out" the appellant Bob White wrote Gladden that he was being billed "my standard rental rate of $65.00 per day for each day you maintain possession of said forklift." The court found that this amount constituted a reasonable rate for rent of the machine and said since it was clear the appellees had used it about five hours the appellants should have $325.00 as damages for that use. While the court did not spell it out specifically, it is clear that the evidence would support the finding that the forklift was used by appellees a part of five different days and $65.00 for each day would explain the sum of $325.00. However, since the appellees had possession of the forklift for about 13 months, it is the appellants' contention that they were entitled to $65.00 per day for the entire 13-month period.

The appellants cite *Cullin-McCurdy Construction Co.* v. *Vulcan Iron Works,* 93 Ark. 342, 124 S.W. 1023 (1910), as authority for their contention that they are entitled to rental value during the entire period the machine was detained by appellees. The appellees do not disagree that the value of the use of the property during detention is a proper measure of damage but they say that in the above cited case the party

detaining the equipment made full use of it each and every day during the period of detention.

We think this is an important distinction to be made in this case. As both sides point out, the measure of damages involved has not been litigated recently but in an older treatise, Wells, *Law on Replevin,* § 579 (2d ed. 1907), it is stated that just compensation for the detention of property which has a usable value will, in many cases, be the reasonable value of that use. Footnote 2, however, contains this statement: "In the case of machinery which wears in using, the damages for detention are reckoned at the value of the use, *less the damage which would result from wear in use.*" The case of *Peerless Manufacturing Co.* v. *Gates,* 61 Minn. 124, 63 N.W. 260 (1895), is cited in support of that statement. That case says:

> [T]he court charged the jury, in substance, that the measure of damage for such detention is the fair rental value of the property during the time it is so detained. While this is the correct rule of damages in many cases, it is not in the case of detention of an article which wears out as rapidly by use as does a threshing machine. It does not appear that the plaintiff used the machine while it so detained it. If it did so appear, the rule laid down would be correct. But, for all that appears, the machine may have been carefully housed and stored during all of this time, and subject to no wear or tear, except such deterioration as would result from keeping it over, properly stored. It seems to us that, under the facts of this case, the correct rule is, what is the fair rental value of the machine, less the damage which would result to it from the extra wear and tear caused by its use?

The *Peerless* case was cited in *Puckett* v. *Hopkins,* 206 P. 422 (Mont. 1922), where the court said, "The rule that the net usable value may be recovered applies only to a cause involving personal property the use of which does not lessen its value materially."

And in McCormick, *Handbook on the Law of Damages,* § 125 (1935), it is said, "In assessing usable value, it is

the net value that is sought, and, if the property was idle during detention and would have been subjected to wear and tear by use, an allowance for this should be made." The case cited in support of that statement is *Armstrong & Latta* v. *City of Philadelphia,* 249 Pa. 39, 94 A. 455 (1915), which states, "If defendant did not use the property, the deterioration which it would have suffered by use must be deducted from the value of the use."

In the instant case, the only evidence in the record as to the rental value of the forklift is that of appellant Bob White. At his rate of $65.00 per day, appellants would receive more than $23,725.00 as rental value for the 13 months the appellees had possession of the forklift. Appellant White testified the forklift was a used one worth $16,000.00 when he let appellees have it. Under that testimony appellants would recover their $16,000.00 investment and make a profit of $7,725.00 in a period of 13 months. And if the forklift was worth only $9,000.00, the price for which appellant admitted he offered it at an auction sale about a month before he loaned it to appellees, the appellants could recover their investment and make a profit of $14,725.00 in the 13-month period.

It was the appellants' burden to prove their damages. *Standridge* v. *City of Hot Springs,* 271 Ark. 754, 610 S.W.2d 574 (1981); *Christmas* v. *Raley,* 260 Ark. 150, 539 S.W.2d 405 (1976). The trial judge gave appellants $65.00 per day for each of the five days which he found that appellees used the forklift but did not award any damages for the other days that the machine was in their possession but not actually used by them. As the fact finder, he could, of course, find that a rental of $65.00 per day was a reasonable rate for the forklift during the time it was in actual use and deteriorating in value because of that use. It is equally true that he could find such a rate to be greatly excessive for rental of the machine during the time it was not being used. *Armstrong & Latta* v. *City of Philadelpha, supra,* also held that whether the property involved could have been rented continuously during the period of detention would materially affect the amount of damages sustained and that the amount of damages should bear some reasonable proportion to the

value of the property detained. Since the appellants produced no evidence from which the court could determine the amount of just compensation which they should receive for the period the forklift was not in use, we think the court was correct in awarding damages for only the days it was used.

It is true that the court did not make a specific finding setting out the reason he awarded damages for only the days the machine was in actual use but we do not reverse the trial judge if his decision is right even if his reasoning is wrong. *Miller* v. *Dyer,* 243 Ark. 981, 423 S.W.2d 275 (1968); *Southern Farm Bureau Casualty Ins. Co.* v. *Reed,* 231 Ark. 759, 332 S.W.2d 615 (1960).

We affirm the decision of the trial judge in this case because, under the law, there is evidence to support his decision and under Civil Procedure Rule 52 (a) it is our duty to affirm his decision if it is not clearly against the preponderance of the evidence.

Affirmed.

COOPER, CORBIN, and GLAZE, JJ., dissent.

TOM GLAZE, Judge, dissenting. The majority decision not only ignores 100 years of law, it also allows a party to unlawfully retain another's property without incurring civil damages. This decision involves a replevin action and the holding adopted by the majority will drastically affect such actions in the future. Therefore, my dissent necessitates a thorough discussion of the facts and the applicable law.

The sole issue in this case concerns the measure of damages arising from a wrongful detention of certain personal property. See Ark. Stat. Ann. § 34-2116 (Repl. 1962). Although the parties tried other matters relative to an oral lease to which they had agreed, appellants in this appeal challenge only that part of the trial court's decision which failed to award the rental value for appellees' detention of a forklift.

At trial, appellees claimed that appellant, Bob White,

loaned them his forklift for the term of an oral lease under which appellants were leasing two rooms from appellees. White contended the forklift agreement between the parties had nothing to do with the lease.

The trial court agreed with White, finding that the use of the forklift by the appellees constituted a gratuitous bailment which was separate from the parties' lease. The court held appellees unlawfully detained the forklift, but since they had never agreed to pay rent, the *court limited* appellants' *damages to the time appellees used it.* Based upon the settled law in Arkansas, the measure applied by the court was clearly erroneous.

Our appellate courts have had no recent occasion to consider the issue posed here. However in *Continental Gin Co.* v. *Clement,* 176 Ark. 864, 4 S.W.2d 901 (1928), the Supreme Court held that the damages for the wrongful detention of property is the usable value of the property. *See also, Cullin-McCurdy Construction Co.* v. *Vulcan Iron Works,* 93 Ark. 342, 124 S.W. 1023 (1910).

The *Cullin-McCurdy* case was cited recently in *Garoogian* v. *Medlock,* 592 F.2d 997 (8th Cir. 1979). In *Medlock,* the court upheld a jury instruction, as being based on Arkansas case law, which allowed the plaintiff (1) the fair market rental value of his tractor which the defendant detained for 45 days, and (2) the amount of damage to the tractor caused by the defendant.

More than 100 years ago, the Supreme Court in *Kelly* v. *Altemus,* 34 Ark. 184, 188 (1879), held the ordinary measure of damages for the plaintiff in replevin, in the absence of proof of special damages, is legal interest on the value of the property in addition to the property itself or its value. Regarding property having a usable value, the court stated the true measure is the value of the use during the detention. *See also* 77 C.J.S *Replevin* § 280 (1952).

The usable value rule adopted in *Kelly* is stated in *Wells on Replevin* (2d ed.), p. 492, § 580. *See also, Korb* v. *Schroedel,* 93 Wis.2d 207, 286 N.W.2d 589 (1980), and D.

Dobbs. *Handbook on the Law of Remedies, Damages — Equity — Restitution,* § 5.14 (1973). Wells discussed the rule and its proper application as follows:

> This rule, allowing the value of the use, is peculiar to the action of replevin. It grows out of the fact that the plaintiff asserts his continued ownership in the property, and seeks to recover the property and not its value. * * * *It only applies in cases where the party claiming the use is in a situation to use it, and had a right to use it,* [citing *Barney* v. *Douglass,* 22 Wis. 464] *and only applies to cases where the property can be put to use. It is for only the loss of the use of property which the party is in a situation to use, and can use, that the value of the use is allowed.* [Emphasis supplied].

As I previously noted, the trial court found the appellees had retained the forklift for months after its return was demanded. The trial court, however, gave appellants damages for only the five days appellees made use of it, and the majority of this court has now affirmed that award of damages. In upholding such award, our Court has allowed appellees, who wrongfully detained appellants' property, to limit their damages merely because they chose to use the forklift for five days even though they withheld it for thirteen months. In sum, the damages depended upon whether appellees actually used the forklift. If this measure of damages is countenanced, other inequitable situations will likely arise. For example, consider the following possible scenario. A person loans his car to a friend but later, because of a dispute, the friend contentiously refuses to return it. Instead, being aware of the decision in this case, he stores the car in his garage never to use it. Under the rationale used in upholding the award in this cause, the car owner who files a replevin action for his car's return would receive no civil compensatory damages. Such a result would be absurd as well as contrary to my understanding of the applicable law. Here, once the trial court found the property was wrongfully detained, it was then required to award damages based on the usable value of the forklift for the period of detention. As noted in *Kelly* v. *Altemus, supra,* and *Wells on Replevin,* the value of the use is for the loss of use of

the property which the party — in the instant case, appellants — is in a situation to use and can use. Contrary to the decision of the majority, it simply does not matter whether appellees used or could have used the forklift. Appellant, White, testified he had a chance to rent the machine, he demanded its return from the appellees, and he was refused. He offered substantial, additional evidence concerning the damages incurred because the forklift was not returned, and damages should have been awarded according to the machine's usable value.

In conclusion, the majority makes a strange reference to the fact that the appellants did not offer evidence to prove their cause. I cannot imagine how much more proof is necessary. In fact, the trial court found the appellants' assigned rate of $65 per day to be a fair rental value. Appellants also offered testimony and evidentiary documents from which the court could have easily determined the period the property was wrongfully detained. On this point, the majority fails, at least to my satisfaction, to indicate what other evidence appellants were required to present to prove their damages. My review of the record reveals they offered substantial proof on the issue of damages. The trial court merely did not consider or rely on much of that evidence because it applied the wrong measure of damages.

Without stating so, the majority has adopted for the first time a rule which affects the measure of damages in replevin actions. This rule is stated in *Armstrong & Latta* v. *City of Philadelphia,* 249 Pa. 39, 94 A. 455 (1915), as follows:

> If defendant did not use the property, the deterioration which it would have suffered by use must be deducted from the value of the use.

While I do not necessarily object to the rule cited in the Pennsylvania case, I believe that everyone should recognize that this rule has never been applied in an Arkansas case. I believe it is unfair for this Court to penalize the appellant because he failed to introduce evidence on how much the forklift depreciated during the period of detention. At the

least, I believe this case should be remanded for a new trial so the parties and trial court can try this matter in view of the new rules we have adopted. *Continental Geophysical Co.* v. *Adair,* 243 Ark. 589, 420 S.W.2d 836 (1967), and *Fidelity Mutual Life Insurance Co.* v. *Beck,* 84 Ark. 57, 104 S.W. 533 (1907).

Because of the impact this decision will have in future replevin actions, I am of the opinion this case should be reviewed by our Supreme Court. I especially believe a review is appropriate because the Supreme Court has not, in recent years, addressed the usable value rule and its application in replevin actions. I am convinced clarification is needed.

COOPER and CORBIN, JJ., join in this dissent.

Jimmy M. BAUGH *v.* Royce O. JOHNSON and Neale M. BEARDEN

CA 82-173 641 S.W.2d 730

Court of Appeals of Arkansas
Opinion delivered November 10, 1982
[Rehearing denied December 8, 1982.]

Holmes, Holmes & Trafford, for appellant.

Coleman, Gantt, Ramsay & Cox, by: *Martin G. Gilbert,* for appellees.

GEORGE K. CRACRAFT, Judge. Jimmy M. Baugh appeals from an order of the chancery court directing him to specifically perform a contract under which he agreed to purchase farm lands belonging to Royce O. Johnson and Neale M. Bearden at a price of $275,000.

The appellees, Johnson and Bearden, were the owners of approximately 180 acres in Lincoln County. The tract consisted of the Southeast Quarter (SE 1/4) of Section Eight (8), Township Eight (8) South, Range Seven (7) West, and 20 acres in the Southwest Quarter of that section lying east of Bayou Bartholomew. The Bayou made a horseshoe bend in the Southwest Quarter of that section. Ten acres of the lands owned by the appellees lay northeast of the Bayou in the Northeast Quarter of the Southwest Quarter, and the

balance lay southeast of the Bayou in the Southeast Quarter of the Southwest Quarter.

In January of 1981 the appellees listed the farm for sale with Robert Harper, a realtor in Star City. Harper was familiar only with the general location of the property and was not then furnished with a copy of the legal descriptions of the lands.

On January 26, 1981 Harper contracted with Baugh for the sale of the property for $275,000. At the time the sale was negotiated Harper located the lands on a county ownership map which indicated that the appellees' 20 acre tract lay wholly within the South Half of the Southwest Quarter of Section Eight. The west 10 acres of that shown on the property map and described in the contract did not in fact belong to appellees. This map did not show appellees as owners (which they in fact were) of the 10 acres lying northeast of the Bayou in the Northeast Quarter of the Southwest Quarter.

Harper then prepared a contract of sale which described the lands as shown on the county ownership map. At the time of the negotiations Baugh mentioned that he was aware that one Ryall was planting wheat on a portion of the farm and asked that the contract contain the stipulation "buyer to have 1981 crop." Such a provision was included in the contract which further provided that the seller would deliver possession of the property to the buyer within ten days after the closing date. No closing date was specified. At that time appellant was assured that possession could be delivered within the time specified in the contract.

According to the findings of the chancellor the mistake was not detected until February 11th when the abstract of title was delivered to Harper. On that date he again met with Baugh and pointed out to him the error in the description. According to Harper no protest was made by appellant concerning the improper description. Appellant again indicated that Ryall was still in possession and appeared to be going on with the wheat crop. He was then assured by appellees' attorney that Ryall had no lease for 1981 and

would vacate the premises on the date specified in the contract. The chancellor found that at that meeting and thereafter no further protest was made by appellant as to either the error in the description or the continued possession of Ryall.

On conflicting evidence the chancellor further found that Harper and appellant met again ten days later at which time appellant informed Harper that he had elected to rescind the contract because he found that there was "more land in the highway that divided the 160 acre tract and in the bayou than I thought." The chancellor accepted Harper's testimony that at that time no mention was made either of the erroneous description or of the continued presence of Ryall. At the time the election to rescind was communicated appellant stated to Harper that he would purchase the land for $230,000. This was communicated to appellees who informed appellant that they would accept no less than $250,000 or suit for specific performance would immediately follow. Appellant refused to do so and this suit was immediately instituted.

Appellant answered asserting that he had a right to rescind the contract because there had been a material misrepresentation as to the acreage and location of the land and a breach of the condition that he was to have "the 1980 crop." He averred that Ryall continued to possess the land and cultivate his wheat crop. By subsequent amendment he further contended that appellees' title to a portion of the land was not merchantable due to adverse possession of others. The chancellor found all issues against appellant and this appeal followed.

The appellant advances several points for reversal, each of which will require a recital of additional facts deemed pertinent to an understanding of our decision. The parties are not in substantial dispute as to the law governing each of these points. They differ only as to the applicability of those rules to the facts of the case. One cardinal rule, however, is applicable to all points. While chancery cases are reviewed *de novo* on the record, the findings of a chancellor will not be disturbed on appeal unless clearly against a preponder-

ance of the evidence and in making the determination we give due regard to the superior position of the trial court to judge the credibility of the witnesses and the weight to be given their testimony. Rule 52 (a), Arkansas Rules of Civil Procedure; *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981).

I

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THERE WAS NO MUTUAL MISTAKE OF FACT WHICH WOULD ENTITLE APPELLANT TO RESCIND HIS OFFER TO PURCHASE.

It was not disputed that Harper was appellees' agent and that he represented to the appellant that appellees owned and were contracting to sell 20 acres of land lying in the South Half of the Southwest Quarter of Section Eight. Harper located the 20 acre tract on a county ownership map which did show appellees as the owner of 20 acres adjoining the Southeast Quarter and lying south of Bartholomew Bayou. Nor was it disputed that the acreage owned by appellees in the South Half of the Southwest Quarter was only 10 acres and that the remaining 10 acres owned by them in the Southwest Quarter actually lay in the North half. In other words the appellees did not own 10 of these acres that Harper represented they owned at the time the contract was made. The appellant contends that the chancellor erred in not directing a rescission of the contract based on that mistake as to the quantity of land sold and its relative position to other lands. We do not agree.

Our courts have held that mistake standing alone is not sufficient to warrant rescission of a contract. It must appear further that the mistake involved a fact material to the inducement to the making of the contract. *Beaty* v. *Griffin,* 235 Ark. 389, 360 S.W.2d 126 (1962); *Blythe* v. *Coney,* 228 Ark. 824, 310 S.W.2d 485 (1958); *Wright* v. *Boltz,* 87 Ark. 567 (1908); *Yeates* v. *Pryor,* 11 Ark. 58 (1850). It must also be shown that the relative position of the parties and their means of information was such that the vendee must necessarily be presumed to have contracted upon the faith he

placed in the statements of his vendor. *McCormick* v. *Daggett,* 162 Ark. 16, 257 S.W. 358 (1924) and *Yeates* v. *Pryor, supra.*

The agent Harper was not at all familiar with the property and knew only its general location. He had to refer to a county property ownership map to determine its acreage and location. The appellant, having lived in the immediate area all of his life, was thoroughly familiar with the appellees' farm. His home was less than half a mile from it; he farmed land owned by his father which has a common corner with appellees' farm. He was familiar with who had worked the farm in prior years and was aware that appellees' tenant Ryall had planted wheat on parts of it. He also knew that the Brown brothers were farming part of the land south of the Bayou. Appellant was informed of the error but did not complain of it or base his request for rescission on it. The chancellor expressly found that appellant's position and his means of information with respect to the property was far superior to Harper's and the court also found that neither the quantity of acres nor the erroneous description was a controlling factor in the consummation of the contract. We cannot conclude that these findings were clearly erroneous.

II

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE APPELLEES HAD NOT BREACHED A SPECIAL CONDITION IN THE OFFER AND ACCEPTANCE WITH RESPECT TO THE 1981 CROP.

The appellant next contends that the trial court erred in holding that there had been no breach of a special condition that appellant would have the 1981 crop. We do not agree.

At the time the contract was executed the appellant asked for, and Harper inserted, this special condition in the contract. It was not disputed that at the time the contract was executed appellant knew that Ryall had planted wheat on 20 acres in the Southeast Quarter and was in possession of the farm on the date of trial. On February 11th the appellant

talked to Harper about the Ryall wheat crop and received assurances from the appellees' attorney that Ryall had no lease on the property for 1981 and that possession of the farm would be delivered at the time specified in the contract. Ryall testified that at the time he talked to the attorney on February 13 he would not have interfered with the sale of the property. There was testimony that after this assurance was given the question of the wheat crop never again came up between the parties. Harper testified that at a subsequent meeting on February 28th the possession issue was not mentioned but that appellant had then stated he would not perform the contract because "there were more acres in the highway and bayou than he had thought." Ryall further stated that he did not elect to cultivate the rest of the lands until he learned of appellant's renunciation of the contract.

The trial court found that the appellant contracted for the purchase of the property with full knowledge of Ryall's possession and wheat crop and that the appellees had worked out an understanding with Ryall under which appellant could have had possession within ten days of the date of closing as provided in the contract. The court expressly found that Ryall would have been agreeable either to the surrender of possession or to any other arrangement satisfactory to appellant, and that he "would not have been difficult to deal with at all." The court further found that there was no way for the appellant to know on the date he elected to rescind that possession of the farm could not be delivered to him within ten days of the date of closing. There was no provision in the contract which required the appellees to have Ryall vacate the premises or place the appellant in possession of the property before the date specified. The appellant's obligation to perform on the specified day was not contingent on prior performance on the part of the appellees in this respect. In the absence of a provision in the contract making appellant's obligation to perform contingent on prior performance by appellees of all of the provisions of the contract, such a provision cannot be read into the contract by the court. *Knox* v. *Knox,* 337 Michigan 109, 59 N.W.2d 108 (1953).

We cannot say that the findings of the trial court on this point are clearly erroneous.

III

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE DEFECTS IN APPELLEES' TITLE DID NOT WARRANT RESCISSION OF THE CONTRACT.

The appellant next contends that the chancellor erred in allowing specific performance because it was proved that the appellees' title to the entire tract was not merchantable. It was proved appellees had no title to 10 acres described in the contract that one Halford resided on and claimed ownership of approximately 5 acres of woodland located in the Southeast Quarter and that Brown was cultivating 2.2 acres of appellees' land in the Southwest Quarter. There was evidence that the adverse claims had been maintained for more than the statutory period. We agree that the appellees did not have merchantable title to those areas. We also agree that a vendee in a contract to purchase real estate ordinarily cannot be compelled to accept a title which is not merchantable and can only be required to accept a title that he can hold without reasonable apprehension of being assailed and which is free from reasonable doubts that might affect its value or interfere with its sale. *Holt* v. *Manuel,* 186 Ark. 435, 54 S.W.2d 66 (1932); *Leroy* v. *Harwood,* 119 Ark. 418, 178 S.W. 427 (1915). Even though a portion of appellees' title was defective, we do not agree that the chancellor erred in his application of the law with respect to such titles to the fact which he found in this case.

Early in our judicial history our court declared the rules applicable to the rights of parties to contract for the purchase of real estate where a portion of the title contracted to be sold is found to be defective. *Yeates* v. *Pryor, supra,* recognized a distinction between the rights of a vendor and of his purchaser in such cases. The vendor may not rely on defects to a portion of his tendered title to relieve him of his obligation under the contract. The vendee in such cases may elect to take the entire title in its defective condition or only

that part of it to which the vendor may show merchantable title. In either event he has a right to seek an abatement of the purchase price as to the deficiency. Of course a vendee is not required to do either and may elect to rescind the entire contract, retrieving any earnest money paid. This right of complete rescission, however, was limited in *Yeates* as follows:

> There can be no doubt that the defect in the quantity sold may be of such a nature, or of such an extent, as to entitle the vendee to a recision [sic] of the contract. On the other hand, it may be so small, or of such a nature as to afford no solid objection to the specific execution of the contract. It is difficult to lay down any general rule upon the subject; each case must, of necessity, depend on its own peculiar circumstances. *Reynolds* v. *Vane,* 4 Bibb. 215. *Cumins* v. *Boyle,* 1 J.J. Marsh, 481. *Bollock* v. *Wilson,* 3 Dana 26. *Buck* v. *McCantry,* 5 Mon. 230. *McCorn* v. *Delany,* 3 Bibb. 48. *Moredock* v. *Rawlings,* 3 Mon. 76, are cases where specific performance was, under various circumstances, decreed, although it appeared that the vendee could not get the benefit of his whole contract. The court, in these cases, seems to have been mainly influenced by the consideration that the deficit was so small or unimportant as not very materially to affect the interest of the parties.
>
> . . . .
>
> In this case, the vendee asks that he may be relieved from the whole contract, and we think it clear that he is entitled to the relief sought, unless the quantity to which the vendor is unable to make title should be so small and unimportant as, in a matter of conscience, to forbid that he should capriciously insist upon his contract.

Whether the part of the tract to which the defect pertains is too small or inconsiderable in comparison to the value as a whole to warrant rescission under this limitation is a question of fact for the chancellor to determine. The area

occupied by Halford was separated from the main tract of appellees' land by a bayou and woods. It was not accessible from any other lands owned by the appellees. It was wild, unimproved timber land which was not suitable for that purpose unless and until access could be provided. Halford did not appear to have the portion claimed by him under fence and, due to the nature of the land his claim of possession might easily be limited to that which he actually occupied with his residence.

The chancellor found that most of the lands lying in the 20 acre tract in the Southwest Quarter was in woods. Of the 10 acres to which the appellees had no title only 5.4 acres were cultivatable. Of the 10 acres to which appellees had record title, only 2.2 acres were adversely claimed. The chancellor found from all of the attending circumstances that the quantity of acres was not such a material inducement to the making of the contract to warrant rescission. He could and did find that the deficit was so small and unimportant that it did not materially affect the interest of the parties and applied the limitations on rescission set forth in *Yeates*. We cannot say that these findings of the chancellor or his application of the law to those findings was clearly erroneous.

IV

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE CONTRACT CALLED FOR A SALE IN GROSS AND THAT THE RECITAL OF ACREAGE IN THE DESCRIPTION WAS NOT OF THE ESSENCE OF THE CONTRACT.

In support of his contention that the court erred in holding that the contract was a sale in gross and not by the acre, appellant advances two apparently inconsistent arguments. The main thrust of appellant's argument insists that the trial court was required to find that there was a sale by the acre and not in gross because "the appellees specifically contracted to sell appellant 20 acres in the Southwest Quarter of Section Eight and could deliver only 10 acres." He argues that as the lands in the Southwest Quarter were

not described by metes and bounds or definite lines but by enumerating acres, delivery of the specified acreage was of the essence of the contract. We cannot agree.

The contract described the lands to be sold as all of the Southeast Quarter of Section Eight and "20 acres located in the South Half of the Southwest Quarter of that section."[1] While the description in the contract did not specify the number of acres contained in the Southeast Quarter, the general land office surveys, except in unusual situations, provide that a quarter section contain 160 acres. The general description of the two tracts was followed by the phrase "containing 180 acres, *more or less.*"

It is well settled that where a description contains words of qualification such as "more or less" or words of similar import, a statement of quantity of acres is a mere matter of description and not of the essence of the contract. In such cases a mention of quantity is not a covenant; nor does it afford grounds for breach even though the stated number of acres falls short of that mentioned in the contract, unless there is fraud or the shortage is of such magnitude that the contract would not have been consummated if the facts had been known. *Hays* v. *Hays,* 190 Ark. 751, 81 S.W.2d 926 (1935). The chancellor expressly found that the purchase price was computed not on a per acre basis or upon the number of tillable acres, but for the farm. He further found that the shortage was not of that magnitude required in *Hays.*

Appellant alternatively asserts that those rules applicable to sales in gross or by the acre envision a merchantable title to lands within a definite description but which, due to gross mistake, contain substantially less acreage than agreed upon by the parties in their contract. He submits that where, as here, the shortage did not result from mistake or misstatement of the quantity of lands embraced within the agreed description but to failure of title to a part of it, the rules governing sales in gross have no application. While we

[1]The question of the legal sufficiency of the description was not raised in the trial court and is not considered on appeal.

are inclined to agree with this statement of the law, we find no error in the court's action. The court's discussion of sales in gross was not the basis for his decision in this case. He recognized the shortage due to defects in title but found the deficiency too small in comparison to the whole to warrant rescission.

V

THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO RECEIVE PROFFERED EVIDENCE OF THE APPELLANT'S NEW OFFER AND APPELLEES' COUNTER-OFFER.

During the course of the trial the appellant made a proffer of proof that at the time he notified Harper that he would not perform, he proposed a new offer of $230,000. He proffered that appellees rejected that offer but made a counter-offer of $250,000. The appellant contends that it was error for the court to exclude that testimony as it tended to prove a mutual rescission and the reopening of negotiations for a new contract. The chancellor ruled that one cannot unilaterally disavow a contract freely entered into and that appellant had no valid grounds for rescission. He found that the counter-offer made by appellees was an effort to compromise and settle the dispute. The evidence fully supports such a finding. Evidence of conduct or statements made in compromise negotiations is not admissible on the issue of liability. Rule 408, *Uniform Rules of Evidence*. We find no error.

Affirmed.

GLAZE and CORBIN, JJ., dissent.

TOM GLAZE, Judge, dissenting. This is a specific performance case. In *Carrick* v. *Gorman*, 232 Ark. 729, 733, 340 S.W.2d 377, 380 (1960), the Supreme Court stated the rule that a vendor must have good title when he sues for specific performance. Here, everyone agrees appellees' title is defective because at least two people hold a part of the subject land adversely. The majority's decision upholding the trial

court's order granting the appellees (vendors) specific performance is clearly contrary to the rule of property announced in *Carrick* v. *Gorman.*

The majority relies on the case of *Yeates* v. *Pryor,* 11 Ark. 58 (1850). In *Yeates,* the vendee filed a suit to cancel his contract to purchase land from the vendor because the vendor's title was defective. The Court held the vendee was entitled to rescission because the vendor failed to perfect title to the land he agreed to convey. The Court indicated, however, that if the defect had been small or immaterial, it would have held otherwise.

While a materiality issue may be relevant in a rescission action brought by a vendee, such an issue is inapposite in a situation in which the vendor seeks specific performance. This distinction was noted in *Carrick* v. *Gorman, supra.* In sum, the court stated in *Carrick* that a vendee, seeking cancellation of a contract, cannot avail himself of defects in the vendor's title without first giving the vendor notice and a reasonable opportunity to cure the flaw. But when it is the vendor who files suit to enforce the contract and the vendee pleads a defect in title, the Court stated it would be manifestly impractical to permit the vendor to ask in the middle of the trial that the hearing be adjourned to afford him an opportunity to remedy the defect. Hence, the rule: a vendor must have good title when he sues for specific performance.

Because the instant case was instituted by the vendor for specific performance, I am convinced the holding in *Yeates* v. *Pryor* is not applicable. After appellant showed that appellees' title was defective, appellees' request to enforce the parties' contract should have been denied. Materiality — like that considered in *Yeates* — was not a relevant issue. Rather, the sole question here was whether appellees could convey merchantable title; the evidence is clear that they could not.

The Supreme Court in *Holt* v. *Manuel,* 186 Ark. 435, 54 S.W.2d 66 (1932), a specific performance case, said that a merchantable title is held to be one which imports such

ownership as enables and insures to the owner the peaceable control and use of the property as against everyone else. The Court also related the following approved definition of merchantable title:

> "A marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some defects appearing in the course of its deduction, and the doubt must be such as affects the value of the land or that will interfere with its sale." *Griffith* v. *Maxwell,* 63 Ark. 548, 39 S.W. 852. And in *Fenner* v. *Reeher,* 148 Ark. 553, 230 S.W. 581, we quoted with approval the following: *"The court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings; or, as it is usually expressed, it will not compel him to buy a lawsuit." (Emphasis supplied).*

Id. at 437-38, 54 S.W.2d at 67.

Considering only the evidence reflecting the hostile claims against the farm land — not to mention the tenant who farms part of the land under an oral lease — it is obvious that future litigation will ensue. Even if appellant chooses not to sue to protect his interests, the people holding adversely are sure to file suit to quiet title in the land they farm. Appellant, no doubt, has brought lawsuits.

Appellees argue that because this was a sale in gross, the small amount of acreage lost to others by adverse possession is immaterial and should not relieve appellant from his contractual obligations. This shortage in acreage is not the result of a mistake or misstatement of the quantity of lands contained within the legal description. Rather, it is the result of appellees' failure to hold good title to part of the land because of encroachments. I can find no Arkansas case law which would apply rules governing sales in gross to the type situation that exists here, and I am of the opinion those rules are inapplicable.

In conclusion, appellant has been forced to purchase land which he did not agree to buy. In addition, that "unagreed-to land" is conveyed with "unwanted future litigation." He simply should not have to buy such litigation, especially when he is not receiving the land which he agreed to purchase in the first place.

I would reverse.

I am authorized to state that CORBIN, J., joins in this dissent.

Jan BLAYLOCK *v.* William F. EVERETT,
Director of Labor

E 82-147 641 S.W.2d 728

Court of Appeals of Arkansas
Opinion delivered November 10, 1982

Michael G. Pritchard, Ozark Legal Services, for appellant.

Bruce H. Bokony, for appellee.

LAWSON CLONINGER, Judge. The appellant, Jan Blaylock, has appealed a decision of the Arkansas Board of Review which found that appellant was ineligible for unemployment benefits under the provisions of § 4 (c) of the Arkansas Employment Security Act, Ark. Stat. Ann. § 81-1105 (c) (Repl. 1976), in that she was not fully available for work.

Appellant attends nursing assistant school at Springdale Memorial Hospital, and the sole issue addressed in the briefs filed on this appeal is whether she is attending a "State vocational school" as that term is used in the Employment Security Act.

We hold that appellant is not attending a State vocational school and the decision of the Board of Review is affirmed.

Since the Employment Security Act was first enacted by Act 391 of the Acts of 1941, § 4 (c) has basically provided, as it now does, that a worker is unemployed within the meaning of the Act if physically and mentally able to perform suitable work and is available for such work.

By Act 93 of the Acts of 1963 a sentence was added to § 4 (c) of the original Act, which stated:

> Provided, however, that an unemployed individual who is enrolled in a short-term vocational training or retraining course, supported by an appropriation made by the Congress of the United States, to which he was referred by the Employment Security Agency of the State in which he resides shall be considered eligible for work and making a reasonable effort to secure work so long as his attendance and progress in the course are satisfactory and he does not refuse to apply for or accept

> suitable work when directed to do so by the Employment Security Agency.

The foregoing provision was deleted by Act 35 of the Acts of 1971, and a provision was added providing that no otherwise eligible worker would be denied benefits by reasons relating to availability for work while in training with the approval of the Administrator of the Employment Security Division. Factors to be considered by the Administrator in granting or denying approval for training are set out in the amendment, and include a necessity that the claimant's skills must be either obsolete or for some other reason such as employment in that labor market is minimal and not likely to improve.

The Employment Security Act was further amended by Act 1083 of the Acts of 1975 (extended session) to provide that:

> Persons who are on layoff and who are attending a State vocational school for the purpose of upgrading or improving their job skills shall be considered available for employment so long as they make reasonable efforts to secure employment; unless, or until, they refuse suitable employment, or referral or recall to suitable work.

We are not persuaded that the legislature intended that the scope of the phrase "State vocational school," as used in the 1975 amendment, be interpreted, as argued by the appellant, to include any vocational school within the state attended for the purpose of upgrading or improving the worker's job skills. We believe, and hold, that it was intended to include only the state-sponsored, tax-supported, vocational schools provided for by Ark. Stat. Ann. § 80-2502 (Repl. 1980) which states that "within each of the . . . districts there shall be established two (2) vocational schools, each to be known as a State school of vocational education." Training in any other institution would require the prior approval of the Administrator of the Employment Security Division.

The decision of the Board of Review is affirmed.

COOPER and GLAZE, JJ., concur.

JAMES R. COOPER, Judge, concurring. I concur in the result reached by the majority opinion, but only because the appellant failed to prove that the course of study which she was taking at Springdale Memorial Hospital was approved by the State Board of Vocational Education. I believe that the term "State vocational school" is to be liberally construed in order to accomplish the beneficial purposes of the Arkansas Employment Security Law. Ark. Stat. Ann. § 81-1101 (Repl. 1976); Ark. Stat. Ann. § 81-1102 (Supp. 1981); *Graham* v. *Daniels,* 269 Ark. 774, 601 S.W.2d 229 (Ark. App. 1980).

The majority construes the term "State vocational school" too narrowly, in my view. I would hold that a person is attending a "State vocational school" whenever that person is enrolled in a course of study approved by the State Board of Vocational Education. The State Board of Vocational Education has the authority to:

(1) establish two (2) vocational schools in each district, Ark. Stat. Ann. § 80-2502 (Repl. 1980);
(2) establish or designate one or more Area Vocational-Technical and Adult Education Schools, Ark. Stat. Ann. § 80-2559 (Repl. 1980);
(3) establish branches of Area Vocational-Technical and Adult Education Schools, Ark. Stat. Ann. § 80-2560.1 (Repl. 1980); and
(4) establish special vocational-technical instruction at public schools or in other facilities, Ark. Stat. Ann. § 80-2560.1 (Repl. 1980).

Under the majority opinion, a person attending a vocational school under subsection one would not be required to obtain the Employment Security Division Administrator's approval, in order to obtain unemployment benefits. However, in order to obtain benefits, a person would have to have approval of his course of study by the Administrator if his particular program fell under subsections two, three, or four. The course of study being pursued is what is significant, rather than the location at which that course of study is taught. It is only when the State Board of

Vocational Education has not approved a course of study, that approval of the Administrator is required, and then the factors which are to be considered by the Administrator are enumerated in the statute.

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

John B. STACKS *v.* F & S PETROLEUM COMPANY, INC.

CA 82-68 641 S.W.2d 726

Court of Appeals of Arkansas
Opinion delivered November 10, 1982
[Rehearing denied December 8, 1982.*]

*COOPER, J., would grant rehearing.

Dan Stripling, for appellant.

Pollard & Cavaneau, by: *Jerry Cavaneau,* for appellee.

TOM GLAZE, Judge. This case involves a requirements agreement. Under the agreement, appellee supplied gasoline to appellant's outlet store located in Bee Branch, Arkansas. Later, appellee filed suit against appellant for $37,527.80, the outstanding balance owed on the gas supplied the outlet. Appellant denied liability and contended that Thomas Davis, who leased the outlet, was solely liable for the past-due monies. The jury returned a verdict against appellant. In this appeal appellant argues, among other things, that the verdict is not supported by substantial evidence.

This legal controversy largely centers on the following March 9, 1977, agreement:

March 9, 1977

Mr. John B. Stacks
Route 1
Damascus, Arkansas

Dear Mr. Stacks:

With further reference to our conversations in regard to our supplying you with motor gasoline at your gasoline outlet which is now under construction in Bee Branch, I have listed below the agreed points which we discussed Sunday, February 20, 1977:

1. We agree to furnish you fuel in an amount up to

50,000 gallons per month. We will withhold this amount from our various allotments. The amounts will be subject to allocation adjustment by the Federal Energy Administration.

2. We will be your exclusive supplier upon the following terms:

a. Costs will be laid-in costs per gallon plus $.01 per gallon.

b. Gallons will be temperature corrected.

c. Billing terms will be net 4 days from invoice.

3. If the Federal Energy Administration allocation falls below 96%, terms in "a" will be negotiated and revised upward.

The above is, in substance, the terms upon which we agreed in our meeting. Please sign below after our signature and return the original to me.

F & S Petroleum Company, Inc.

/s/ Dee Francy, President

/s/ John B. Stacks

In brief, appellant contends the foregoing agreement is indefinite and fails to obligate him for gasoline subsequently supplied to his outlet. After the agreement was executed, appellant leased the outlet to Davis. Except for two initial loads of gasoline ordered by appellant, all other loads were delivered to the outlet at the direction of Davis. Appellant contends that he is not obligated for that gas furnished the outlet while Davis was lessee because: (1) the agreement was merely a commitment by appellee to supply gasoline to appellant's outlet; (2) the agreement did not require him to purchase gas — even a minimum order — nor did it specify how long the agreement would last; (3) the terms in the agreement did not purport to obligate appellee

to supply gas to a subsequent owner or lessee of the outlet, nor did it make appellant liable to guarantee the debt of Davis.

This transaction is controlled by Ark. Stat. Ann. § 85-2-306 (1) (Add. 1961), which provides:

> 85-2-306. Output, requirements and exclusive dealings. — (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable output or requirements may be tendered or demanded.

Both at common law and under the Uniform Commercial Code, a requirements contract is simply an agreement by the buyer to buy his good faith requirements of goods exclusively from the seller. *See Wilsonville Concrete Products* v. *Todd Building Co.,* 281 Or. 345, 574 P.2d 1112 (1978). Comment 2 to § 85-2-306 (1) explicitly rejects the notion that requirements contracts are too indefinite to enforce because such contracts are held to mean the actual good faith requirements of the particular party. Therefore, Professors White and Summers conclude that a party who seeks to invalidate a requirements contract bears a heavy burden. *See* White and Summers, *Uniform Commercial Code,* § 3-8 (2d ed. 1980). Comment 2 further provides that a requirements contract does not lack mutuality of obligation since the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his requirements will approximate a reasonably foreseeable figure.

In view of the foregoing rules and guidelines, the fact that the parties' March 9 agreement left open the number of gallons to be purchased monthly does not support invalidation of the agreement. The Code imposed on the appellant, as a buyer, the responsibility to conduct his business in good

faith and in accordance with commercial standards of fair dealing in the trade so that his requirements would approximate a reasonably foreseeable figure, in this instance, 50,000 gallons per month. Appellee agreed to furnish this amount on the terms specifically contained in the March 9 agreement. Additionally, appellant agreed to purchase gasoline exclusively from appellee. The parties' agreement undoubtedly qualifies as a requirements contract and is enforceable as such. Although the agreement failed to provide for when it would terminate, Ark. Stat. Ann. § 85-2-309 (2) states that if a contract provides for successive performances but is indefinite in duration, it is valid for a reasonable time.

In holding that appellant was directly liable for the gasoline delivered to his outlet under the March 9 agreement, it is unnecessary to consider his argument that he could be responsible for the purchases only if Davis were appellant's agent. However, we do consider one other issue raised by appellant, concerning one of the court's instructions. Appellee sued appellant on two theories: (1) that appellant was directly liable to appellee under the parties' March 9 agreement, or in the alternative (2) that appellant was obligated as a guarantor under the March 9 agreement which was a contract of guaranty that covered gasoline purchases made by Davis. Appellant countered, claiming the March 9 agreement was not an enforceable contract, but even if it were, that he was discharged by a novation, *i.e.*, that all the parties agreed for Davis to take on the contractual obligations for the gasoline in place of appellant. The court instructed the jury on each of the foregoing contentions of appellant and appellee and additionally gave the following instruction over appellant's objection:

INSTRUCTION NO. 8

> You are further instructed that when contract rights and duties are assumed by a new party, the person originally obligated remains liable as a surety unless he is discharged by novation.

Appellant argues that the language in this instruction was confusing because it erroneously implied there was

evidence of an assignment and that it misused the term surety for that of guaranty. We agree that the language in the instruction could have been more exacting. However, we fail to see how appellant was prejudiced. Obviously, the jury found no novation or it would not have found appellant liable for the gasoline. Furthermore, we have found that appellant was directly liable for the gasoline under the parties' agreement and the evidence amply supports that conclusion as well as the verdict rendered by the jury. The parties' March 9 agreement was neither a guaranty nor a surety. Although the instruction may have proved to be unnecessary, the appellant was not prejudiced by its having been given.

Since we find no error, we affirm.

Affirmed.

MAYFIELD, C.J., concurs.

COOPER, J., dissents.

Clayton HAMILTON, Employee *v.* JEFFREY STONE COMPANY, Employer, and the TRAVELERS INSURANCE CO., Insurance Carrier

CA 82-220 641 S.W.2d 723

Court of Appeals of Arkansas
Opinion delivered November 10, 1982

McMath, Leatherman & Vehik, P.A., by: *Art Anderson,* for appellant.

Michael E. Ryburn, for appellees.

TOM GLAZE, Judge. This is an appeal from a decision of the Workers' Compensation Commission that appellant's silicosis claim was barred by the statute of limitations.

Appellant is a 62-year-old man who was employed by Jeffrey Stone Company from 1957 to 1969. His duties

included working on a rock crusher, a machine which emits large amounts of silica dust which appellant inhaled daily for twelve years. In July, 1969, he was hospitalized for what was diagnosed at the time as tuberculosis. A doctor advised appellant not to return to his job because of his difficulties with breathing.

Appellant began working as a guard with a security firm in January, 1970; he worked until December, 1977, when he had to stop working entirely because of problems with breathing and being shortwinded. In November, 1980, appellant's problem was diagnosed as silicosis. He filed his claim for permanent and total disability in December, 1980, contending the statute of limitations on silicosis did not begin to run until his condition was diagnosed. Respondent insurance company controverted the claim in its entirety, maintaining that the claim was barred by the statute of limitations. The statutes establish that silicosis claims must be filed within one year after disablement, and such disablement must occur within three years of the last injurious exposure to the hazards of silicosis. *See* Ark. Stat. Ann. §§ 81-1314 (a) (7), 81-1318 (a) (2) (Repl. 1976). The Commission affirmed the Administrative Law Judge's decision that the claim was barred. On appeal, appellant argues the statutes of limitation pertaining to silicosis should be: (1) declared unconstitutional because they violate the Equal Protecton Clause of the Fourteenth Amendment of the United States Constitution; but if constitutional, (2) interpreted to run from the date of discovery or the time at which the claimant knows or should reasonably be expected to know of his injury.

Before deciding the constitutional issue raised by the appellant, we must consider appellee's argument that constitutional questions cannot be raised for the first time on appeal. We have previously held that an issue will not be considered by this Court when presented for the first time on appeal. *Dodson Creek, Inc.* v. *Fred Walton Realty Co.*, 2 Ark. App. 128, 133, 620 S.W.2d 947, 949 (1981). We have applied that rule with equal force to appeals from the Arkansas Workers' Compensation Commission. *Ashcraft* v. *Quimby*, 2 Ark. App. 332, 336, 621 S.W.2d 230, 232 (1981).

Until now, this Court has not been asked whether constitutional questions must first be presented at the Commission level. The general rule is that the constitutionality of a statute will not be considered if raised for the first time on appeal. *See e.g., Sweeney* v. *Sweeney,* 267 Ark. 595, 593 S.W.2d 21 (1980). This rule has also been followed by appellate courts in appeals from workers' compensation commissions and other administrative agencies. *E.g., Lewis* v. *Anaconda Co.,* 543 P.2d 1339 (Mont. 1975); *Benson* v. *North Dakota Workmen's Compensation Bureau,* 250 N.W.2d 249 (N.D. 1977); and *Unemployment Compensation Department* v. *Hunt,* 17 Wash.2d 228, 135 P.2d 89 (1943); *see also* 3 A. Larson, *The Law of Workmen's Compensation,* § 78.12 (1976 & July, 1982 Supp.).

Even though the Commission may not have the authority to declare statutes unconstitutional, we believe such issues should first be raised at the Administrative Law Judge or Commission level. Constitutional questions often require an exhaustive analysis which is best accomplished by an adversary proceeding. Obviously this can be done only at the hearing level. Requiring these constitutional issues to be considered by the Commission, we can be assured that such issues will be thoroughly developed before we are asked to rule on a statute's validity.

In *Swafford* v. *Tyson Foods, Inc.,* 2 Ark. App. 343, 621 S.W.2d 862 (1981), we were called on to decide the validity of Ark. Stat. Ann. § 81-1302 (m) after an Administrative Law Judge ruled it unconstitutional. The Commission took the position that it could not declare a legislative act unconstitutional because that was within the court's jurisdiction. Since the constitutional issue was raised at the administrative hearing level, we held § 81-1302 (m) unconstitutional without addressing whether the issue was required to be raised below before we reviewed it.

In the instant case, appellant failed to properly raise before the Commission the issue concerning the constitutionality of §§ 81-1314 (a) (7) and 81-1318 (a) (2). Because we have never held, until now, that such issues must be raised first at the Commission level, we believe it would be unfair

not to remand this cause in order to allow the appellant the opportunity to present and argue his constitutional issue. We especially believe such action is warranted because the Commission only recently expressed the opinion that it had no authority to consider constitutional issues.

Before remanding, we reject appellant's other contention that the statutes of limitation pertaining to silicosis run from the date of discovery or when the claimant knows or should reasonably be expected to know his injury. Our Supreme Court has held that in silicosis cases the statute commences to run at the time of disablement and not at the time the claimant learns he is suffering from the disease and that disablement does not occur until the employee is unable to work and earn his usual wages. *Quality Excelsior Coal Co.* v. *Smith,* 233 Ark. 67, 342 S.W.2d 480 (1961).

Therefore, we affirm the Commission's finding that appellant's claim was barred under §§ 81-1314 (a) (7) and 81-1318 (a) (2), assuming such provisions to be constitutional. We otherwise remand this case for the Commission's consideration of the parties' respective presentations and arguments relative to the constitutionality of the foregoing statutory provisions.

Affirmed and remanded.

MAYFIELD, C.J., and CLONINGER, J., concur.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in the remand of this case but would remand both issues to the Commission.

Mark SMITH *v.* William F. EVERETT, Director of Labor, and SMITH DITCHING

E 82-94 642 S.W.2d 320

Court of Appeals of Arkansas
Opinion delivered November 10, 1982
[Supplemental Opinion on Denial of Rehearing December 15, 1982.]

Appellant, *pro se.*

Thelma Lorenzo, for appellee.

TOM GLAZE, Judge. This is an Employment Security case in which the Board of Review found the claimant voluntarily quit his job without making reasonable efforts to preserve his job rights. The Board's decision reversed the Appeal Tribunal which found that claimant quit work because of a personal emergency. The Board's decision was based primarily upon an affidavit submitted to it by the employer, who had failed to appear before the Appeal Tribunal. In reversing the Tribunal, the Board found considerable discrepancy in the claimant's testimony and

the employer's affidavit, and it determined that the more "credible evidence" was weighted on the side of the employer. We reverse and remand consistent with the Supreme Court's recent holding in *Smith* v. *Everett,* 276 Ark. 430, 637 S.W.2d 537 (1982).

In *Smith,* the Supreme Court, citing *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), applied the following rule to the State's award of unemployment benefits:

> [B]efore state granted benefits . . . can be taken away claimant must be given an opportunity to confront and cross-examine adverse witnesses at an evidentiary hearing.

The Arkansas Supreme Court held in *Smith* that the claimant had no opportunity to subpoena or cross-examine adverse witnesses either before the Appeal Tribunal or the Board of Review. The Court reversed and remanded with directions to permit Leardis Smith the opportunity to confront his adverse witnesses under the rule announced in *Goldberg* v. *Kelly.* A similar situation exists here and the same disposition as taken in *Smith* is required.

The factual question here is whether the claimant made any attempt to preserve his job rights before he quit. At the Appeal Tribunal hearing, claimant testified that his wife had been shot, and pursuant to a doctor's instructions, he needed to be with her. Additionally, the couple had an infant, and claimant had to care for the child. claimant testified that he had repeatedly told his boss (and boss's son) that, because his job took him away from home overnight, claimant needed either to work in his home town or to be allowed to take his family with him. Claimant said that on November 9, 1981, he gave notice to his employer that he would have to quit unless arrangements could be made allowing him to be at home at night. The employer failed to appear at the Appeal Tribunal hearing and the Tribunal awarded claimant benefits.

After the employer appealed the Tribunal's decision, the Board of Review notified both the employer and

claimant that another hearing would not be held but that each of them could submit an affidavit or other documentary evidence. The employer submitted an affidavit which indicated he had no notice that claimant was dissatisfied or had any intentions to quit. Based upon this affidavit, the Board held against the claimant, finding that claimant did not preserve his job rights because he failed to notify his employer that a personal emergency existed.

Through no fault of his own, the claimant has never had the opportunity to cross-examine the employer. As the Arkansas Supreme Court announced in *Smith* v. *Everett,* the claimant must be afforded that opportunity as well as the right to subpoena and cross-examine other adverse witnesses whose names may have surfaced as the result of the employer's belated affidavit.

This cause is remanded to the Board with directions that a hearing be conducted consistent with this opinion and pursuant to the applicable procedures set forth in Ark. Stat. Ann. § 81-1107 (d) (3) (Repl. 1976). As a part of this decision, we further hold that the Board does not have the jurisdiction to accept additional evidence in appeals pending before it. *See Brown Jordan* v. *Dukes,* 269 Ark. 581, 583, 600 S.W.2d 21 (Ark. App. 1980); and *Brewer* v. *Everett,* 3 Ark. App. 59, 21 S.W.2d 883 (1981).

Remanded.

Supplemental Opinion on Denial of
Rehearing delivered December 15, 1982

TOM GLAZE, Judge. We reversed and remanded this cause, relying on the recent Supreme Court decision of *Leardis Smith* v. *Everett,* 276 Ark. 430, 637 S.W.2d 537 (1982). In its petition for rehearing, appellee first contends that the Supreme Court erred in its holding in *Smith* because the Court incorrectly cited and relied on the case of *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). Appellee also argues that our Court erred by considering an issue that was never raised below or on appeal. For obvious reasons, we consider only appellee's second argument.

The instant case was pending at the time the Supreme Court rendered its decision in the *Smith* case. Consequently, the claimant was entitled to claim the benefits of the Supreme Court's holding in *Smith. See Cummings* v. *State,* 239 Ark. 1027, 396 S.W.2d 298 (1965). Of course, appellee's argument is that claimant should not benefit from such holding because he failed to raise the issue either at the Board level or in his appeal to this Court. As a general rule, we certainly agree with the appellee on this point and we recently applied this rule in Workers' Compensation cases. *See Ashcraft* v. *Quimby,* 2 Ark. App. 332, 336, 621 S.W.2d 230, 232 (1981); and *Hamilton* v. *Jeffrey Stone Company,* 6 Ark. App. 333, 641 S.W.2d 723 (1982).

In Employment Security cases, the Board of Review, appeal tribunals and special examiners are not bound by common law, statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before such hearing officers must be conducted in a manner to ascertain the substantial rights of the parties. Ark. Stat. Ann. § 81-1107 (d) (4) (Repl. 1976). Here, the appellee urges us to adopt a rule which would impose a duty on the parties to formally interpose objections in order to preserve a record for an

appeal to this Court. If we required the parties to formally object or proffer evidence to preserve a record for appeal purposes, we would be imposing a duty contrary to that envisioned by the Arkansas General Assembly when it enacted § 81-1107 (d) (4). We believe it would be fundamentally unfair to adopt such a rule in this type case. Parties in Employment Security cases are rarely represented by attorneys, and the records on review often reflect clear errors that affect the substantial rights of the parties. The appeal tribunals and the Board of Review are mandated by law to conduct hearings and appeals in a manner to ascertain the substantial rights of the parties. If they fail to do so, we have a correlative duty to remand these cases to require it to be done.

In conclusion, we dispose of appellee's contention that this Court somehow became a fact-finding body because we recognized from the record in this cause that the claimant was never afforded the opportunity to cross-examine adverse witnesses. While we protect, by our decision, the parties' right to a fair hearing and appeal as contemplated by the clear language in § 81-1107 (d) (4), we merely remand this cause for further proceedings that comply with that law. The Board of Review's authority as fact-finder remains inviolate.

Reversed and remanded.

MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in the denial of the petiton for rehearing filed by the Director of Labor. The basis of my concurrence is the last sentence of our opinion which reads: "As a part of this decision we further hold that the Board does not have jurisdiction to accept additional evidence in appeals pending before it. *See Brown Jordan* v. *Dukes,* 269 Ark. 581, 583, 600 S.W.2d 21 (Ark. App. 1980); and *Brewer* v. *Everett,* 3 Ark. App. 59, 621 S.W.2d 883 (1981)."

Those cases were concerned with Ark. Stat. Ann. § 81-1107 (d) (3) (Repl. 1976) which describes the procedure for review by the Board of Review as follows:

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

The above provision was quoted in *Brown Jordan* v. *Dukes,* where this court said, "We interpret 'previously submitted' to mean submitted in some previous hearing at which either party would have an opportunity to question or support it." That statement was quoted, and the decision of *Brown Jordan* again approved, in *Brewer* v. *Everett, Director.* The statute also provides that the board may "direct" that "additional" evidence be taken and both *Brown Jordan* and *Brewer* held that statements sent to the board after the hearing before the appeals referee did not constitute "additional evidence" directed to be taken by the board.

Thus, the last sentence in our opinion states our holding in *Brown Jordan* and in *Brewer* and is not new. The holding of our Supreme Court in *Smith* v. *Everett,* 276 Ark. 430, 637 S.W.2d 537 (1982), makes it necessary, however, for us to insist that the procedure in *Brown Jordan* and *Brewer* be followed. In most of our appeals from the Board of Review neither party is represented by an attorney. Considering the number of appeals filed, it is almost beyond our capacity to determine on our own whether the appellant has waived the opportunity to cross-examine the witness who sends "new" evidence to the board in the form of a written statement; or whether the pro se appellant has raised the cross-examination issue before the board; or whether a party has been prejudiced by the board's failure to follow the procedure indicated in *Brown Jordan* and *Brewer.* On the other hand, it is quite apparent that there has been no opportunity to confront and cross-examine adverse wit-

nesses when they testify for the first time by written statement furnished to the board.

The petition for rehearing points out that there is language in Ark. Stat. Ann. § 81-1107 (d) (1) (Repl. 1976) which authorizes the chairman of the Board of Review to appoint a reporter to take and transcribe testimony taken before the board and that § 81-1107 (d) (7) (Supp. 1981) provides that the Court of Appeals may remand a matter and order additional evidence to be taken before the board. Neither provision, however, negates our holding that under § 81-1107 (d) (3) (Repl. 1976) the board does not have jurisdiction to accept additional evidence in *appeals* pending before it.

Walter THURMAN *v.* DIRECTOR OF LABOR

E 82-114 642 S.W.2d 323

Court of Appeals of Arkansas
Opinion delivered November 17, 1982

MELVIN MAYFIELD, Chief Judge. The Employment Security Division made a determination that the appellant in this case had received $117.00 in unemployment benefits to which he was not entitled. The overpayment resulted from the payment of $53.00 each week for a period of nine weeks when, according to the agency's contention, the weekly payments should have been reduced to $40.00 under Section 3 (h) of the Employment Security Law, Ark. Stat. Ann. § 81-1104 (Supp. 1981), because appellant had previously quit a base-period employer without good cause connected with the work. However, that *overpayment* determination was appealed to the Appeal Tribunal which issued a decision on January 25, 1982, holding against the agency's contention.

In the meantime, the agency had notified appellant that he was liable to repay the $117.00 and that *repayment* determination was appealed to the Appeal Tribunal and was set for hearing on January 28, 1982. At that hearing the referee found it would not be against equity and good conscience to require repayment of the $117.00. He ex-

plained, however, that although the base-period employer still had the right to appeal the tribunal's January 25 decision holding that appellant had not been overpaid, it might be best for appellant to delay making any repayment because there probably would be no repayment due.

Nevertheless, the referee issued his decision that appellant was liable for repayment and that decision was affirmed by the Board of Review without any reference to the status of the overpayment determination. The board's repayment decision is now before us for review.

In *Brannan* v. *Everett*, 5 Ark. App. 271, 636 S.W.2d 301 (1982), the appellant contended the Appeal Tribunal's hearing on repayment was premature because the issue of overpayment was still on appeal. In sustaining that contention, we said:

> We hold that, on these facts, the Agency should not have made a final decision regarding appellant's liability for repayment of benefits when the ultimate question of his eligibility had not yet been resolved. We do not mean to imply that the Agency was without authority or jurisdiction to hold a hearing on the question of repayment, but only that a final determination as to his repayment liability was premature. If the case were decided otherwise, it is easy to see how appellant could, theoretically, be required to repay benefits to the Agency based on a hearing such as this one, when ultimately it might be decided on appeal that he was, in fact, eligible for the benefits.

Although the appellant in the instant case did not raise the issue in the hearing before the referee, the issue was raised by the referee himself and we think the reasoning and the holding in *Brannan* apply with equal force here. Even as this opinion is being written the issue may be moot. It could save the time, effort, and expense of the referee, the board, and this court to wait until the overpayment issue is finally determined.

The decision of the Board of Review is reversed and the matter is remanded with directions that a new hearing be held on the issue of repayment in the event the appeal of the overpayment issue is finally decided in favor of the agency.

Reversed and remanded.

Wilbert JOHNSON *v.* STATE of Arkansas

CA CR 82-101 642 S.W.2d 324

Court of Appeals of Arkansas
Opinion delivered November 17, 1982

Chris E. Williams, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Wilbert Johnson was charged with first degree murder. He was found guilty of second degree murder and sentenced to a term of 20 years imprisonment. The homicide resulted from wounds to the victim's neck, proved and admitted to have been inflicted by the appellant. He appeals from that judgment, advancing four points of error. We find no merit in any of them and affirm the conviction.

After the homicide the appellant left the scene, but within an hour he called a police officer in whom he had confidence and offered to turn himself in. After he was taken into custody he was read his *Miranda* rights, acknowledged that he understood them, signed a waiver and gave a statement describing the circumstances under which the homicide occurred. The appellant first contends that his pre-trial statement was improperly received. At a *Denno* hearing he testified that he did remember the officer's reading him his rights but he was so intoxicated and sleepy that he did not fully comprehend. The officers, on the other hand, testified that before questioning, appellant was fully advised of his *Miranda* rights, stated that he understood them and freely executed a written waiver. The officers stated that although the appellant had been drinking, he was not so intoxicated that he did not know what he was doing and was responsive to all questions propounded to him.

Because it was known that he had been drinking he was given a chemical breath analysis which registered 0.19 percent. A reading of 0.10 is the point at which a presumption of being under the influence of intoxicating liquor arises under our motor vehicle laws. Ark. Stat. Ann. § 75-1031.1 (3) (Repl. 1979). One of the officers testified that because the appellant had been drinking he discussed this matter with the prosecuting attorney. As a result of that discussion he returned the following day when the appellant

was completely sober and again informed him of his *Miranda* rights and obtained a reaffirmance of all of the contents of his statement given the evening before. Several of the officers participated in the investigation and interrogation of the appellant. All of them agreed that while it was obvious that he had been drinking and was under the influence of alcohol, he was not so incapacitated that he was unaware of what he was doing or saying. To the contrary they all testified that he was fully capable of understanding and aware of what he was saying and doing.

Whenever the voluntariness of confession is disputed on constitutional grounds this court makes its own determination of whether the statement was freely and voluntarily given. This independent determination is based on a review of the totality of the circumstances surrounding the making of the statement, and the findings of the trial court in ruling the statement admissible will not be set aside unless this court can say that its ruling was clearly erroneous. *Sumlin* v. *State,* 266 Ark. 709, 587 S.W.2d 571 (1979); *Chambers* v. *State,* 275 Ark. 177, 628 S.W.2d 306 (1982).

The fact that an accused has been drinking at the time of his confession does not in and of itself invalidate his incriminating statement subsequently given. The test is whether he had sufficient mental capacity at the time he waived his constitutional rights to know what he was doing and voluntarily did it. *Kennedy* v. *State,* 255 Ark. 163, 499 S.W.2d 842 (1973). It is for the trial court to determine the credibility of the witnesses and it is not required to give the appellant's testimony greater weight than that of the police officers. *Hunes* v. *State,* 274 Ark. 268, 623 S.W.2d 835 (1981); *Hayes* v. *State,* 274 Ark. 440, 625 S.W.2d 498 (1981). We cannot say that the trial court's finding that the waiver of constitutional rights was freely and voluntarily executed was clearly erroneous.

Even if we assume that the statement given by the appellant on the night of his arrest was constitutionally infirm due to intoxication, it does not follow that his reaffirmation of that statement twenty-four hours later was

deficient as a matter of law. One who makes a confession which is involuntary on constitutional grounds is not perpetually disabled from making a voluntary one after the conditions of abuse have been effectively removed. Whether the abuse and its continued effect upon the voluntariness of a subsequent confession have been removed is to be determined by a conclusion as to whether at the time the second statement was made the accused was fully informed and had that mental freedom to confess or deny his participation in the crime. *Matthews* v. *State,* 261 Ark. 532, 549 S.W.2d 492 (1977); *Woodard* v. *State,* 261 Ark. 895, 553 S.W.2d 259 (1977).

At the time appellant reaffirmed his initial statement he was "cold sober." The officers testified that they again fully informed him of all of his constitutional rights and that he understood them. They testified that he thereafter freely and voluntarily made the same statement he had made twenty-four hours earlier. The court could find that any infirmity which might have existed from intoxication was clearly removed.

For the foregoing reasons we find that the trial court did not err in admitting the written statement.

The appellant next contends that the trial court never expressly ruled that the statement was made voluntarily. He contends that this violates a requirement that a judge's conclusion that a confession is voluntary must appear from the record with unmistakable clarity as required in *Harris* v. *State,* 271 Ark. 568, 609 S.W.2d 48 (1980). While not abstracted by appellant, the appellee points out to us and the record does reflect that at the conclusion of the *Denno* hearing the court stated "The motion is denied. The statement is held to be voluntary and admissible, both of them."

The appellant next contends that the trial court erred in refusing to give his proffered instruction on voluntary intoxication as a defense. We find no merit to this contention for several reasons.

The appellant has not set out in his abstract the other instructions which the court did give. The State argues that under these circumstances the appellate court assumes that the jury was properly instructed. *Ellis* v. *State,* 267 Ark. 690, 590 S.W.2d 309 (Ark. App. 1979); *Moser* v. *State,* 262 Ark. 329, 557 S.W.2d 385 (1977).

Furthermore *Ellis* points out that while voluntary intoxication remains a defense to crimes in which an element is that the act be done knowingly and purposely, the defendant has the burden of proving that defense by a "preponderance of the evidence." In *Ellis* the instruction which the court held to be defective contained no provision on the burden of proof and was not specifically directed to whether the required degree of intoxication existed at the time the crime was committed. In the case under review, while the instruction did recite the proper burden of proof, it did not define "preponderance of the evidence." The party may not complain of the refusal of the trial court to give an instruction which is only partly correct as it is his duty to submit a wholly correct instruction. *Jackson* v. *State,* 92 Ark. 71, 122 S.W. 101 (1909).

We find no error in the trial court's refusal to give the instruction for still another compelling reason. While there was evidence that appellant had been drinking and that he was intoxicated when arrested an hour or more after the incident, there was no evidence from which a jury might find that he was intoxicated to such a degree as to be unable to form the requisite intent to commit the crime *at the time* it was committed. *Bailey* v. *State,* 263 Ark. 470, 565 S.W.2d 603 (1978).

The appellant next contends that the trial court erred in refusing to give his proffered instruction on justification or "self-defense." This instruction would have told the jury that if appellant reasonably believed that the deceased was about to commit a felony with force or violence or was about to use unlawful and deadly force he would be authorized to use such force as was reasonably necessary. That instruction also contained the following conclusion:

> Wilbert Johnson, in asserting this defense, is required only to raise a reasonable doubt in your minds. Consequently if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to his guilt of *murder in the first degree* then you must find him not guilty.

The State argues that the instruction was defective in several respects. However, assuming that the instruction was a proper one, we find no prejudice to have resulted from the failure of the court to give it. This instruction was offered only as a defense to the crime of first degree murder. The jury did not find him guilty of that offense. Its verdict found him guilty of a lesser included offense of second degree murder and fixed his punishment accordingly. No other instruction on self-defense as to any lesser included offense was offered.

The appellant finally contends that the trial court erred in making remarks about the probationary system to a member of the jury out of the presence of the other members of the panel while it was in deliberation. We do not address the question because there is nothing in the record. The only reference to such a statement is contained in a motion for a new trial in which it was alleged that the court misinformed the jury as to their sentencing responsibility when he informed them that parole cannot be considered in sentencing. Absent anything in the record before us regarding any conversations which might have taken place between the court and member of the panel, we can make no determination that the court did not properly overrule the motion for new trial.

Affirmed.

GLAZE, J., dissents.

Gina L. WARD *v.* STATE of Arkansas

CA CR 82-96 642 S.W.2d 328

Court of Appeals of Arkansas
Opinion delivered November 17, 1982

Paul K. Lancaster and *Robert A. Parker,* for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. The appellant, Gina L. Ward, was charged jointly with her husband, Randy Ward, with first degree murder in the death of the couple's four-month old son, Todd Ward, who died from skull fractures and internal injuries. Appellant's motion for severance was granted. Appellant was convicted by a jury verdict of second degree murder and sentenced to five years in prison.

Appellant contends that the trial court erred in failing to grant her motion for a directed verdict of acquittal, and that there is no substantial evidence to support the jury's verdict. We hold that the action of the trial court was proper and the judgment is affirmed.

Ark. Stat. Ann. § 41-1503 (Repl. 1977), provides that a person commits murder in the second degree if . . . (b) he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or (c) with the purpose of causing serious physical injury to another person, he causes the death of any person.

A directed verdict of acquittal is proper only when no fact issue exists, and the court will review the evidence on appeal in a light most favorable to the appellee and affirm if there is any substantial evidence to support the verdict. *Harris* v. *State,* 262 Ark. 680, 561 S.W.2d 69 (1978).

Appellant insists that all the evidence connecting her with Todd's death is circumstantial, and that is correct, because there were no eyewitnesses. For circumstantial evidence to be sufficient, it must exclude every other *reasonable* hypothesis consistent with innocence, but the question of whether it *does* exclude every other reasonable hypothesis is usually for the fact finder to determine. *Smith* v. *State,* 264 Ark. 874, 575 S.W.2d 677 (1979). Although the jury should be instructed, as was done in this case, that circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion, that is not the standard by which we review the evidence. Our responsibility is to determine whether the verdict is supported by substantial evidence, which means whether the jury could have reached its conclusion without having to resort to speculation or conjecture. *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981).

An examination of the evidence reveals that Todd, the child, was left with appellant's mother for several hours on Saturday, September 19, 1981, and that appellant and her husband picked up the child at about 8:00 p.m. that evening. Appellant's mother testified that at that time Todd ate well and had no bruises or scratches on him, but had "just a tiny blue speck on his cheek." At 2:00 p.m. the next day, Sunday, appellant and her husband left the child with a babysitter, Mrs. Puckett, so that the parents could go shopping. Upon arriving at the babysitter's, appellant took the child directly to the nursery and told the Pucketts not to bother the child because he was sick. Mrs. Puckett testified that she glanced at Todd and saw that he had a black eye, bruises and a little dug-out place on the side of his nose. The babysitter and her husband found the child gasping for breath at 2:30 p.m. and discovered that he had bruises and scratches all over his face, forehead and head. Appellant and her husband took Todd to the home of appellant's mother, and from there the child was taken to the hospital where he died the following day.

Dr. William R. Collie saw Todd at 6:00 p.m. in the hospital emergency room. Dr. Collie testified that Todd had numerous bruises and scratches about the head and was in shock. At first, it was thought that a head injury was the

cause of the child's condition, but within two hours Todd's abdominal cavity began to swell tremendously. It was then discovered that the real source of Todd's problem was a ruptured intestine within the abdominal cavity. X-rays revealed that Todd also had a fractured skull. Dr. Collie testified that the ruptured intestine would require an impact of considerable force, that such an injury is very rare in a child of Todd's age, and that it could not have been caused by a fall; that the internal abdominal injury could have been caused by force from the front or the back, and probably occurred 24 to 36 hours before admission. Dr. Collie stated that the skull fracture could have been caused by a fall, but that it would be "extraordinary" for a four-month old to fall and fracture his skull in that manner because of the pliability of the skulls of infants. Dr. Collie testified that Todd could not have caused the injuries on his cheek and the side of his nose. Although Dr. Collie asked appellant for an explanation of the injuries when Todd was admitted to the hospital, appellant offered none.

Dr. Dennis Smith, a pathologist and medical examiner for the state, performed an autopsy on September 22, 1981. Dr. Smith testified that the cause of death was a "blunt trauma to the head and to the abdomen," and that he classified the death as a homicide, with the abdominal injury being the immediate cause of death. Dr. Smith estimated that the abdominal injury occurred within 24 hours of surgery. The record is not clear as to the time of surgery, but it was certainly no earlier than 8:00 p.m. on September 21.

In *Williams* v. *State,* 267 Ark. 527, 593 S.W.2d 8 (1979), appellant was convicted of committing first degree battery on her ten-month old daughter and assessed a ten-year prison sentence. On appeal, she alleged that there was a lack of evidence to support the jury's finding of guilt. Evidence showed that the child was suffering from severe injuries which included burns, fractured ribs, and various bruises and contusions on her body. The medical testimony was that the child had suffered from child abuse. Appellant denied abusing the child in any way and suggested that perhaps the child had fallen. The Arkansas Supreme Court held that

although the evidence was circumstantial there was sufficient evidence to support the jury's finding that appellant had abused her child. The court held that there was no longer a distinction between an accessory and a principal and that there was no doubt that appellant could not have been around the child without knowing of her injuries.

In *Limber* v. *State,* 264 Ark. 479, 572 S.W.2d 402 (1978) the father was found guilty of second degree murder and given a twenty-year prison sentence, and the mother was given a five-year sentence for manslaughter. Appellant, the mother, argued that there was no evidence submitted by the state which connected her to any of the incidents or accidents that could have caused the death of her nineteen-month old son. The court recognized that although the evidence was circumstantial, there was evidence to indicate that she had seen her husband slap the child and spank him with such force as to leave a bruise. She admitted that she had seen him use his foot on the child. She testified that she had observed several bruises and cut places on her child and that she had argued many times about her husband's disciplining the children. The court held that "her complicity, according to the evidence, was more than innocent bystander."

In the case now before this court Dr. Collie estimated that Todd had sustained the skull fractures between 6:00 a.m. and 6:00 p.m. Friday, and Dr. Smith testified that the abdominal injuries which were the immediate cause of death were sustained somewhere around 10:00 p.m. on Saturday or 24 hours prior to surgery. It is obvious that a four-month old child is not mobile, and it is uncontradicted that he was in the custody and care of his parents from 8:00 p.m. Saturday until 2:00 p.m. Sunday. We do not distinguish between an accessory and a principal, Ark. Stat. Ann. § 41-301 et seq. (Repl. 1977), and there is no doubt that appellant could not have been around the child without knowing of his injuries. *Williams* v. *State, supra.* The jury could properly infer that the parents were responsible for Todd's care and health during the period in which the injuries were sustained, and that the injuries were either inflicted by one or both of them or could be explained. The jury was at liberty to accept the testimony of appellant's

mother, to the effect that Todd had no visible bruises when she saw him at 8:00 p.m. Saturday, or they could disregard her testimony and conclude that the injuries to Todd's head occurred before that time.

In *Cassell* v. *State, supra,* the Arkansas Supreme Court noted that "... defense counsel have not in the course of an excellent brief ventured to formulate a theory of the crime by which Cassell might emerge as an innocent man ... Nor have we been able to reconcile such a theory with the evidence." In the present case neither appellant nor her husband testified, but it was not unreasonable for the jury to find that appellant could not have been completely ignorant of any event which inflicted such violent blows to her son. The doctors' testimony established as conclusively as it is possible to do that the injuries were not self-inflicted or the result of a fall or other accident, and the only logical inference is that one or both of the parents inflicted the blows.

When appellant was asked for an explanation of the injuries at the hospital she offered none, and later made a statement to a social worker that Todd scratched himself on the way to the hospital. It is significant that when appellant went to get Todd at the Pucketts' house on Sunday afternoon, appellant called her husband to observe how Todd jerked when she touched his abdomen. She did not mention Todd's tenderness about his abdomen at the hospital, and the doctors did not discover the internal injuries until two hours later when the child's abdomen swelled.

Instructions were given to the jury as to first degree murder, second degree murder, manslaughter and negligent homicide. It was proper to present the issues of fact to the jury and there is substantial evidence to support a conviction for second degree murder.

Affirmed.

J. B. HARRISON, Jr. *v.* BENTON STATE BANK,
Guardian of Lillie B. BECKWITH

CA 82-102 642 S.W.2d 331

Court of Appeals of Arkansas
Opinion delivered November 17, 1982

Sam Ed Gibson, P.A., for appellant.

Bob Alsobrook, for appellee.

TOM GLAZE, Judge. This probate case involves the liability of a surety, appellant J. B. Harrison, Jr., on a bond filed in the guardianship of Lillie B. Beckwith, an incompetent. The bond provided that Harrison and A. D. Parsons, as sureties, were jointly and severally obligated for the

lawful administration of the ward's estate by her guardian, Edward Elmore. Unfortunately, Elmore unlawfully withdrew $12,900 for his personal use, and Beckwith's family subsequently petitioned to remove him. A successor guardian, Benton State Bank (Bank), was appointed in his stead. Elmore later filed his first and final accounting to which the Bank objected. At a hearing on the Bank's objections, the court found the amount owed the estate by Elmore was $12,250 and it entered judgment against Elmore, Parsons and Harrison in that amount. Harrison appealed from that judgment, and we reversed for a reason not relevant here. On remand, a new trial was held and a judgment was again entered against Elmore, Parsons and Harrison for $8,417.11. The second judgment was less than the first because Elmore and Parsons paid $3,832.89 after the first judgment was entered, thereby reducing the amount owed the estate.

In this second appeal, Harrison first argues that he was excused from his obligations on the bond because a plea bargain agreement was consummated in a criminal proceeding brought against Elmore for theft, a charge resulting from his wrongful withdrawal of funds from the Beckwith's estate. The essence of the plea bargain was that Elmore would reimburse the estate by making periodic payments to the Bank and in return, Elmore would receive a suspended sentence. Apparently, the prosecuting attorney obtained the Bank's approval before the plea bargain agreement was entered. Harrison contends this plea bargain agreement was a novation which discharged his obligation to pay the monies owed the estate. He also cites *Continental Insurance Companies* v. *Rowan,* 250 Ark. 724, 466 S.W.2d 942 (1971), and argues that as a surety, he cannot be liable to the estate in a greater amount *or* "in any way differently from the way" in which the principal, Elmore, is liable, Harrison's argument is a misstatement of the rule in *Rowan.*

In *Rowan,* the successor guardian filed an action directly against the surety without first proceeding against and establishing the liability of the principal/initial guardian who had been removed. The court held that before the successor guardian could sue the surety, he was required

to obtain a settlement or accounting from the principal and an order directing the principal to pay over the sum found due the estate. In recognizing the soundness of this procedure, the court noted the rule, on which Harrison now relies, that the surety's liability is derivative and ordinarily does not exceed that of the principal.

Here, the Bank proceeded against Elmore, established his liability to the estate in the sum of $8,417.11 and obtained a judgment against Elmore, Parsons and Harrison. The judgment also directed that after Harrison has paid the $8,417.11 he must be reimbursed by the estate from any money it receives from Elmore. The rule in *Rowan* limits Harrison's liability to the amount Elmore owed the estate. The rule does not, however, discharge Harrison's liability merely because he is required to pay the debt owed the estate in a different way (in a lump sum) from that required of Elmore (in periodic payments).

Nor can we agree with Harrison's argument that the plea bargain agreement was intended as a novation to extinguish his surety obligation. The court in *Barton* v. *Perryman*, 265 Ark. 228, 577 S.W.2d 596 (1979), stated that a novation is the substitution by mutual agreement of one debtor, or of one creditor, for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished. We find no evidence that shows the parties intended, by their plea bargaining, to extinguish the judgment debt owed by Harrison. The judgment against Harrison, Parsons and Elmore remains unchanged and unsatisfied. The evidence clearly shows that Elmore consented to the plea bargain agreement to keep from going to the penitentiary — not to relieve Harrison of his obligation to the estate.

Aside from the parties' lack of intent to enter a novation, the facts here simply do not come within the definition of a novation as that term is set forth in the Restatement of the Law on Contracts. Section 424 of that Restatement provides:

A novation . . . is a contract that

> (a) discharges immediately a previous contractual duty or a duty to make compensation, and
> (b) creates a new contractual duty, and
> (c) *includes as a party one who neither owed the previous duty* nor was entitled to its performance. [Emphasis supplied].

Obviously, Elmore owed a duty to pay the subject debt to the Beckwith estate; it was his breach of guardianship duties that obligated him, Parsons and Harrison. In fact, he remains liable on that debt as is evidenced by the judgment still pending against him and his sureties. In sum, we affirm the trial court's finding that no novation existed and that, contrary to Harrison's contention, the action against him on the debt was not premature or dischargeable under any rule contained in *Rowan.*

Harrison next contends that the court erred in finding that he was mentally competent at the time he signed the bond. On this point, we adopt the rule that a surety, like other parties to a contract, must have the requisite contractual capacity if he undertakes a personal obligation of suretyship. *Doty* v. *Mumma,* 305 Mo. 188, 264 S.W. 656 (1924); and 74 Am. Jur., Suretyship § 9; *see also Kelly's Heirs* v. *McGuire,* 15 Ark. 555, 597 (1854). The Supreme Court in the landmark case of *Kelly's Heirs* v. *McGuire* discussed the relative law regarding the mental capacity to contract as follows:

> [T]he party to be charged in a contract, must not only express his assent that he will be bound, but he must be endowed with such degree of reason and judgment as to enable him to comprehend the subject. The assent, which is requisite to give validity to a promise, supposes a free, fair, and serious exercise of the reasoning faculty. *Chitty on Contracts* 134. *The law presumes there is full capacity to contract, and mental incapacity forms an exception to the general rule;* which must be shown by those who would set aside the contract. *Id.* 135.
>
> It would be wholly impracticable to lay down any exact general rule as to incapacity to contract; because

> each case will be found influenced by its own peculiar circumstances. *But it may be freely admitted that mere weakness of understanding, is not, of itself, sufficient to invalidate a contract, if the person is capable of comprehending the subject.* [Emphasis supplied].

The circumstances in this case support the chancellor's finding that Harrison had the capacity to contract at the time he signed the surety bond. Harrison suffered and was treated for a stroke on July 15, 1978, forty-four days prior to his signing the bond on August 28, 1978. His family physician testified that he had no doubt that thirty days after the stroke Harrison was not capable of making rational judgment decisions and that he seriously doubted he could three months after. However, the doctor candidly admitted that, neurologically, Harrison had difficulty in pronouncing words but that no other neurological defects were observed. When the doctor saw him on August 31, 1978, Harrison had recovered his ability to speak, had no other signs or symptoms or any further strokes and was instructed to discontinue taking medication.

Harrison and his wife owned two businesses, a furniture store and a funeral home. Mrs. Harrison testified that shortly after her husband's stroke and subsequent release from the hospital, she had him sign checks and conduct certain business transactions. In fact, he executed a retail contract on August 24, 1978, four days before he signed Elmore's bond. Mrs. Harrison related that the doctor never stated that her husband was incompetent or lacked comprehension although she gave her opinion that he did lack comprehenson. She further testified that her husband "never refused to sign anything that I put in front of him between July, 1978, and the first of 1979." In sum, Mrs. Harrison, an experienced businesswoman, obviously did not believe her husband's mental capacity was diminished to the extent that he could not perform all the business matters she presented him. On these facts, we cannot say the chancellor was clearly erroneous in finding Harrison mentally competent when he signed Elmore's bond.

Finally, Harrison argues that the bond was not enforceable because it was not accompanied with qualifying affidavits, and it was not supported by consideration. He cites no legal authority and offers no real argument for either proposition. Therefore, we do not consider these two issues because they are not supported by convincing argument or authority. *Shannon* v. *Anderson,* 269 Ark. 55, 598 S.W.2d 97 (1980).

Affirmed.

L. M. MEDLOCK et al *v.* ARKANSAS STATE HIGHWAY COMMISSION et al

CA 82-73 642 S.W.2d 336

Court of Appeals of Arkansas
Opinion delivered November 24, 1982
[Rehearing denied December 22, 1982.]

William J. Cree and *Irwin & Kennedy,* by: *Robert E. Irwin,* for appellants.

Thomas B. Keys and *Chris O. Parker,* for appellees.

MELVIN MAYFIELD, Chief Judge. The issue in this case is whether the chancery court erred in refusing to enjoin the Arkansas State Highway Commission from placing concrete posts on its right-of-way to close a commercial access to a state highway.

The history of this case starts in 1966 when the Highway Commission condemned property in Conway County for the construction of the Blackwell Interchange to connect State Highway 64 and Interstate Highway 40. The crossover road between these highways is a controlled access facility and the road, and a fence barring access to the road, were in

place by November of 1976. Construction of the road bisected property owned by appellants' predecessors in title and left two residual triangles of land abutting Highway 64 and the crossover road to I-40.

Appellant Medlock purchased the eastern residual of 2.2 acres in 1971. It was then unimproved pasture land. In 1973 appellant Goodall obtained an option to purchase that property with the intention of constructing and operating a liquor store on it. In 1980 a retail liquor permit was obtained and construction of the store building began in March of 1981. The land was subsequently conveyed to 101, Inc., a corporation, which is one of the appellants here, along with Medlock, and with Goodall and Robert Bell, who are, apparently, the owners of 101, Inc.

In 1976 the appellants applied for an access driveway permit to the crossover road and it was denied. In 1980 a permit was requested for an access driveway to Highway 64 and it was turned down. On September 5, 1980, the appellants filed suit against the commission asking for an order restraining the commission from preventing access to the crossover road and to Highway 64. This complaint was answered but no trial was held until October of 1981. In the meantime, construction of the store building was completed and traffic from Highway 64 to the store began. When highway department personnel attempted to place concrete posts on its right-of-way to close the driveway the public was using, the appellants obtained a temporary restraining order, but on October 8, 1981, after trial, the court held it was without power to enjoin the commission and the temporary injunction was dissolved.

Appellants argue on appeal that (1) because all of the owners of the land involved were not made parties to the original suit for condemnation, the order of condemnation for the crossover road right-of-way is void as to the omitted parties, and (2) immediately after the commission attempted to block appellants' access to Highway 64, a suit for injunction was filed and it should have been granted unless and until just compensation was paid for the taking of appellants' right of access.

In *Bryant* v. *Ark. State Highway Comm'n,* 233 Ark. 41, 342 S.W.2d 415 (1961), the court held that where the Highway Commission was threatening to take private property without making provision for compensation, the landowner was entitled to enjoin the commission from the taking until an amount sufficient to constitute just compensation had been deposited in court. The court said this would not be regarded as a suit against the state, but where the owner stood by and permitted the commission to take, occupy, and damage his land, he could not maintain a suit for damages because that would be a suit against the state. Other cases have reaffirmed this principle. See *Ark. State Highway Comm'n* v. *Flake,* 254 Ark. 624, 495 S.W.2d 855 (1973) and *Ark. State Highway Comm'n* v. *Rice,* 259 Ark. 190, 532 S.W.2d 727 (1976).

So, assuming that appellants owned an interest in the land involved and that they were not made parties to the condemnation suit, it is nevertheless clear that the crossover road and the fence barring access thereto, have been constructed and used too long for appellants now to obtain an injunction against the commission on the first basis they assert.

As to access to Highway 64, we think the trial judge's action was correct though perhaps not for the reason he gave.

Under Ark. Stat. Ann. § 76-201.5 (m) (Repl. 1981), the Highway Commission is required:

> To adopt reasonable rules and regulations from time to time for the protection of, and covering, traffic on and in the use of the State Highway System and in controlling use of, and access to, the highways, except that no provision contained herein shall be construed as repealing the existing "rules of the road."

Pursuant to that statutory authorization, the Highway Commission adopted its *Regulations for Access Driveways to State Highways* (1976). Regulation B (1) (c) states:

> [A]ccess driveways shall be prohibited for a sufficient distance from the intersection to preserve the normal and safe movement of traffic through it, and in no case shall the distance be less than the intersecting street return radius.

In the hearing before the chancellor the appellees introduced evidence that appellants' entire driveway lies within the return radius of the intersection. There was testimony as to the number of vehicles entering and leaving through the driveway and a traffic safety engineer testified that the commercial use of the driveway presented a hazardous traffic condition.

The commission's regulations for access driveways were upheld as constitutionally valid exercises of the police power of the state in *Ark. State Highway Comm'n* v. *Hightower*, 238 Ark. 569, 383 S.W.2d 279 (1964). Here, the appellants had reason to know that they would have a problem obtaining an access driveway permit and they accepted that risk when they built their building without such a permit. We hold that the evidence supports a finding that the commission's exercise of its authority was reasonable and supports the trial court's order refusing to enjoin the commission's action.

Although we affirm the result of the trial judge's decision, we do not agree that he was without jurisdiction to grant the injunction as to the Highway 64 access. We hold, therefore, that he did not err in refusing to enjoin the commission from closing the *commercial* driveway from appellants' property to Highway 64. We note, however, that the trial court's order does not affect the right of non-commercial ingress and egress to and from appellants' property and Highway 64.

Affirmed.

Mitchell JOHNSON and Mildred Mann GRIFFIN, d/b/a DALARK PACKAGE STORE *v.* ARKANSAS ALCOHOLIC BEVERAGE CONTROL BOARD et al

CA 82-114 642 S.W.2d 335

Court of Appeals of Arkansas
Opinion delivered November 24, 1982

Eugene D. Bramlett of *Brown, Compton & Prewett, Ltd.*, for appellants.

Treeca J. Dyer, for appellees.

LAWSON CLONINGER, Judge. A decision of the Alcoholic Beverage Control Board denied the application of appellants, Mitchell Johnson and Mildred Mann Griffin, d/b/a Dalark Package Store, for a retail liquor and beer permit to be located on Highway 7 near the Dalark community in Dallas County. The decision of the Board was affirmed by the Circuit Court of Dallas County.

For reversal, appellants contend that the Board's decision is not supported by substantial evidence and was arbitrary, capricious and an abuse of discretion. We find no merit to appellants' contention and we affirm.

The ABC Board Regulations, § 1.32, provides that no permit shall be issued for the following premises:

> . . . .
>
> (3) Any premise for which, in the judgment of the Director, adequate police protection is not available due to the remoteness of the location of the premises;
>
> (4) Any premise for which the issuance of a permit would not in the judgment of the Director, promote the public convenience and advantage. . . .

In this case the relevant portion of the Board's findings was as follows:

> . . . .
>
> 2. That the prosecuting attorney for the Thirteenth Judicial Circuit, Robert Laney, objected to this application stating that there was no law enforcement protection in the area.
>
> 3. That testimony revealed that the chief market area for an outlet at the proposed location would be the Arkadelphia area and testimony also revealed that the highway between Dalark and Arkadelphia is narrow and treacherous and it is found that it would be opposed

to the public safety and welfare to issue a permit at this location.

4. It is further found that an outlet at this location would create law enforcement problems both for Dallas County and Clark County by virtue of the fact that Dalark is in a rural area and is not regularly patrolled by the state police and sheriff's offices of the two respective counties.

5. That Dalark has a population of approximately 150 people and there is no sufficient public need for a retail liquor outlet at this location.

It is concluded from the above and foregoing findings that it would not be to the convenience and advantage of the public to issue the applied-for permits.

The ABC Board has broad discretionary power to "... determine whether public convenience and advantage will be promoted by issuing such permits . . .", Ark. Stat. Ann. § 48-301 (Repl. 1977), and a decision of the Board will be affirmed if supported by substantial evidence and if it is not arbitrary, capricious or an abuse of discretion. Ark. Stat. Ann. § 5-713 (Supp. 1981).

Appellants testified that the proposed liquor and beer outlet is designed to serve 3,000 residents who live in the western half of Dallas County, but they made no further effort to show that the public convenience and advantage would be promoted by the issuance of the permit. Dalark community is located on the county line between Dallas and Clark Counties, and the parties recognize that the market area for the proposed outlet would include part of Clark County, which has voted by local option to remain a dry county.

The objection to the granting of the permit registered by the prosecuting attorney for Dallas County on the grounds that there was inadequate law enforcement protection in the area of Dalark is supported by the evidence.

Testimony indicated that patrols of the Dallas County Sheriff's Department were infrequent, no more than once a week, and that the state police were in the area infrequently, perhaps not seen for a month at a time.

Evidence also indicated that 4,600 students attend Ouachita Baptist University and Henderson State University in Arkadelphia, only twelve miles from Dalark, and that the highway between Arkadelphia and Dalark is narrow and treacherous. A majority of those college students are under the age of 21, the legal age for purchasing alcoholic beverages, and that fact would dictate the need for regular police patrols. The remoteness of the area is an issue in this case as it was in *Copeland* v. *Alcoholic Beverage Control Board,* 4 Ark. App. 143, 628 S.W.2d 588 (1982).

We hold that there is substantial evidence to support the decision of the Board, and that there is no showing of an abuse of discretion.

Affirmed.

CORBIN, J., not participating.

Georgia Sue BLACK, Widow of Lemuel BLACK, Deceased *v.* RIVERSIDE FURNITURE COMPANY

CA 82-338 642 S.W.2d 338

Court of Appeals of Arkansas
Opinion delivered November 24, 1982

Robert S. Blatt, for appellant.

Harper, Young, Smith & Maurras, by: *Tom Harper, Jr.,* for appellee.

LAWSON CLONINGER, Judge. In this workers' compensation case, the appellant, Georgia Sue Black, is the widow of Lemuel Black. Lemuel Black, deceased, was a custodian at Riverside Furniture Company from 1974 to 1981. His duties included sweeping sand and sawdust from the floor of the mill, gathering trash containers and emptying the containers into dumpsters. Some of those containers would weigh 75 pounds or more.

On January 14, 1981 the decedent became ill at work and was treated by a physician of his choice. He returned to work on January 19, 1981 and again became ill at work. He was then referred to Dr. J. Campbell Gilliland, who determined that Mr. Black had two pre-existing heart conditions, arteriosclerosis and atrial septal defect. On February 23, 1981 Dr. Donald Patrick performed surgery on Mr. Black's heart to repair the atrial septal defect, which is a hole in the wall of the two upper chambers of the heart, and a double by-pass for the arteriosclerosis. On March 10, 1981 Mr. Black died from complications of the by-pass operation.

A claim for death benefits under Ark. Stat. Ann. § 81-1315 (Repl. 1976) was filed by appellant, contending that her husband's death arose out of and in the course of his employment; specifically, that his work at Riverside aggravated both his pre-existing heart conditions, which resulted in surgery. Appellee, Riverside Furniture Com-

pany, contended that Mr. Black's heart condition and subsequent death were the result of a congenital heart defect and arteriosclerosis which was totally unrelated to his work.

The Administrative Law Judge determined that "the claimant had failed to prove by a preponderance of the evidence that the death of Lemuel Black was substantially caused by an injury or injuries arising out of and in the course of his employment at Riverside Furniture." The Full Commission adopted the opinion of the Administrative Law Judge and denied appellant benefits.

We find substantial evidence to support the decision of the Commission and we affirm.

There is ample evidence in the record to sustain the appellant's claim, but that is not the question on this appeal; the issue is whether there is substantial evidence to sustain the Commission's findings in favor of the employer. *Tigue* v. *Caddo Minerals Company,* 253 Ark. 1140, 491 S.W.2d 574 (1973). It is well established that on appeal, it is the duty of this court to review the evidence in the light most favorable to the Commission's decision and uphold that decision if it is supported by substantial evidence. Before the court may reverse a decision of the Commission, the court must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Insurance Company,* 2 Ark. App. 1185, 618 S.W.2d 573 (1981). Weighing the evidence falls within the province of the Commission and it must weigh medical evidence as it does any other evidence. Even where the medical testimony is conflicting, the resolution of the conflict is a question of fact for the Commission. *Barksdale Lumber Company* v. *McAnally,* 262 Ark. 379, 557 S.W.2d 868 (1977).

In order to determine whether there is any substantial evidence to support the Commission's findings, it is necessary to review the medical testimony presented by Dr. Gilliland, the treating physician, Dr. Patrick, the surgeon, and Dr. Taylor Pruitt. Dr. Gilliland testified unequivocally that in his opinion that although neither of Mr. Black's

cardiac problems was precipitated by his employment, his work certainly aggravated both of his pre-existing conditions and it was responsible for precipitating his "syncopal episodes" at work on January 14, 1981. Dr. Gilliland further testified that Mr. Black's activity at work aggravated his symptoms and also aggravated his disease. At another point Dr. Gilliland testified that the progression of the arteriosclerosis was not accelerated or aggravated by Mr. Black's employment, and that Mr. Black was "disabled" before he went to Riverside.

Dr. Patrick testified that in his opinion the working conditions produced the symptoms of angina, which is the pain message to the heart, but that no damage is done by the angina in the sense of death of cells. Dr. Patrick was of the opinion that Mr. Black's working conditions neither aggravated nor accelerated his two pre-existing heart conditions, but would rather aggravate the symptomatology.

Dr. Pruitt testified in a deposition based on a report sent to him on Mr. Black, and was of the opinion that Mr. Black's symptoms of sweating, shortness of breath, cold sweat and heart palpitations would be aggravated by any exercise. Dr. Pruitt testified that death of heart cells is a myocardial infarction and is different from angina pectoris. Dr. Pruitt stated that it is conceivable that Mr. Black could have drastically increased his exercise and caused a myocardial infarction, but that it is interesting that Mr. Black did not have a myocardial infarction despite the documented exercise. He also stated that he did not know of any evidence which would allow him to say that the natural history of Mr. Black's atrial septal defect was hastened by the exercise which he did.

In determining whether a claimant's disability is a result of his employment, the test is whether the work claimant was doing aggravated the pre-existing condition to the extent that the work was a factor in bringing on the attack. *Reynolds Metal Company* v. *Cain,* 243 Ark. 483, 420 S.W.2d 872 (1967). A claim is compensable, without proof of unusual strain or exertion, when the claimant's ordinary work aggravates a pre-existing condition and thus con-

tributes to the injury. *McGeorge Construction Company* v. *Taylor,* 234 Ark. 1, 350 S.W.2d 313 (1961). Pre-existing disease or infirmity of an employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Conway Convalescent Center* v. *Murphee,* 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979).

We have a situation in this case which has not been specifically addressed before in this jurisdiction; namely, whether or not aggravation of the symptoms of a pre-existing condition is compensable. It is not controverted that Mr. Black had two pre-existing heart conditions. His work aggravated the symptoms of those conditions, consisting of chest pains which is called angina pectoris. Mr. Black's injury, his death, was the result of by-pass surgery which was conducted to correct the pre-existing heart condition.

In *Duffy* v. *State Accident Insurance Fund,* 603 P.2d 1191 (Or. Ct. App. 1979), the claimant had suffered from coronary artery disease of longstanding. The mental and physical stress of his employment combined with his underlying heart condition to cause attacks of angina pectoris to the extent that he was required to stop work. The Oregon court refused to award claimant benefits on the basis of claimant's underlying heart condition, stating that medical evidence showed that all that happened to claimant as a result of his work were temporary episodes of angina pectoris which stopped when he quit his work and did not affect in any way the severity of progress of his underlying heart disease. In *Kostamo* v. *Markett Iron Mining Company,* 274 N.W.2d 412 (Mich. 1977), the court recognized that arteriosclerosis is an ordinary disease of life which is not caused by work or aggravated by the stress of work. The court recognized that although claimant may have pain while working with his disease, it is not compensable.

In the case before the court, although Dr. Gilliland testified that Mr. Black's working conditions accelerated and

aggravated his pre-existing heart conditions, both Dr. Patrick and Dr. Pruitt testified that it merely accelerated his symptoms in the form of angina pectoris. Mr. Black's death was caused by arterial by-pass surgery to correct the previous heart condition of arteriosclerosis, and there is substantial evidence to support the Commission's finding that Mr. Black's death did not arise out of and in the course of his employment.

Affirmed.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I concur in the result to the extent that there was medical evidence which supports the finding that Mr. Black's working conditions served only to accelerate his *symptoms* rather than to accelerate or hasten his death. The Arkansas rule is well established that when the ordinary exertion or straining of the employee's usual work causes the unexpected and disabling event or injury or accelerates or hastens its consummation, that in itself constitutes a compensable accident because the injury and disability is due to the employment. *Bryant Stove & Heading* v. *White,* 227 Ark. 147, 296 S.W.2d 436 (1956).

Under this rule, if the evidence had shown Black's work had caused his angina pains which in turn accelerated or hastened his death, this claim, in my opinion, undoubtedly would have been compensable. In sum, this case should be limited to its facts and the underlying medical evidence that substantiated the fact that Black's work-related angina symptoms did not hasten the cause of his death. For this reason, I agree with the majority decision.

Lisa GRAHAM *v.* STATE of Arkansas

CA CR 82-99 642 S.W.2d 342

Court of Appeals of Arkansas
Opinion delivered November 24, 1982

M. J. Probst, P.A., by: *M. J. Probst,* for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant was convicted of second degree murder and sentenced to three years imprisonment. She raises two issues on appeal: (1) that the trial court erred

in admitting into evidence the testimony of two doctors who performed physical examinations on her, and (2) that the court erred in denying her motion for a directed verdict of acquittal because there was insufficient evidence to sustain a conviction. We need not decide appellant's first argument because even when we consider the doctors' testimonies, the State's evidence fails to show appellant committed murder.

On appeal we review the evidence in the light most favorable to the appellee and affirm if there is substantial evidence. Substantial evidence means that the jury could have reached its conclusion without having to resort to speculation and conjecture. The fact that evidence is circumstantial does not render it insubstantial. *Wrather* v. *State,* 1 Ark. App. 155, 613 S.W.2d 601 (1981). But in order for circumstantial evidence to be sufficient to support a finding of guilt in a criminal case, it must exclude every other reasonable hypothesis consistent with innocence. *Smith* v. *State,* 264 Ark. 874, 575 S.W.2d 677 (1979).

Viewed in the light most favorable to the State, the evidence proved that the body of a black female infant was retrieved from the Bayou Mason in Desha County on May 17, 1981. On May 19, 1981, the State Medical Examiner, Dr. Fahmy Malak, performed an autopsy on the body and concluded it was a black, female infant resulting from a nine-month pregnancy. Malak stated that the baby had been born alive and died from being struck on the head. The baby had been dead at least four days before the autopsy was performed.

On June 11, 1981, appellant consented to separate physical examinations conducted by Dr. Virgil Hayden and Dr. Rodger D. House. Both doctors testified that their examinations revealed a substantial likelihood that appellant had recently been pregnant and delivered a child. Dr. House testified that appellant told him that she had never been pregnant and never had an abortion or a spontaneous loss. House estimated that appellant had been pregnant and delivered a baby more than six weeks prior to his examination on June 11. Other witnesses included a school teacher who saw appellant in April and May of 1981, and who

believed appellant was pregnant at the time. Another woman, Hattie Johnson, testified that she saw appellant in May or June or 1981 and that she looked pregnant.

The State concedes that the evidence is far from overwhelming but argues there was sufficient evidence for the jury to conclude that appellant gave birth to the deceased infant and that she was responsible for the baby's death. In sum, the State contends the evidence shows that (1) appellant was pregnant but denied it, and (2) she had a baby but concealed that fact from others. These two conclusions, the State argues, lead logically to a third: appellant disposed of — murdered — the baby under circumstances designed to conceal its birth. Such a conclusion is clearly speculative and one in which we cannot indulge.

It is the duty of this Court to set aside a judgment based upon evidence that did not meet the required standards, left the fact finder only to speculation and conjecture in choosing between two equally reasonable conclusions and merely gave rise to a suspicion of guilt. *Smith* v. *State, supra.* Here, there is no evidence that even tends to prove the deceased baby was appellant's. Nor did the evidence establish that she had anything to do with the baby's death. The most the evidence shows is that appellant was pregnant, she delivered a baby, and she did not reveal the baby's whereabouts. Even these conclusions are left open to doubt by the medical evidence. Dr. House said that although his medical opinion was that she had been pregnant, he still had some doubt. House stated his uncertainty was due to appellant's faiure to emit a discharge, called lochia, a normal occurrence for about six weeks after a pregnancy. Neither Dr. House nor Dr. Hayden could testify that appellant had a full-term pregnancy, assuming she had been pregnant. The only evidence which may have possibly connected appellant as the deceased infant's mother became unavailable when the baby's body was lost. Apparently, the State Medical Examiner's office had planned to have a test performed in Washington, D.C., which, at least, could have excluded appellant as being the baby's mother. Before those plans could be acted upon, whoever had possession of the body lost it and it was never found.

Because the medical evidence tended to show that appellant was pregnant and that she denied it, perhaps it could be concluded that a logical suspicion arose that appellant was the newly found baby's mother. However, a suspicion is all it remained. There are young women who often times have their own reasons for never disclosing or admitting a pregnancy to others. We certainly cannot conclude from that fact alone that appellant or any other woman was responsible for the sad, unfortunate loss of life found in the Bayou Mason. We must reverse and dismiss.

Reversed and dismissed.

James Earl PHILLIPS *v.* STATE of Arkansas

CA CR 82-116 644 S.W.2d 288

Court of Appeals of Arkansas
Opinion delivered December 1, 1982

Coleman, Gantt, Ramsay & Cox, by: *John D. Davis,* for appellant.

Steve Clark, Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. James Earl Phillips appeals from his conviction by jury of the crime of negligent homicide as defined in Ark. Stat. Ann. § 41-1505 and § 41-203 (Repl. 1977). His punishment was assessed at six months in the county jail and a fine of $250. The sole issue on appeal is the sufficiency of the evidence to sustain the verdict. It is a well settled rule that the evidence adduced at the trial is reviewed on appeal in the light most favorable to the appellee and the judgment must be affirmed if there is any substantial evidence to support the findings of the trier of fact. *Fountain* v. *State,* 273 Ark. 457, 620 S.W.2d 936 (1981) and *Cooper* v. *State,* 275 Ark. 207, 628 S.W.2d 324 (1982). Substantial evidence is that which is 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 a suspicion or conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980).

Under Ark. Stat. Ann. § 41-1505 (Repl. 1977) a person commits negligent homicide if he "negligently" causes the

death of another person. Ark. Stat. Ann. § 41-203 (Repl. 1977) declares:

> A person acts negligently with respect to attendant circumstances or a result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or result will occur. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

In the commentary to this section it is noted that negligent conduct is distinguished from reckess conduct primarily in that it does not involve the conscious disregard of a perceived risk. In order to be held to have acted negligently under this section it is not necessary that the actor be fully aware of a perceived risk and recklessly disregard it. It requires only a finding that under the circumstances he *should* have been aware of it and his failure to perceive it was a *"gross deviation"* from the care a reasonably prudent person would exercise under those circumstances. The section itself declares that the degree of negligence sufficient to establish civil liability will not suffice for the purpose of this section. The question is not whether he acted the same as a reasonably prudent person would have under the same circumstances, but whether his action was a gross deviation from that standard. In earlier cases involving negligent homicide statutes with similar wording, it was stated that in order for the negligence to be criminal it must be shown that a homicide was not improbable under the facts existing at the time which should reasonably have an influence and effect on the conduct of the person charged. *Phillips* v. *State,* 204 Ark. 205, 161 S.W.2d 747 (1942). When the facts disclosed by this record are reviewed in the light most favorable to the State we cannot say that the finding of the jury was not sufficiently supported.

On November 14, 1980 Diana Synco was shot and mortally wounded while hunting with her husband, Richard

Synco, in a wooded area in Jefferson County. James Earl Phillips admitted firing the fatal shot but contended that he believed he was shooting at a deer. On the day of the tragedy the Syncos had left their home in Stuttgart before daylight and had driven to the Bayou Meto Wildlife Management Area in Jefferson County. This area had been opened for a deer hunt restricted to the taking of buck deer. Upon arrival at the Wildlife Management Area they met friends, parked their vehicle and rode into the area in their friends' truck. When they arrived at the place they intended to hunt they parked the truck and Synco and his wife walked across a bean field toward a wooded area, their friends having gone in a different direction. After crossing the field the Syncos walked along the edge of the woods on a trail or roadway.

The appellant, also hunting deer, had arrived in the vicinity at about the same time and was walking along the edge of the woods toward the Syncos about 100 yards distant from them when the event occurred. All witnesses agreed that dawn was just breaking. It was dark, foggy and drizzling rain; visibility was very poor. According to Richard Synco he first observed a "silhouette in the fog down the road" about 100 yards from where he and his wife were walking. The Syncos decided that it was possibly another hunter and that they should get in the woods. They started toward the woods but before they got there they heard a shot. Synco grabbed his wife and rushed her into the buck-brush thicket where they could no longer see the "silhouette." While they were standing there a second shot was fired, mortally wounding Mrs. Synco. Synco then fired a warning shot and shouted for help. According to Mr. Synco, at all times both he and his wife were wearing orange hunting vests as outside garments.

The appellant testified that while standing on the edge of the field he observed a movement of a white patch and dark patch next to it which resembled a buck and a doe brousing at the edge of the field. He saw no "hunting orange" or other hunter and felt sure that what he saw was a pair of deer. He admitted that he saw no horns or large ears

and did not ascertain whether the objects were four-footed or otherwise. He then fired at the darker object. As they darted into the woods he fired a second shot before he heard a warning shot and someone shouted that someone had been hurt. He then went to the scene and offered assistance. He was sent to locate the other hunters and request that the truck be brought to Mrs. Synco. After identifying himself he then ran to his mother's house which was located in that area and called the sheriff's office reporting the incident. He called the hospital at DeWitt informing them that a bullet wound victim was en route.

The investigating officer determined that the shot was fired from a distance of about 75 to 80 feet. He stated that due to the shape of the woods the Syncos had a better view of Phillips than he had of the victim. From where the appellant stood when he fired the victim would have "blended more into the woods."

While deer hunting is a popular sport enjoyed by many, it can under some circumstances be hazardous. It involves the use of powerful weapons that propel lethal loads great distances in areas where the landscape, in many instances, makes visibility poor and identification of a target difficult. When a hunter fires his gun in an area where he knows others might be there clearly exists a substantial risk of harm. The hunter in these circumstances must exercise great care in identifying his target. It has been said that if in doubt, you must not shoot. *State* v. *Green,* 38 Wash.2d 240, 229 P.2d 318 (1951) and Annot., 23 A.L.R.2d 1397; *State* v. *Newberg,* 129 Or. 564, 278 P. 568 (1929) and Annot., 63 A.L.R. 1225. Appellant's testimony tended to prove that he had exercised the requisite care. It was for the jury to determine the weight to be given this testimony.

In the case at bar the conditions in which the appellant found himself called for an exercise of extreme care. All agreed that visibility was extremely limited; his ability to properly identify his target was similarly limited. The appellant was aware that others were hunting in the area

when he fired a high powered rifle at an obscure object in a thicket. We conclude that there was substantial evidence from which the jury could and did find that he should have been aware of the substantial and unjustifiable risk of harm under the circumstances and that the circumstances were such that his failure to perceive it involved a gross deviation from the standard of care that a reasonable person would observe in the same situation.

We find no error.

David REEDER and Charles W. SIMCO and REEDER-SIMCO, GMC, INC. *v.* ARKANSAS LOUISIANA GAS COMPANY

CA 82-112 644 S.W.2d 291

Court of Appeals of Arkansas
Opinion delivered December 1, 1982

Wiggins, Christian & Garner, by: *Robert O. Sawyer,* for appellants.

Daily, West, Core, Coffman & Canfield, by: *Michael C. Carter* and *Wyman R. Wade,* for appellee.

JAMES R. COOPER, Judge. This case involves the scope of an easement. The tracts of land owned by appellants and appellee were sold to them by their common grantors, Arkla Exploration Company and Stephens Production Company. Appellee purchased its land in 1968. In 1973, appellants purchased their tract of land, which lies south of the land owned by appellee. There was an existing road constructed of gravel which extended through the middle of appellants' land. The offer and acceptance executed by appellants provided that the existing road would be relocated within and along the western boundary of appellants' land.

The existence and location of the easement were resolved at the trial court level, and the only issue on which evidence was presented was the scope of the easement. The trial court heard testimony from various witnesses, including a licensed civil engineer. At the close of the testimony, the trial court viewed the land.

The trial court noted that the existing road had been used to transport heavy equipment, and that the new road would be used for the same purpose. The trial court defined the easement for the new road to be twenty feet in width, plus a five foot shoulder on both sides. The trial court noted that the five foot shoulders were necessary for lateral support of the road surface and to allow oversized loads of equipment to

pass each other. The trial court further found that the parties had contemplated a turn at the northern end of the road, which would further encroach on appellants' land, and that the testimony established that a fifty foot turning radius was required for such a turn. From the trial court's decision, comes this appeal.

Appellants argue that the trial court erred because it enlarged the scope of an easement, which was established by express grant. The basis for this argument is that at the time the easement was granted, the parties agreed that an easement was to be established on the western boundary of appellants' land and that the new road would be identical in dimensions to the existing road. The trial court undertook to define the scope of the easement, based on the intent of the parties and the use to which the existing road was being put at the time of the grant of the easement.

In chancery cases, we review the record *de novo,* but we will not reverse the chancellor on appeal unless his findings of fact are clearly erroneous or against a preponderance of the evidence. Rule 52 (a), Ark. Rules of Civ. Proc.; *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981).

In the case at bar, the contract provided that the existing road would be relocated along the western boundary of appellants' land. Thus, it was necessary for the trial court to consider the dimensions of the existing road, the use to which the existing road was being put, and the purpose of the easement, in order to ascertain the intent of the parties. *See,* 25 Am. Jur. 2d *Easements and Licenses* § 75, 78 (1966); 28 C.J.S. *Easements* § 75, 77 (A) (1) (3) (1941). The trial court was correct in defining the scope of the easement to be that which is reasonably necessary for the purpose and use for which it was created, since the easement was not clearly defined in the contract. *See, Hatfield* v. *Arkansas Western Gas Co.,* 5 Ark. App. 26, 632 S.W.2d 238 (1982).

The findings of the chancellor are neither clearly erroneous, nor against a preponderance of the evidence, and therefore we affirm.

Affirmed.

Rickey Gene BELL *v.* STATE of Arkansas

CA CR 82-82 644 S.W.2d 601

Court of Appeals of Arkansas
Opinion delivered December 1, 1982
[Rehearing denied January 12, 1983.*]

*COOPER and GLAZE, JJ., would grant rehearing.

H. David Blair, for appellant.

Steve Clark, Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant, Rickey Gene Bell, was charged with aggravated robbery and kidnapping on November 24, 1980. He was convicted by jury verdict and sentenced to thirty years imprisonment. He now brings this appeal.

In viewing the evidence in the light most favorable to the appellee, as we must do on appeal, we find that on the morning of November 24, 1980, the state's principal witness, Donnie Payton, was working at Cross Roads Amoco Service Station in Independence County, Arkansas. Appellant, Rickey Gene Bell, drove into the service station and got one dollar's worth of gas. He paid for the gasoline and left. Approximately twenty minutes later, he came back to the service station and asked Mr. Payton to fill up the gasoline tank. Mr. Payton thereupon went back into the service station and appellant followed him. Appellant put a gun to Mr. Payton's head and told him to open the cash register. Appellant subsequently took between $150 and $200 out of the cash register. He then told Mr. Payton to get into the car and they left together. They rode around for approximately twenty to thirty minutes, at which time appellant let Mr. Payton out of the car on a country road.

Appellant's first point for reversal is that the trial court erred in its ruling regarding the extent to which the state would be allowed to prove past convictions for the purpose of impeaching appellant's credibilty on the witness stand. Before trial, appellant sought a preliminary ruling regarding the extent to which details of previous convictions would be admissible. The trial court allowed proof beyond

the fact of felony conviction and appellant alleges that this was error. The trial court, however, limited the inquiry by the prosecution to whether or not appellant was convicted of a felony and what that felony was.

Ark. Stat. Ann. § 28-1001, Rule 601 (a) (Repl. 1977) reads in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted, but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involves dishonesty for false statement regardless of the punishment.

Appellant specifically cites *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981) for this point. In *Jones, supra,* appellant was charged with sexual abuse in the first degree. The defense counsel presented a pre-trial motion asking the court to rule that if Jones elected to testify the prosecution could not impeach his credibility by showing that Jones had pleaded nolo contendere to an earlier charge of rape. It was argued that the prejudicial effect of the earlier conviction would outweigh its probative value. The Arkansas Supreme Court agreed with appellant, holding that the prejudicial effect of the previous conviction clearly outweighed its value bearing on credibility. The court recognized that at the pre-trial hearing, it was admitted by defense counsel that Jones's two previous convictions for burglary and theft would be admissible if he testified. Hence, the court held that a third conviction, for a similar sexual assault upon a little boy, would have been of scant probative value as compared to its significantly prejudicial effect on the jury.

In *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982), appellant was tried and convicted of the offense of rape. On appeal, he contended that it was error for the trial court to deny the defendant's motion in limine and allow into evidence prior convictions of the defendant. Appellant had

previously been convicted of the offenses of burglary and rape, and the trial court ruled that the evidence was admissible to impeach the credibility of appellant. On appeal, the Arkansas Supreme Court affirmed the decision of the trial court, holding that the trial court did not abuse its discretion, and "these matters must be decided on a case by case basis." The court specifically recognized that although the evidence might not be admissible under Rule 404 (b), it could be admissible under Rule 609 for a purpose of attacking the credibility of a witness.

In *Washington* v. *State,* 6 Ark. App. 85, 638 S.W.2d 690 (1982), appellant was convicted of second degree murder, and his only point for reversal was that the trial court erred in failing to grant his motion in limine, which sought to prohibit the state from offering evidence of a previous murder conviction. Appellant indicated that he intended to testify in his own defense. The court recognized that where a defendant in a criminal case testifies in his own behalf, his credibility is placed in issue and the state may impeach his testimony by proof of a prior felony conviction. [See *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979)]. The court also recognized that a trial court has a great deal of discretion in determining whether the probative value of the prior conviction outweighs its prejudicial effect, and the decision of the trial court should not be reversed absent an abuse of discretion. See also *Cooley* v. *State,* 4 Ark. App. 238, 629 S.W.2d 311 (1982). As set out in *Washington, supra,* some of the factors which should be considered by the trial court are:

1. Impeachment value of the prior crime.

2. The date of the conviction and the witness's subsequent history.

3. The similarity between the prior conviction and the crime charged.

4. The importance of the defendant's testimony.

5. The centrality of the credibility issue.

The Arkansas Court of Appeals held in *Washington* that the trial court did not abuse its discretion in admitting the prior felony conviction for purposes of impeaching appellant's credibility. The court recognized that there was a direct conflict in the evidence. The testimony of the state's witnesses, if accepted by the jury, would result in a murder conviction. The appellant's testimony, if accepted by the jury, would have resulted in an acquittal. Therefore, the whole case turned on the resolution of the credibility factor between the state's witness and the appellant.

In the instant case, if appellant had testified, his testimony would have been in direct conflict to the testimony of the state's principal witness. Hence, we have the same situation as was present in *Washington*. Furthermore, appellant has failed to show that any unfair prejudice would result from the state introducing the prior felony conviction. It is unclear from the record, but, at one point, the trial court made the statement that the previous convictions dealt with a burglary conviction and a breaking and entering conviction. Hence, it is the opinion of this court that there was no abuse of discretion in the trial court's decision to allow the state to impeach appellant's credibility by naming the previous felony convictions.

Appellant's second point for reversal is that his right against double jeopardy was violated when the trial court ordered a second trial after the jury could not reach a verdict in the first trial. Upon conclusion of the first trial, the jury retired and deliberated for approximately an hour and fifteen minutes. Upon their return, the foreman informed the court that they had been unable to reach a verdict. The court allowed the jury to deliberate for a while longer. The jury returned after another hour and informed the court that they had still not reached a verdict. The trial judge allowed the jury to retire again. The jury was brought back to the courtroom after two additional hours, and the court asked the foreman if they had made any progress. The foreman told the trial judge that the jury was split down the middle. The court asked the foreman if he thought it would make any difference if the jury had a night's sleep. The foreman

stated that he thought in his opinion it would not. The court thereupon declared a mistrial.

Ark. Stat. Ann. § 43-2140 (Repl. 1977) provides in pertinent part:

> If, after retirement, [the jury] does not agree in a verdict, and it satisfactorily appears that there is no probability they can agree, the court may discharge them.

Ark. Stat. Ann. § 43-2141 (Repl. 1977) provides:

> In all cases where a jury is discharged, the cause may again be tried at the same or another term of the court.

This very issue was decided by the Arkansas Supreme Court in *Beard, Morrison and Cook* v. *State,* 277 Ark. 35, 639 S.W.2d 52 (1982) in which it was held that a defendant's double jeopardy rights are not violated if he is required to stand trial following a mistrial due to a hung jury.

Appellant's third point for reversal is that the trial court erred in failing to exclude an in-court identification by the alleged victim, which was tainted by a suggestive pre-arrest identification procedure. Appellant bases this assertion on the fact that the state's principal witness, Donnie Payton, identified appellant in a photographic lineup in which he also viewed five other pictures with similar characteristics of appellant. Previous to the photographic lineup, Donnie Payton had gone through several mug books in which he could not identify the appellant. Appellant's picture was in one of the mug books, but testimony indicated that this picture was four years old, and that appellant did not look the same. Thereafter, a photographic lineup was provided to Mr. Payton. He subsequently identified appellant as the man who committed the robbery.

The rule is that suppression of an in-court identification is not warranted unless the pre-trial photographic lineup was so suggestive as to create a substantial likelihood

of irreparable misidentification. *Fountain* v. *State,* 273 Ark. 457, 620 S.W.2d 936 (1981). Factors to be considered in testing the reliability of a lineup identification are:

1. Opportunity of the witness to view the criminal at the time of the crime.

2. The witness's degree of attention.

3. The accuracy of the witness's prior description of the criminal.

4. The level of certainty demonstrated by the witness at the confrontation.

5. The length of time between the crime and the confrontation.

See *Fountain, supra; McCraw* v. *State,* 262 Ark. 707, 561 S.W.2d 71 (1978).

Applying the factors to the instant case, Donnie Payton identified appellant pursuant to the photographic lineup on the same day that the robbery was committed. He had the opportunity to view the criminal for a long period of time during the robbery and kidnapping. He gave an accurate description of the criminal to the police. Furthermore, he positively identified appellant at the photographic lineup and also in court. Hence, we hold that there was no element of suggestiveness in the pre-trial lineup identification and accordingly, it was not error for the trial court to refuse to suppress the in-court identification.

Appellant's final point for reversal is that the trial court erred in admitting testimony regarding glue-sniffing by the appellant. The state's counsel referred to appellant sniffing glue during the alleged crime in his opening statement and also, he elicited a statement from Donnie Payton of the incident. Both times, appellant's counsel moved for a mistrial. His argument was based on Ark. Stat. Ann. § 28-1001, Rule 404 (b) (Repl. 1979), which states that evidence of other crimes or acts is inadmissible to show that the

defendant acted in conformity therein. He also cites Rule 403, contending that the probative value is substantially outweighed by unfair prejudice to the defendant.

This argument is clearly answered by the case of *Young* v. *State,* 269 Ark. 12, 598 S.W.2d 74 (1980) wherein it is held that although the general rule is that evidence of other crimes by the accused, not charged in the indictment and information and not a part of the same transaction, is not admissible at the trial of the accused, evidence of other criminal activity is admissible under the res gestae exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense. See also *Euton* v. *State,* 270 Ark. 121, 603 S.W.2d 468 (Ark. App. 1980).

Affirmed.

MAYFIELD, C.J., concurs.

COOPER and GLAZE, JJ., dissent.

MELVIN MAYFIELD, Chief Judge, concurring. This case and the case of *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608, also decided today, are just two examples of the difficulty that courts are having with a rule of evidence in effect in the federal courts and in many of the state courts in this nation.

In these cases the defendants asked the trial court to rule on whether the state could ask them about prior convictions in the event they testified in their defense. In both cases the court ruled that the prior convictions would be admissible. Neither defendant testified and both contend on appeal that the ruling of the trial court was wrong. I concur in the result reached by the majority in these cases because I would hold that the trial court had no duty to make the advance ruling and that a defendant who does not take the stand waives his objections to the ruling.

In *United States* v. *Johnston,* 543 F.2d 55 (8th Cir. 1976), the court said: "Moreover, until Johnston took the stand,

which he chose not to do, the court had no duty to rule on his pretrial motion regarding the admissibility of evidence of his prior convictions for purposes of impeachment." There are other federal circuit courts which have held that a defendant's failure to take the stand does not constitute a waiver of his objection to the trial court's ruling. See 3 J. Weinstein & Berger, *Weinstein's Evidence* § 609[05] (1981). In that regard, the case of *United States* v. *Cook,* 608 F.2d 1175 (9th Cir. 1979), is of interest. In the majority opinion, six judges held, on this point, that the defendant's failure to take the stand did not waive his right to challenge, on appeal, the trial court's ruling that he could be impeached by prior convictions if he testified. The opinion pointed out that in some cases in the past the court had held to the contrary, but said "we believe it is unrealistic to continue to refuse to review these rulings unless the defendant takes the stand."

Five judges disagreed. In one opinion, four of those judges said:

> This court should begin to question whether its attempts to devise new and further refinements for the criminal procedure system serve in any real sense to secure a fair and just trial.

In a separate opinion, another judge said:

> What I believe the majority is doing is creating another device which more often will lead to reversal of otherwise entirely proper convictions than to prevention of injustice. Put differently, what the majority requires may well satisfy our intellectual aspirations for justice but is unlikely otherwise to serve the ends of justice.

The *Cook* case makes it clear that there is no constitutional question involved on the single point of whether the trial court's advance ruling is reviewable on appeal when the defendant does not testify. In *New Jersey* v. *Portash,* 440 U.S. 450 (1979), the constitutional implications of the pretrial ruling were considered only because the state system had

done so and the right of appellate review when the defendant had not testified was not an issue. Even so, one Justice wrote:

> [A] requirement that such a claim be adjudicated on appeal only when presented by a defendant who has taken the stand prevents a defendant from manufacturing constitutional challenges when he has no intention of taking the stand and testifying in his own behalf. More fundamentally, such disembodied decisionmaking removes disputes from the factual and often legal context that sharpens issues, highlights problem areas of special concern, and, above all, gives a reviewing court some notion of the practical reach of its pronouncements.

Arguments for and against allowing review when the defendant obtains a ruling but does not take the stand are well presented in *United States* v. *Cook, supra,* and we need not reiterate here. The defendants in the instant case and in *Williams* v. *State,* handed down today, both sought to limit the evidence of their prior convictions to the *fact* of conviction and thus to exclude the details of the conviction. Although I do not agree that this should be the rule in all cases, I do think it would be the proper rule in some cases.

In my view this should be a part of the balancing test provided in Rule 609 (a). In some cases the *fact* of the prior conviction would be admissible but the details of the conviction would not be because the prejudicial effect would then outweigh the probative value. I would hold, however, that the defendant must actually take the stand and testify before the court can properly perform the necessary balancing test contemplated in Rule 609 (a). As the four-judge dissent in the *Cook* case says, that is the time when the probative value of the conviction can be balanced against its prejudicial effect with the most care and precision. Without that actual testimony and the actual offer of the prior convictions (whether this is done in the courtroom or in chambers), the trial court, and the appellate court on review, can only speculate on the evidence and rule in the dark.

As to the balancing test, I would like to see a commonsense, practical approach. The factors set out in our case of *Washington* v. *State,* 6 Ark. App. 85, 638 S.W.2d 690 (1982), are proper and worthwhile but are not all-inclusive. I would hope that no list, no ritual, no fetish, would replace the trial judge's discretion and sense of what is right. And I would hope that the appellate courts would remember that the trial judge rules in the arena and not in the library.

JAMES R. COOPER, Judge, dissenting. I dissent for the reasons expressed in my dissenting opinion in *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608 (1982), and an additional reason. Because of the facts in this case, some amplification is necessary. This is the appellant's second trial on this charge. The first trial ended in a mistrial. In both trials, the appellant's counsel agreed to stipulate to the *fact* that the appellant was a convicted felon, but he sought to preclude the State from showing the nature of the prior convictions and from showing more than one conviction. Apparently, the appellant had approximately ten prior convictions.

In the first trial, the trial court denied the appellant's motion. In the second trial, the trial court ruled that the State could show the convictions, including the nature of the felonies, but that the State could not go into the facts which led to the convictions, nor the sentences received for them. Based on that ruling, the appellant's counsel informed the trial court that the appellant would have testified in his own behalf had it not been for the trial court's ruling. He also informed the trial court of the substance of the appellant's testimony.[1]

The appellant's offer to stipulate to the *fact* of the prior convictions, and his requested limitation of the State's proof, came after the State had rested its case and before the

[1]This was clearly done at the hearing in the first trial. It is somewhat unclear whether the record of the first hearing was incorporated into the record of the second trial, but that procedure was followed at least for one other motion. (T. 456). For the purpose of this discussion, I assume that the appellant raised the question in the same manner in his second trial as he did in the first.

appellant's defense began. As in *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981), and *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608 (1982), the appellant did not take the stand and no evidence concerning the prior convictions ever reached the jury.

As noted in my dissent in *Williams,* the case at bar is *not* a routine case where this Court should determine if the trial court erred in balancing probative value against prejudicial effect. The added element, *i.e.,* appellant's stipulation of the *fact* of the prior felony conviction, has not been dealt with in either case. *Williams* and the case at bar are substantially different from *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982), *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981), and *Washington* v. *State,* 6 Ark. App. 85, 638 S.W.2d 690 (1982).

The appellant argues that the trial court's ruling had a chilling effect on his decision to testify. I would reverse and remand this case based on the reasons in my dissenting opinion in *Williams.*

In the case at bar, I would reverse and remand for another reason. Under Rule 609 (a) (1), before the trial court can allow prior convictions into evidence for impeachment purposes, he must balance the probative value of the prior convictions against their prejudicial effect on the jury. I cannot see how the trial court can properly balance the probative value of prior convictions against their prejudicial effect until the appellant has testified on direct examination, or, at the very least, until the appellant has proffered his testimony, and the State has proffered its evidence concerning the prior convictions.

The trial court made a blanket ruling that the State would be allowed to prove all of the appellant's prior felonies, however many there were, and the type of crime underlying each conviction, but would not be allowed to go into the specific details of each crime nor the sentence received. I cannot determine whether the trial court had sufficient information before him to perform the mandatory balancing required under Rule 609 (a) (1). To this extent, I

agree with Judge Glaze's dissenting opinion in *Williams.* An on-the-record determination by the trial court, considering the factors that this Court outlined in *Washington* v. *State,* 6 Ark. App. 85, 638 S.W.2d 690 (1982), and such other factors as may be appropriate in a given case, will enable the appellate courts to decide these cases on the law and the facts, rather than on the assumption that the trial court properly performed his duty. Like Chief Judge Mayfield, I do not advocate a ritual or list, but I would require that something be contained in the record to show that the trial court *did* exercise his discretion as required by Rule 609 (a) (1). I also note that I do not necessarily disagree with the approach suggested by Chief Judge Mayfield in his concurring opinion in the case at bar, that whether more information than the *fact* of the prior conviction should be admitted may, in an appropriate case, merely be another factor to consider in the balancing process.

Chief Judge Mayfield has indicated that he would hold that the trial court had no duty to make an "advance ruling" on the admissibility of appellant's prior convictions, in the event that he testified. This issue was not raised by either party, and is not properly before this Court.

I note that *Smith* v. *State, supra,* and *Washington* v. *State, supra,* were appeals from the denial of motions *in limine and* the admission into evidence of the prior felony convictions. *Jones* v. *State, supra, Williams* v. *State, supra,* and the case at bar were appeals from the denial of motions *in limine* only. While the Arkansas Supreme Court has not clearly decided the question raised by Chief Judge Mayfield, it certainly treated the question as being one which was properly before it in *Jones* v. *State, supra.*[2]

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[2]For a discussion of the arguments for and against allowing review by an appellate court when the defendant does not testify, see *United States* v. *Cook,* 608 F.2d 1175 (9th Cir. 1979) (en banc), *cert. denied,* 444 U.S. 1034, 100 S. Ct. 706, 62 L.Ed.2d 670 (1980).

Glen PILLOW and Terry DICUS, d/b/a PILLOW AND DICUS FARM *v.* THERMOGAS COMPANY OF WALNUT RIDGE

CA 82-111 644 S.W.2d 292

Court of Appeals of Arkansas
Opinion delivered December 1, 1982

Henry & Morgan, by: *John R. Henry,* for appellants.

No brief for appellee.

DONALD L. CORBIN, Judge. Appellants, Glen Pillow and Terry Dicus, requested appellee, Thermogas Company of Walnut Ridge, to apply 350 pounds of liquid fertilizer per acre to appellants' farmlands at a set per acre application cost. Appellee billed appellants for $7,631.55 representing a 309-acre application. Appellants then figured the application on 213 acres for a total of $4,872.33. Controversy arose

over what was the correct amount of the debt. Appellants mailed a check to appellee for $4,872.33 with a notation "acc in full" on the face of the check. Appellee scratched through this notation and wrote on the check "check not accepted in full payment of account. H. Dicus." The trial court awarded appellee judgment for the difference between the full amount claimed by appellee and the amount paid by check by appellants. We reverse.

The issue on appeal is whether an accord and satisfaction has been reached. In this one-brief case, appellants cite two pre-code cases. In *American Insurance Union* v. *Wilson,* 172 Ark. 841, 291 S.W. 417 (1927), the Supreme Court, at page 844, stated:

> The law is well stated in this state that where a debtor sends a check to his creditor to apply upon a disputed claim the reception and collection of the check by the creditor renders it an accord and satisfaction of the debt.

Further, at page 845, the Court stated:

> The term "liquidated" when used in connection with the subject of accord and satisfaction has reference to a claim which a debtor does not dispute.

Here, the record clearly reflects that there was no liquidated claim. Appellee's principal agent, Howard Dicus, testified that at the time he received appellants' check a controversy existed and that he cashed the check after marking through the notation "acc in full" and wrote "check not accepted in full payment of account. H. Dicus."

Appellant also cites *Root Refining Co.* v. *Brooks,* 192 Ark. 1, 90 S.W.2d 221 (1936), which stated the following rule from *Massachusetts Mutual Life Ins. Co.* v. *Peoples Loan & Investment Co.,* 191 Ark. 982, 88 S.W.2d 831 at page 5:

> When a claim is disputed or unliquidated, and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be

> accepted in full satisfaction of the claim or not at all, the retention and use thereof by the creditor constitutes an accord and satisfaction. (Citing cases).
>
> It was there also said that it was not necessary that the dispute or controversy should be well founded, but that it was necessary that it should exist in good faith.

There, the payee-creditor received a check which contained this indorsement: "This check is given in payment of final payment on account of purchase of lease covering NE1/4 of the NW1/4, section 18, township 17 south, range 17 west, Union County, Arkansas." Before depositing the check for collection, the payee-creditor made the following notation on its back: "Payment on account but not final payment." The Court stated that the payee had the option of accepting the check as tendered or of returning it. He had made his election and was bound by it.

The same holds true here. Appellee's unilateral alteration is of no legal consequence. He had the option of accepting the check as tendered or of returning it.

The Uniform Commercial Code, Ark. Stat. Ann. § 85-1-207, provides:

> A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

Arkansas has not yet interpreted Ark. Stat. Ann. § 85-1-207 as to its effect on the common law rule of accord and satisfaction. We hold that § 85-1-207 has not altered our common law rule of accord and satisfaction. If we were to decide that a creditor can reserve his rights on a "payment in full" check, it would seriously circumvent what has been universally accepted in the business community as a convenient means for the resolution of disagreements. Thus, we hold that the acceptance by a creditor of a check offered by

the debtor in full payment of a disputed claim is an accord and satisfaction of the claim. A unilateral action by the creditor in protest or an attempted reservation of rights by the alteration of a check offered as payment in full is of no legal consequence. See *Chancellor, Inc.* v. *Hamilton Appliance Co.,* 175 N.J. Super. 345, 418 A.2d 1326 (1980).

Reversed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. This case raises a question of first impression in the State of Arkansas, whether the Uniform Commercial Code, Ark. Stat. Ann. § 85-1-207 (Add. 1961), has altered the common law rule of accord and satisfaction as it relates to "full payment checks". The majority, without any analysis, has reversed the trial court, and held that the common law rule has not been changed by the adoption of the Uniform Commercial Code in Arkansas.

In an attempted settlement of a disputed debt, appellants mailed a check for $4,872.33 to appellees with a notation "acc in full" on the face of the check. Appellee scratched through the notation and wrote, "check not accepted in full payment of account. H. Dicus." The trial court apparently found that this reservation of rights was effective, and awarded appellee judgment for the difference in the full amount claimed by it and the amount tendered by appellants. Neither the trial court nor either attorney mentioned the U.C.C.

The initial question in this case is whether the U.C.C. applies to this transaction, since U.C.C. § 1-207 is only applicable to transactions falling under the U.C.C.'s substantive articles, two through nine. *Peek Planting Co.* v. *W. H. Kennedy & Sons, Inc.,* 257 Ark. 669, 519 S.W.2d 49 (1975). In cases involving a check sent to a creditor and marked by the debtor as "payment in full" or words to that effect, some courts have looked at the underlying transaction to determine whether the provisions of the U.C.C. apply. *See, Van Sistine* v. *Tollard,* 95 Wis.2d 678, 291 N.W. 2d 636 (Wis. App.

1980); *Blottner, Derrico, Weiss & Hoffman* v. *Fier,* 101 Misc.2d 371, 420 N.Y.S.2d 999 (1979). Using such an approach, it would be necessary to determine whether the underlying transaction in the case at bar is a delivery of services or a transaction in goods. If the underlying transaction is a delivery of services, then the U.C.C. does not apply and the common law rule of accord and satisfaction would control the decision in this case. However, if the underlying transaction is a transaction in goods, then the U.C.C. does apply, Ark. Stat. Ann. § 85-2-102 (Add. 1961), and Ark. Stat. Ann. § 85-2-103 (4) (Add. 1961) makes Ark. Stat. Ann. § 85-1-207 (Add. 1961) applicable.

I believe that a better approach would be to determine whether the check is a negotiable instrument under Article 3 of the U.C.C., Ark. Stat. Ann. § 85-3-101 *et seq.* (Add. 1961). This type of analysis would lead to uniformity in the law concerning "full payment checks". After all, the overriding purpose behind the enactment of the U.C.C. was to provide uniformity in commercial law. If the check is a negotiable instrument under Article 3 of the U.C.C., then Ark. Stat. Ann. § 85-3-102 (4) (Add. 1961) makes Ark. Stat. Ann. § 85-1-207 (Add. 1961) applicable.

In order that a writing may be considered a negotiable instrument, it must contain an unconditional promise to pay and no other promise, order, obligation or power, except as authorized by Article 3. Ark. Stat. Ann. § 85-3-104 (1) (b) (Add. 1961). The courts of the various states were split on the issue of whether the addition of "payment in full" or words to that effect were conditional and thus made the check non-negotiable, until the addition of U.C.C. § 3-112 (1) (f). Ark. Stat. Ann. § 85-3-112 (1) (f) (Add. 1961). That section provides that a term in a draft, which states that the payee, by endorsing or cashing it, acknowledges full satisfaction of an obligation of the drawer does not affect the negotiability of the instrument. [1] Under this type of Article 3 analysis, uniformity in the law would be achieved, because the same law would apply to all cases involving a check

[1]A check is a draft drawn on a bank and payable on demand. Ark. Stat. Ann. § 85-3-104 (2) (b) (Add. 1961).

marked "payment in full" or words to that effect, regardless of the underlying transaction.

Since the check involved in the case at bar is a negotiable instrument under Article 3, the U.C.C. does apply, and it becomes necessary to determine whether Ark. Stat. Ann. § 85-1-207 (Add. 1961) has altered the common law rule of accord and satisfaction. Arkansas Statutes Annotated § 85-1-207 (Add. 1961) provides:

> A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

The courts in other jurisdictions are split on the effect of U.C.C. § 1-207. Several jurisdictions have held that U.C.C. § 1-207 does not alter the prior existing law of accord and satisfaction.[2] The basis for this view is that the legislature did not explicitly provide that U.C.C. § 1-207 was intended to modify the law of accord and satisfaction. Thus, it would appear that several legislatures adopted U.C.C. § 1-207 intending that it reflect existing law. This is especially so, when consideration is given to U.C.C. § 1-103, which provides:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to

[2]*Connecticut Printers, Inc.* v. *Gus Kroesen, Inc.*, 184 Cal. Rptr. 436 (1982); *American Food Purveyors, Inc.* v. *Lindsay Meats, Inc.*, 153 Ga. App. 383, 265 S.E.2d 325 (1980) (but questioning the soundness of this theory); *Chancellor, Inc.* v. *Hamilton Appliance Co.*, 175 N.J. Super. 345, 418 A.2d 1326 (1980); *Eder* v. *Yvette B. Gervey Interiors, Inc.*, 407 So.2d 312 (Fla App. 1981); *Brown* v. *Coastal Truckways, Inc.*, 44 N.C. App. 454, 261 S.E.2d 266 (1980); *Jahn* v. *Burns*, 593 P.2d 828 (Wyo. 1979); *State of Washington, Dept. of Fisheries* v. *J-Z Sales Corp.*, 25 Wash. App. 671, 610 P.2d 390 (1980); *See also*, Hawkland, *The Effect of U.C.C.* § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check, 74 Com. L.J. 329 (1969); Rosenthal, *Discord and Dissatisfaction, Section 1-207 of the Uniform Commercial Code*, 78 Colum. L. Rev. 48 (1978).

> contract, principal and agent, estoppel, fraud, misrepresentation, duress, corecion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions. [Ark. Stat. Ann. § 85-1-103 (Add. 1961)].

Also, the comment to the above section states that: "this section indicates the continued applicability to commercial contracts of all supplemental bodies of law, except insofar as they are *explicitly displaced* by this Act. " [Emphasis added.]

In *Eder* v. *Yvette B. Gervey Interiors, Inc.*, 407 So.2d 312 (Fla. App. 1981), the Florida Appellate Court, in stating its reason for holding that U.C.C. § 1-207 does not alter the prior existing law on accord and satisfaction, said:

> It is unfair to the party who writes the check thinking that he will be spending his money only if the whole dispute will be over, to allow the other party, knowing of that reasonable expectation, to weasel around the deal by putting his own markings on the other person's checks. There is no reason why § 1-207 should be interpreted as being an exception to the basic duty of good faith, when it is possible to interpret the two sections consistently.

Other jurisdictions have held that U.C.C. § 1-207 does alter the prior existing law of accord and satisfaction.[3]

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[3]*Miller* v. *Jung*, 361 So.2d 788 (Fla. App. 1978); *Bivins* v. *White Dairy*, 378 So.2d 1122 (Ala. App. 1979) (approved in dictum); *Scholl* v. *Tallman*, 247 N.W.2d 490 (S.D. 1976); *Peterson* v. *Crown Financial Corp.*, 476 F.Supp. 1155 (E.D. Pa. 1979) (note); *Kilander* v. *Blickle Co.*, 280 Or. 425, 571 P.2d 503 (1977) (approved in dictum); *Lange-Finn Const Co., Inc.* v. *Albany Steel & Iron Supply Co., Inc.*, 94 Misc.2d 15, 403 N.Y.S. 2d 1012 (N.Y. Sup. Ct. 1978); *Kroulee Corp.* v. *A. Klein & Co., Inc.*, 103 Misc.2d 441, 426 N.Y.S.2d 206 (1980); *Braun* v. *C.E.P.C. Distributors, Inc.*, 77 App.Div.2d 358, 433 N.Y.S.2d 447 (1980) (New York's annotation to U.C.C. § 1-207 provides, "This section permits a party involved in a Code-covered transaction to accept whatever he can get by way of payment . . . without losing his rights . . . to sue for the balance of payment, so long as he explicitly reserves his rights.") *See also*, J. White & R. Summers, *The Law under the Commercial Code* § *13-21* (2d ed. 1980); Hawkland, *The Effect of U.C.C.* § *1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 Com. L.J. 329 (1969).

The U.C.C. was the joint work of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The first draft was completed in 1952. The New York Law Revision Commission undertook the task of analyzing the U.C.C. section by section. Many changes were made in the Official Draft of the U.C.C. as a result of the recommendation of the New York Law Revision Commission. Prior to the adoption of the U.C.C. by New York, the New York Commission on Uniform State Laws submitted its report on the U.C.C., including section by section annotations examining the relationship between the U.C.C. provisions and the existing New York law. This report stated in reference to U.C.C. § 1-207:

> The Code rule would permit, in Code-covered transactions, the acceptance of a part . . . payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand the balance of the . . . payment. [Report of the Commission on Uniform State Laws to Legislature of State of New York, pp. 19-20 (1961).]

We do not have that section by section annotations to guide us in determining the intent of the Arkansas legislature in enacting U.C.C. § 1-207, but I think the New York annotation, in light of the extensive and intense study done there, is persuasive.

The policy of the Arkansas General Assembly in adopting the Uniform Commercial Code[4] is that the courts of this State are to attempt to give the Uniform Commercial Code a uniform interpretation, not only within this state, but also with those of other states. Ark. Stat. Ann. § 85-1-102 (2) (c) (Add. 1961). However, since the courts in other states are split on the effect that U.C.C. § 1-207 has on the prior existing law of accord and satisfaction, this Court may decide this question by adopting the "better" of the two interpretations. I believe the better rule, leading to greater uniformity, is that, in Article 3 cases, U.C.C. § 1-207 displaces the common law rule of accord and satisfaction.

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[4]Act No. 185 of 1961.

It seems to me more logical to hold that the common law rule of accord and satisfaction has been modified by U.C.C. § 1-207. Contrary to the majority view, the law of accord and satisfaction will not be destroyed by the viewpoint expressed herein. Accord and satisfaction will continue to be an effective tool for compromise where rights are not specifically reserved. Its availability for the settlement of disputes through compromises made in good faith would not be affected.

I would affirm the decision of the trial court.

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

Richard WILLIAMS *v.* STATE of Arkansas

CA CR 82-93 644 S.W.2d 608

Court of Appeals of Arkansas
Opinion delivered December 1, 1982

William R. Simpson, Jr., Public Defender, by: *Jackson Jones,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Richard Williams, was convicted by a Perry County jury of rape, a violation of Ark. Stat. Ann. § 41-1803. He was sentenced to a term of twenty-five years of imprisonment. We affirm.

Appellant contends that the trial court erred in denying his motion in limine wherein he asked the Court to order the State not to use evidence of his prior rape or sexual abuse conviction to impeach his credibility as a witness. Appellant contended at trial that the prior crime had no relation to the defendant's character for truthfulness; that the only purpose for eliciting the nature of the prior crime would be to imply that appellant, having been convicted of that crime previously, was likely to be guilty this time; and that any probative value of the evidence of the prior crime was greatly

outweighed by its prejudicial nature. Rule 609 (a) of the Arkansas Uniform Rules of Evidence provides in pertinent part:

> [f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one (1) year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

In *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981), the defendant was charged with the sexual abuse of a nine-year old boy. The trial court ruled that if the defendant elected to testify, the State would be allowed to impeach his credibility by showing that he had pleaded *nolo contendere* to an earlier charge of rape that involved a young boy. The Supreme Court reversed the trial court. The Court noted that "[t]here may be instances in which proof of an earlier conviction for the same crime as that on trial may be admissible, but there are sometimes strong reasons for excluding such proof because of the pressure on lay jurors to believe that 'if he did it before he probably did so this time.'" The Court concluded that on the facts of the case before it involving the "particularly shameful and outrageous crime" of sexual abuse of a child, "the prejudicial effect of the previous conviction clearly outweighed its value as bearing on credibility." The Court in *Jones* v. *State, supra,* also pointed out that the defendant had two previous convictions for burglary and theft which could have been used to impeach his credibility as a convicted felon and that proof of the rape conviction would have been of "scant probative value."

In the present case, appellant admitted that the State might properly be allowed to impeach his credibility by proof that he was a convicted felon without mentioning that the prior felony conviction was for rape or sexual abuse.

In *Smith* v. *State*, 277 Ark. 64, 639 S.W.2d 348 (1982), the defendant was charged with rape of a 78 year-old woman. At the pretrial hearing on the motion in limine in which the defendant sought to exclude evidence of prior convictions involving burglary and rape, the trial court ruled that the prior convictions were permissible pursuant to Rule 609. The trial court in *Smith* also ruled that the probative value of the evidence outweighed the possibility of prejudice to the defendant. The Supreme Court affirmed the trial court's ruling citing *Jones*, but went on to say, "These matters must be decided on a case by case basis."

The trial court is required to weigh the probative value of the prior conviction against its prejudicial effect. Here, the trial court made the following ruling at the hearing on appellant's motion in limine as follows:

> The bottom line of this case is whether the jury's going to believe Mrs. Carter that it was forced or whether they're going to believe Mr. Williams that it was by consent. And the State is entitled to attack Mr. Williams' credibility just as you attacked Mrs. Carter's credibility by inquiring that her husband was in the penitentiary. It shouldn't but it did go to her.
>
> But, be that as it may, the bottom line is credibility. I'm going to permit the State to inquire of his prior conviction for credibility purposes. And, if you want me to instruct the jury at that time, I will do so.

We cannot say that the trial court abused its discretion in this instance.

Finally, appellant contends that the trial court erred in failing to grant a mistrial upon the revelation by the victim on redirect that her husband was in jail with the appellant. This issue arose out of the following testimony by the victim:

> Q. Did the defendant, Richard Williams, know that your husband was in prison?
> A. Yes.

Q. Do you know how he knew that?
A. They had been jailed together.

Appellant concedes that no motion for mistrial was requested or admonition asked. The granting of a mistrial is a drastic remedy and should be resorted to only when the prejudice is so great that it cannot be removed by an admonition to the jury. *Cobb* v. *State,* 265 Ark. 527, 579 S.W.2d 612 (1979). The declaring of a mistrial lies within the discretion of the trial court. *Cary* v. *State,* 259 Ark. 510, 534 S.W.2d 230 (1976). Its actions will not be reversed absent a clear showing not only of abuse of that discretion but of prejudice likely to result. *Daugherty* v. *State,* 3 Ark. App. 112, 623 S.W.2d 209 (1981); *Finch* v. *State,* 262 Ark. 313, 556 S.W.2d 434 (1977).

Although appellant cites *Glick* v. *State,* 275 Ark. 34, 627 S.W.2d 14 (1982), in support of his argument, we believe its rationale is applicable in support of the State's position that a mistrial was not warranted. The Supreme Court in *Glick, supra,* stated:

> Conceding the testimony had some prejudicial aspects, it should be said that the state has a right to meet its burden of proof from the relevant facts of the case, even though some coincidental detriment to the defendant may result. If one of the victims of the robbery knew the accused in the penitentiary and recognized him because of that association, the state cannot be deprived of probative evidence connecting the defendant to the crime simply because there are dual aspects to such evidence. Appellant cites *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954), but that decision is not in point — it deals with the question of when evidence of a prior offense, not part of the offense being tried, can be introduced. We are not dealing with prior offenses but simply with admissible evidence from which a jury might infer the accused had been, or was, in the penitentiary. While the state cannot make direct proof of that fact (and, indeed, should refrain from even drawing needless attention to it), because of the heavy burden of proof placed on the state under the law, it

> cannot be denied the opportunity of meeting that burden simply because some of the evidence has a coincidental implication not favorable to the accused. See *Young* v. *State,* 269 Ark. 12, 598 S.W.2d 74 (1980); and *Tarkington* v. *State,* 250 Ark. 972, 469 S.W.2d 93 (1971).

The victim in this case merely stated the reason she knew that the appellant was aware that her husband did not live with her. Appellant injected this matter into the case through his questioning of the victim during cross-examination and he cannot complain of what was developed. *Philmon* v. *State,* 267 Ark. 1121, 593 S.W.2d 504 (Ark. App. 1980).

We affirm.

MAYFIELD, C.J., concurs.

COOPER and GLAZE, JJ., dissent.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in the result of the opinion in this case for the reasons set out in my concurring opinion in *Bell* v. *State,* handed down today.

TOM GLAZE, Judge, dissenting. It is my opinion that the Supreme Court's recent cases of *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981); and *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982), are totally irreconcilable. Anything this Court attempts to do in this case to distinguish the holdings in *Jones* and *Smith* is meaningless.

In both cases, the defendants filed pretrial motions requesting that the Court rule that if they elected to testify, the prosecution could not impeach their credibility by showing they previously had been convicted of the same crime with which they presently were being tried. In *Jones,* the Supreme Court held the prejudicial effect of the earlier conviction outweighed its probative value. The case was reversed and remanded for a new trial. In *Smith,* the Supreme Court upheld the trial court's decision to admit the

earlier conviction, stating the trial court was required to make a determination of whether the probative value of the conviction outweighed its prejudicial effect; the Supreme Court said that it could not say the trial court abused its discretion.

The problem that arises from the opposite results reached in *Jones* and *Smith* is that one cannot determine from the record what factors the respective trial courts considered when they admitted the earlier convictions. There is simply no mention of any evidence or reasons why the prior convictions were or were not prejudicial. Nonetheless, the Supreme Court held in *Jones* the earlier conviction was prejudicial but in *Smith* it was not.

In *Jones,* the defendant had been convicted of other felonies in addition to the one the Supreme Court ultimately decided was prejudicial. Perhaps, the court concluded that these other felony convictions were sufficient for impeachment purposes. I seriously doubt that this could be the sole distinction between *Jones* and *Smith.* The critical issue concerning whether to admit or exclude an earlier conviction for the same crime is whether its admission would prejudicially cause the jurors to believe the defendant is guilty because he had done the same crime before. Whether a defendant has only one or a host of convictions does not address the real issue.

In future cases that involve this same issue, one can expect the defendant to cite *Jones* for reversal and the State to cite *Smith* for affirmance. I am convinced the majority of this court would have reversed this cause if it had not been for the Supreme Court's more recent holding in *Smith.*

I believe more definite guidelines should be established when the admissibility of impeachment evidence under Rule 609 of the Arkansas Rules of Evidence is involved. In determining probative value and prejudice, the trial judge at least should consider (1) the impeachment value of the prior conviction, (2) the proximity in time and the witness' subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of testimony and

(5) the centrality of the credibility issue. I have no objection to a case by case analysis, as is suggested by the Supreme Court in *Smith,* but I believe the trial court should make a finding *on the record* that the probative value of admitting a prior conviction outweighs its prejudicial effect as is required by Rule 609 (a) (1). A clear finding insures that the trial court has taken into account the relevant considerations. This explicit balancing process has been urged by a number of our federal courts. *See United States* v. *Fountain,* 642 F.2d 1083 (7th Cir. 1981); *United States* v. *Preston,* 608 F.2d 626 (5th Cir. 1979); and *United States* v. *Mahler,* 579 F.2d 730 (2nd Cir. 1978). If this procedure is followed, an appellate court will be in a position to honestly state that the trial court weighed the possible prejudice of the prior conviction. Otherwise, we will never know what was considered and are left to guess on appeal. This is exactly what occurred in *Jones* and *Smith.*

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the part of the majority opinion which deals with the admissibility of a prior felony conviction for the purpose of attacking the credibility of a witness. The appellant decided not to testify in his own defense, based on the trial court's ruling regarding the admissibility of a prior conviction. He now alleges that the trial court erred.

Where a defendant in a criminal case testifies in his own behalf, his credibility becomes an issue, and the State may impeach his testimony by proof of prior felony convictions. Uniform Rules of Evidence, Rule 609 (a), Ark. Stat. Ann. § 28-1001 (Repl. 1979); *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979). Rule 609 (a) provides:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved

dishonesty or false statements, regardless of the punishment.

In the case at bar, the prior conviction for rape or sexual abuse would only be admissible because of its seriousness and not because it involved dishonesty.

The purpose of impeachment evidence is to show background facts which bear directly on whether jurors ought to believe a particular witness, rather than other and conflicting witnesses. The rationale for admitting prior crimes under Rule 609 (a) is that an accused should not be permitted to appear before a jury as a reasonably trustworthy person of good character, when his criminal record is to the contrary. *United States* v. *Lewis,* 626 F.2d 940 (D.C. Cir. 1980).

The theory that all felony convictions are relevant to credibility depends on the following assumptions: (1) that a person with a criminal record has a bad general character, and (2) that a person with a bad general character is the type of person who would be inclined to disregard the obligation to testify truthfully. From these assumptions, the jury may then determine that the witness is not testifying truthfully. 3 J. Weinstein, Evidence § 609 [02] (1981).

In a criminal case, the accused with a criminal record runs the risk that the jury may decide to punish him because he is a bad person, regardless of his guilt; or that the jury will assume that since he has been previously convicted of a crime, then he is therefore likely to be guilty of the crime charged. These are precisely the reasons why the use of character evidence is barred, at least where its sole purpose is to prove that the accused acted in conformity with his character. Uniform Rules of Evidence, Rule 404 (b), Ark. Stat. Ann. § 28-1001 (Repl. 1979); *Price* v. *State,* 268 Ark. 535, 597 S.W.2d 598 (1980); *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954).

If the accused testifies in his own behalf, he faces impeachment by proof of his prior felony convictions and the risk that the jurors, instead of considering the convic-

tions as relevant to credibility, will consider them as evidence of guilt, despite instructions to the contrary.

Generally, cases involving Rule 609 (a) are concerned with whether the trial court abused his discretion in determining whether the probative value of a prior conviction outweighs its prejudicial effect. However, in the case at bar and in *Bell* v. *State,* 6 Ark. App. 388, 644 S.W.2d 601 (1982), defense counsel offered to stipulate to the *fact* of the prior conviction, and sought to exclude that which would be most prejudicial, the nature of the prior crime. The majority has chosen to treat this case as a routine probative value versus prejudicial effect case, when an additional, significant element is present. The majority opinion does not discuss how telling the jury about the nature of the prior crime has any probative value, much less how that probative value outweighs its prejudicial effect.

Given the theory behind Rule 609 (a) (1), I can see no justification for allowing the jury in the case at bar to know the nature of the crime for which the appellant was convicted, when his counsel had requested that the specific crime not be revealed. The nature of the crime had little or no relevance to the credibility of the appellant, unlike the crimes contemplated by Rule 609 (a) (2) which involve dishonesty or false statements, and the possibility of prejudice was extremely high, because of the similarity with the crime charged. Particularly in light of the nature of the prior crime, I believe that the State should have been limited to proving the *fact* of the prior conviction, assuming that the probative value of that fact outweighed its prejudicial effect. In deciding whether to allow into evidence the prior conviction, the trial court said:

> . . . I have before me a rape case in which the defense is one of consent and I have no evidence of consent at this time.
>
> In anticipating that Mr. Williams will take the stand and tell his story that the intercourse did occur by consentual agreement, then I will permit the prosecutor to inquire of him as to his prior sexual activities

> for credibility purposes. I'm permitting him to inquire into it for credibility purposes.
>
> The bottom line of this case is whether the jury's going to believe Mrs. Carter that it was forced or whether they're going to believe Mr. Williams that it was by consent. And the State is entitled to attack Mr. Williams' credibility just as you attacked Mrs. Carter's credibility by inquiring that her husband was in the penitentiary. It shouldn't but it did go to her.

The jury was entitled to know that the appellant was a convicted felon. Rule 609 (a) so states. However, in balancing the probative value of the prior conviction against its prejudicial effect, the trial court could have given the jury the probative information (the fact of the conviction) without the prejudicial information (the nature of the crime), and thereby not affected the free exercise of one of appellant's rights (his decision whether to testify in his own defense).

The interests of the State are protected by such an approach. In cases where the prior crime is similar or identical to the one charged, the risk of prejudice is very high. If the trial court excludes any reference to the prior crime, then justice is not served because the defendant appears to the jury as a law-abiding person of good character, rather than a person whose credibility is suspect by virtue of a felony conviction. On the other hand, if the trial court allows the nature of the crime in evidence, then the defendant must decide whether to testify, with the knowledge that the jury may convict him based on an improper use of the prior conviction. When it is possible to apply the Rules of Evidence so as to safeguard the rights of the State and the defendant, and to accomplish the purpose for which the Rule was adopted, I think that is the better approach. I think the trial court should have limited the State's proof to the *fact* of the prior conviction.

The position taken in this dissenting opinion is not inconsistent with the prior decisions of the Arkansas Supreme Court or this Court. In *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982), *Jones* v. *State,* 274 Ark. 379, 625

S.W.2d 471 (1981), and *Washington* v. *State,* 6 Ark. App. 85, 638 S.W.2d 690 (1982), the appellants never offered to stipulate to the *fact* of their prior convictions. This Court and the Arkansas Supreme Court decided those cases on the issues presented to them. In the case at bar, I think the majority opinion ignores the distinguishing factor of this case, and that is the offered stipulation.

I would reverse and remand for a new trial.

MEYER'S BAKERY, INC., and THE HOME INSURANCE COMPANY *v.* Oliver PRATT

CA 82-308 644 S.W.2d 299

Court of Appeals of Arkansas
Opinion delivered December 1, 1982

Tom Forest Lovett, P.A., for appellants.

Whetstone & Whetstone, by: *Bud Whetstone,* for appellee.

TOM GLAZE, Judge. This is a workers' compensation case. Appellant's sole argument for reversal is that the Commission erred in finding appellee incurred a back injury while he was within the scope and course of his employment. We believe the Commission's finding is supported by substantial evidence, and therefore we affirm.

On June 28, 1980, appellee, a truck driver, was making a delivery to a bakery in Natchez, Mississippi. In order to back his tractor-trailer rig into the bakery, appellee had to leave the tractor to find someone to open a large door which was apparently the entranceway to the loading platform. It was dark and as he was walking, appellee inadvertently stepped into a hole and fell. He braced his fall but not before wrenching his right knee. After appellee's return home, Dr. William Y. Oh treated appellee's knee injury, and in July, 1980, the doctor performed a menisectomy. After this surgery, appellee continued to complain of pain radiating down his right leg extending into the big toe, so Dr. Oh referred appellee to Doctors Giles and Jouett. Giles, a neurosurgeon, diagnosed a disc herniation at the L5-S1 interspace and did a laminectomy which appellee stated stopped the pain in his leg that extended into the toe. He said that another type pain remained immediately below the knee.

The Administrative Law Judge found that appellee's disc problem was causally connected with his knee injury

and awarded benefits accordingly. In a two-one decision, the Commission affirmed the Law Judge's decision.

The Supreme Court recited the following rule in *Hall* v. *Pittman Construction Co.,* 235 Ark. 104, 357 S.W.2d 263 (1962), which we find applicable here:

> If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award. *Clark* v. *Ottenheimer Bros.,* 229 Ark. 383, 314 S.W.2d 497. *But if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the commission's conclusion is controlling. Kivett* v. *Redmond Co.,* 234 Ark. 855, 355 S.W.2d 172 (Emphasis supplied).

Id. at 105-06, 357 S.W.2d at 264.

Appellant forcefully argues that appellee indicated that he neither knew when nor how he hurt his back. At one time, appellee claimed he hurt it prior to the knee injury. Additionally, no doctor gave an opinion which specifically stated the knee injury caused or contributed to the back injury. On the other hand, appellee testified that he never had a back problem before the night he suffered the knee injury. In fact, he has never experienced any back pain even though it is undisputed that he had a herniated disc. The pain he did describe was of two different but distinct types, one which radiated down his leg into his big toe and a second which was localized at a spot below the knee. The pain extending into the toe was completely eliminated after his back surgery. No evidence was presented that showed that appellee suffered any injury between the time of the knee incident on June 28, 1980, and the disc problem which was diagnosed in November, 1980.

In sum, this case turns on a question of fact. There is evidence that appellee's pain commenced when he injured his knee and that the major part of this pain was alleviated because of his back surgery — not the meniscectomy. On these facts we may have found the knee and back injuries unrelated, but this was the Commission's decision to make. We believe its decision is controlling and based on substantial evidence.

Affirmed.

George AARON *v.* William F. EVERETT, Director of Labor, and COUNTRY PRIDE

E 82-120 644 S.W.2d 301

Court of Appeals of Arkansas
Opinion delivered December 1, 1982
[Rehearing denied January 12, 1983.]

James B. Bennett, for appellant.

Bruce H. Bokony, for appellees.

TOM GLAZE, Judge. In this Employment Security Division case, the Board of Review denied appellant benefits because he reported for work under the influence of intoxicants. Appellant contends (1) the decision is not supported by substantial evidence, and (2) the actions attributed to appellant were not "misconduct" as that term is defined by case law.

Arkansas law clearly provides that an individual shall be disqualified for benefits if he or she is discharged for misconduct in connection with the work on account of reporting for work while under the influence of intoxicants. Ark. Stat. Ann. § 81-1106 (b) (2) (Repl. 1976). Therefore, we find no merit in appellant's second contention, assuming there is substantial evidence to support the Board's finding he appeared for work under the influence. We believe there is substantial evidence, and therefore we affirm.

On the evening of December 14, 1981, appellant went to a party, and he apparently drank too much liquor. He returned home at 1:00 A.M., went to bed and arose to go to work at 7:00 A.M. After he worked for five minutes, his foreman told appellant to go home and return the next day. He did. The next day, December 16, appellant was informed he was being dismissed because he was intoxicated when he reported for work on December 15. Although appellant denied the charge, he admitted that he could have had an

odor of alcohol about him. When asked whether he might still have been under the influence of alcohol, he answered, "Well, I had did it." Based on appellant's own testimony, we believe the Board had sufficient evidence to disqualify appellant under § 81-1106 (b) (2), *supra.*

In its findings, the Board made reference to an employer's sworn letter that it had received after the Appeal Tribunal hearing but before the Board's decision. The letter stated that appellant had had three previous warnings and a suspension for intoxication on the job. We recently held in *Smith* v. *Everett,* 6 Ark. App. 337, 642 S.W.2d 320 (1982), that the Board does not have the jurisdiction to accept additional evidence in an appeal pending before it. We noted in *Smith* that the claimant must be afforded the opportunity to cross-examine his employer or other adverse witnesses whose names may have surfaced as the result of an employer's belated affidavit.

Here, little would be gained by remanding this cause for further proceedings because the reason given for appellant's discharge was substantiated by appellant's testimony alone. This being so, appellant was not prejudiced by the inadmissible evidence later provided the Board which tended to show additional alcohol incidents involving the appellant.

In conclusion, we note that appellant cited a nonpublished opinion as legal authority. This practice is prohibited by Rule 21 of the Rules of the Supreme Court and the Court of Appeals. *See also Rainbolt* v. *Everett,* 3 Ark. App. 48, 621 S.W.2d 877 (1981). An opinion which qualifies as one not designated for publication is written primarily for the parties and their attorneys. These interested parties already are knowledgeable of the facts of their case. For that reason, such nonpublished opinions often do not contain a litany or rehash of those matters which underly the legal issue(s) decided by this Court. Once again, we state that nonpublished opinions will not be considered as authority and should not be cited to this Court.

Affirmed.

Kerry Eugene KENDRICK *v.* STATE of Arkansas

CA CR 82-94 644 S.W.2d 297

Court of Appeals of Arkansas
Opinion delivered December 1, 1982

Guy Jones, Jr., P.A., for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant was convicted of second degree murder. He contends the court erred in finding that his confession was voluntarily made, and in so finding, the court failed to apply the proper legal tests relative to presumption and burden of proof. Appellant also argues that the court erroneously excluded his proffered instruction which was premised upon Ark. Stat. Ann. § 41-514 (Repl. 1977), a statute which provides if force is recklessly or negligently employed, the defense of justification is unavailable. After considering the three issues raised by appellant, we find the trial court was correct in each instance.

First, the trial court held a *Denno* hearing. Appellant never objected to the court's adverse ruling nor did he raise any question that the court was not following the correct law regarding any applicable legal presumption or burden of proof. It is presumed appellant has been accorded a fair trial and that the judgment of conviction is valid. He had the burden of showing either prejudicial error in the record or that the record is so inadequate that he is unable to show such error. *See Butler* v. *State,* 264 Ark. 243, 570 S.W.2d 272 (1978).

Secondly, we find the evidence sufficient to show that appellant's confession was voluntary. In reviewing the voluntariness of a confession, we make an independent determination based upon the totality of the circumstances, with all doubts resolved in favor of individual rights and safeguards, and we will not reverse the trial court's holding

unless it is clearly erroneous. *Harvey* v. *State,* 272 Ark. 19, 611 S.W.2d 762 (1981). The evidence was conflicting on the voluntariness issue. However, any conflict in the testimony of different witnesses is for the trial court to resolve. *Id.* In sum, appellant argues that his physical and mental conditions were diminished when he confessed because, among other things, he (1) had previously been shot, (2) was in pain, (3) was on medication, (4) had drunk a can of beer and (5) had been threatened and given promises in exchange for a confession. The State's evidence showed appellant appeared normal and quite able to understand the proceedings against him. The police officers were aware of appellant's injury but did not observe that he was in pain or on medication. Although the entire interview of appellant was not taped, his statement of confession was recorded. The court heard the tape and was able to hear appellant's manner of speaking and to detect any difficulty he may have had in communicating. The officers denied that they had threatened appellant or promised him anything for his confession. A psychologist, who was not present at appellant's interview, testified that the contents of the confession itself negated any probability of appellant's intoxication. The psychologist said that appellant's statement was cautious, logical and goal-directed, indicating he was in touch with reality. Considering the total circumstances, we cannot say the trial court was clearly erroneous in finding appellant's confession voluntary.

Finally, appellant urges the trial court erred in excluding the following proffered instruction:

THE DEFENDANT'S REQUESTED
INSTRUCTION NO. 2

> If you find that Kerry Kendrick believed that the use of force was necessary in defending himself or a third person from the use or imminent use of force by Darryl Gooden, but was reckless or negligent either in forming that belief or in employing an excessive degree of force, then Kerry Kendrick may not rely upon such defenses as to the lesser included offenses of Manslaughter and Negligent Homicide, as Manslaughter

and Negligent Homice [sic] require reckless and negligent conduct, respectively.

However, if you find that Kerry Kendrick was reckless or negligent in forming that belief or in employing an excessive degree of force, then you must find Kerry Kendrick not guilty of Murder in the First Degree and Murder in the Second Degree.

You are reminded that the defendant, in asserting these defenses, is required only to raise a reasonable doubt in your minds. Consequently, if you believe that these defenses have been shown to exist, or if the evidence leaves you with a reasonable doubt as to his guilt, then you must find him not guilty.

Paragraph 2 of appellant's proffered instruction is a misapplication of the justification law set forth in Ark. Stat. Ann. § 41-514 (Repl. 1977). Section 41-514 states:

> 41-514. Justification — Reckless or negligent use of force — Reckless or negligent injury or risk to third parties. — (1) When a person believes that the use of force is necessary for any of the purposes justifying that use of force under this chapter [§§ 41-501 — 41-514] but the person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the justification afforded by this chapter is unavailable in a prosecution for an offense for which recklessness or negligence suffices to establish culpability.
>
> (2) When a person is justified under this chapter in using force but he recklessly or negligently injures or creates a substantial risk of injury to a third party, the justification afforded by this chapter is unavailable in a prosecution for such recklessness or negligence toward the third party. [Acts 1975, No. 280, § 514, p. 500.]

In a concurring opinion in *Martin* v. *State,* 261 Ark. 80, 547 S.W.2d 81 (1977), Justice Fogleman accurately stated that the Arkansas Criminal Code provides that there is no justification if the belief that the use of force is necessary is

arrived at recklessly or negligently or the force is excessive. Here, the trial court gave AMCI 4105, a justification instruction based upon Code provision Ark. Stat. Ann. § 41-507 (Repl. 1977). This provision provides the defense of justification to the person defending himself or a third person from what the actor "reasonably believes" to be the imminent use of deadly physical force. The actor must have a "reasonable belief" that the situation necessitates the defensive force employed. In addition, the defense is available only to one who acts reasonably in administering such force. See Commentary to § 41-507, *supra*. "Reasonably believes" or "reasonable belief" means the belief that an ordinary, prudent man would form under the circumstances in question and *one not recklessly or negligently formed.* Ark. Stat. Ann. § 41-115 (18) (Repl. 1977).

To accept appellant's instruction and interpretation of § 41-514 would render meaningless the requirement of reasonableness found in the basic Code justification provisions. This obviously is the reason the Committee responsible for our criminal jury instructions deemed it unnecessary to draft one based upon § 41-514.

Affirmed.

[redacted]